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[1] Appointed to serve Nov. 13, 1947–Dec. 31, 1947.

[2] Retired Nov. 15, 1947.

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30 Cal.2d 512

HAMMOND v. McARTHUR.

L. A. 19818.

Supreme Court of California, in Bank.

Aug. 5, 1947.

1. Joint tenancy 🔑1

To create a "joint tenancy" there must be unity of interest, unity of title, unity of time and unity of possession, and the right of survivorship is an important incident of a joint tenancy relationship.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

2. Joint tenancy 🔑4

A voluntary conveyance to a stranger of the entire interest of a joint tenant severs the joint tenancy relationship, which is also terminated when one joint tenant conveys his entire interest to the other joint tenant.

3. Joint tenancy 🔑3

Where a joint tenant conveys his interest to a third person the latter becomes a tenant in common instead of a joint tenant with the other.

4. Joint tenancy 🔑5

Where one of two joint tenants in a fee simple makes a conveyance of his interest for life, upon the termination of the life interest, the joint tenancy as it originally existed revives.

5. Joint tenancy 🔑6

Where one joint tenant conveyed to other joint tenant a life estate together with the right to all the rents and profits of the property, there was no termination of the joint tenancy as regards right of survivorship on death of grantee of such life estate.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Harold L. Hammond, as administrator of the estate of Nettie Elizabeth Rowley, against Alberta June McArthur, to quiet title to an undivided one-half interest in certain realty. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

Prior opinion, 175 P.2d 924.

Vincent Scott, of Los Angeles, for appellant.

Donald J. Dunne, of Los Angeles, for respondent.

EDMONDS, Justice.

Nettie Rowley, a widow, and Alberta June McArthur, an unmarried woman, took title to certain real property as joint tenants. Later, Miss McArthur conveyed to Mrs. Rowley a life estate in the land, with the right to all of its rents and profits. Upon the death of Mrs. Rowley, the administrator of her estate unsuccessfully sued to quiet title to an undivided one-half interest in the property, and his appeal from the adverse judgment presents only the question as to the effect of Miss McArthur's deed.

The essential facts are undisputed. When Miss McArthur was seven years of age, she went to live with Mrs. Rowley, who was her great-aunt. For about 21 years prior to Mrs. Rowley's death, they resided on the property, the title to which is now in controversy.

In 1939, Mrs. Rowley conveyed the land to Miss McArthur and herself as joint tenants. Two years later, Mrs. Rowley and her niece joined in a grant deed to the latter. After about a month, the niece and her aunt, by deed, replaced the title in themselves as joint tenants. This was in May, 1941. The last conveyance between the parties was made in August or October of the same year, when Miss McArthur conveyed to Mrs. Rowley a life estate, together with the right to all of the rents, and profits of the property. It appears from the evidence that the deed of May, 1941, and the one subsequently executed by Miss McArthur, were made at the insistence of "a representative of the Old Age Pension".

Title to the property was quieted in Miss McArthur. The trial court found that the "decedent prior to the time of her death and for a long period prior thereto was the owner in joint tenancy" of the property in question, and "that upon the death of said decedent, said joint tenancy interest terminated and that the * * * title * * * vested in * * * Alberta June McArthur in fee simple; * * *." The appeal is from the judgment entered upon these findings.

As grounds for the reversal of the judgment, the appellant contends that Miss McArthur's conveyance of the life estate to her aunt terminated the joint tenancy and she and her aunt thereby became tenants in common. More particularly, the administrator claims that the conveyance of the life estate destroyed the unities necessary to a joint tenancy. The intention of the parties to a deed is to be gathered from the instrument itself, he contends, and parol evidence is not admissible to explain an unambiguous instrument. Therefore, he asserts that an undivided one-half interest in the land is property owned by Mrs. Rowley which is subject to administration and distribution in her estate.

Miss McArthur takes the position that the transfer of the life estate neither enlarged nor diminished the title then held by the parties, and the unities were not thereby destroyed. As a lease does not terminate a joint tenancy, the argument continues, neither will a conveyance of a life estate, nor a transfer of the right of possession sever a joint tenancy. The conveyance of the life estate did not convey to the cotenant anything which she did not already possess and this estate was not repugnant to the rights of survivorship. Furthermore, Miss McArthur concludes, there is evidence to support the implied finding that the parties to the various deeds did not, by executing and delivering these conveyances, intend to sever the joint tenancy.

[1] For the creation of a joint tenancy, four unities are required, namely, unity of interest, unity of title, unity of time, and unity of possession, and the absence of any one of these elements ordinarily will change the nature of the estate. McDonald v. Morley, 15 Cal.2d 409, 412, 101 P.2d 690, 129 A.L.R. 810; Siberell v. Siberell, 214 Cal. 767, 771, 7 P.2d 1003; see, 2 Tiffany, Real Property, 3d Ed., 1939, sec. 418, p. 196; 4 Thompson on Real Property, Perm. Ed. 1940, sec. 1776, p. 312; 48 C.J.S., Joint Tenancy, § 4, p. 927. The right of survivorship is an important incident of a joint tenancy relationship. McDonald v. Morley, supra, 15 Cal.2d at page 412, 101 P.2d 690, 129 A.L.R. 810; Siberell v. Siberell, supra. It is conceded that, in the present case, a joint tenancy in fee simple was created, and the only question for decision is whether or not the granting of a life estate by one joint tenant to the other severs the joint tenancy in so far as the right of survivorship is concerned.

[2] The decisions in the various jurisdictions are not entirely uniform in their holdings regarding the acts of a joint tenant which terminate or sever the joint tenancy relationship. But it is established law that a voluntary conveyance to a stranger of the entire interest of a joint tenant, severs the joint tenancy relationship. Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.2d 513; Green v. Skinner, 185 Cal. 435, 438, 197 P. 60; Hiltbrand v. Hiltbrand, 13 Cal.App.2d 330, 333, 56 P.2d 1292; Tilden v. Tilden, 81 Cal.App. 535, 542, 254 P. 310; see, 2 Tiffany, op. cited, supra, p. 209; 4 Thompson, op. cited, supra, p. 317; Note, 129 A.L.R. 813, 814. Such a tenancy is also term-

inated when one joint tenant conveys his entire interest to the other joint tenant. Estate of Harris, 9 Cal.2d 649, 659, 72 P.2d 873; 2 Tiffany, op. cited, supra, p. 211; 4 Thompson, op. cited, supra, p. 317. It has been held that an agreement between two joint tenants whereby they agree to a different disposition of the property than that of survivorship terminates the relationship. McDonald v. Morley, supra, 15 Cal.2d at page 412, 101 P.2d 690, 129 A.L.R. 810. And in Reiss v. Reiss, 45 Cal.App.2d 740, 114 P.2d 718, it was held that a joint tenancy was terminated when one joint tenant transferred his entire interest in the estate to a trustee for the use and benefit of the grantor.

By the filing of an action in partition, an estate in joint tenancy is not terminated, but the judgment in such an action brings about that result. Dando v. Dando, 37 Cal.App.2d 371, 372, 99 P.2d 561; see, 4 Thompson, op. cited, supra, p. 316; 48 C.J.S., Joint Tenancy, § 4, p. 928; Note, 129 A.L.R. 813, 817. Likewise, a judgment lien against a joint tenant's interest does not sever the joint tenancy, although a sale upon execution of the judgment has that effect. Young v. Hessler, 72 Cal. App.2d 67, 69, 164 P.2d 65; Zeigler v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118; Pepin v. Stricklin, 114 Cal.App. 32, 35, 299 P. 557; Hilborn v. Soale, 44 Cal.App. 115, 185 P. 982; see, 2 Tiffany, op. cited, supra, p. 211; 4 Thompson, op. cited, supra, p. 318; 48 C.J.S., Joint Tenancy, § 4, p. 928.

In jurisdictions where a mortgage ordinarily operates to transfer the legal title, a mortgage by a joint tenant causes a severance of the joint tenancy. 2 Tiffany, op. cited, supra, p. 210; Note, 129 A.L.R. 813, 817. Also, in some states where a mortgage is regarded as mere security, a mortgage by a joint tenant brings the tenancy to an end. See 2 Tiffany, op. cited, supra, p. 210; Note, 129 A.L.R. 813, 817. However, that conclusion is not in accord with the common-law authorities to the effect that the creation by a joint tenant of a mere charge upon the land is a nullity as against the right of survivorship of the other joint tenant. See 2 Tiffany, op. cited, supra, pp. 210, 211.

[3-5] If one of three or more joint tenants conveys his interest to a third person, the latter then becomes a tenant in common, instead of a joint tenant, with the other, although such others remain joint tenants as between themselves. See Estate of Galletto, 75 Cal.App.2d 580, 587, 171 P.2d 152; 2 Tiffany, op. cited, supra, p. 209. But joint tenants may contract with each other concerning the exclusive possession and division of income from the property and this will not necessarily terminate the joint tenancy. Wells v. Wells, 64 Cal.App.2d 113, 148 P.2d 126; Tindall v. Yeats, 392 Ill. 502, 64 N.E.2d 903; see, 48 C.J.S., Joint Tenancy, § 11, p. 933; 33 C.J. 911. And a lease by one joint tenant for a term of years will not effect a complete severance of the tenancy. See Swartzbaugh v. Sampson, 11 Cal. App.2d 451, 454, 54 P.2d 73; 2 Tiffany, op. cited, supra, p. 210. As stated by text writers, when one of two joint tenants in fee simple makes a conveyance of his interest for life, upon the termination of the life interest, the joint tenancy, as it originally existed, revives. See 2 Tiffany, op. cited, supra, p. 209; 25 Cal.L.Rev. 207, 208. Applying these principles to the facts shown by the present record, and excluding from consideration the parol evidence received for the purpose of explaining the intention of the parties in executing the deed, the release of the life estate in favor of Mrs. Rowley did not terminate the joint tenancy for the purposes of survivorship.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment on the ground that the conveyance, or attempted conveyance, by one joint tenant to the other, of a life estate in the joint tenancy property does not destroy any essential element of the joint tenancy.

CARTER, J., concurs.

30 Cal.2d 453

FREEMAN et al. v. CHURCHILL et al.

L. A. 20041.

Supreme Court of California, in Bank.
July 11, 1947.

1. Automobiles 🔑245(14)

Whether truck driver who collided with automobile at intersection controlled by automatic traffic signals, was negligent in driving heavily loaded truck into intersection at about 25 miles an hour while traffic light was amber, was for jury. Vehicle Code, § 476.

2. Automobiles 🔑245(80)

Whether motorist whose automobile collided with truck which had entered intersection on amber light, was contributorily negligent in entering intersection immediately on change of signal from red to green while truck was in intersection, was for jury. Vehicle Code, § 476.

3. Trial 🔑296(4)

Error, if any, in use of words "any negligence" in instruction that there was no such thing as comparative negligence, and that "any negligence" of plaintiff which proximately contributed to collision between plaintiff's automobile and truck barred recovery whether truck driver was more or less negligent, was cured by other instructions on negligence and contributory negligence.

4. Automobiles 🔑246(19, 23)

Instruction that motorist and truck driver were required to maintain a reasonable lookout for other traffic lawfully using the highways, "as" such lookout would have been maintained by persons of ordinary prudence in their positions, was not erroneous on ground that jury was told that a person of ordinary prudence would have kept a lookout, since the word "as" meant "in the same manner" rather than "because".

See Words and Phrases, Permanent Edition, for all other definitions of "As".

5. Automobiles 🔑150

For a motorist to meet the test of ordinary care, he must maintain a reasonable lookout for traffic lawfully on the highway.

6. Automobiles 🔑171(9)

When entering signal control intersections on the "go" signal, a motorist should look to see if cross traffic which has lawfully entered in the intersection has cleared it. Vehicle Code, § 476.

7. Trial 🔑256(10)

Instruction that fact that there was a criminal action arising out of automobile accident should not influence jury's consideration and that it was material to refer to it in the trial only because statements made by witnesses may be shown on cross-examination to test the accuracy of testimony given by them in the trial, was not prejudicially erroneous, on ground that instruction limited use of former testimony to impeachment, whereas it contained admissions of defendant truck driver, where plaintiffs did not request instruction giving broader scope to testimony at criminal trial, and testimony given at such trial was used to impeach truck driver rather than as independent evidence.

8. Master and servant 🔑333

A judgment on the merits favorable to an employee in an action by a third person for a tort of employee is a bar to an action by third person against employer, where employer's asserted liability for tort rests on respondeat superior and not on his independent tort, and rule is same whether actions are separate or employee and employer joined in the same action, and though employer does not, but employee does, plead defense of contributory negligence.

9. Master and servant 🔑333

Though generally, defense of one defendant does not inure to benefit of his codefendants, where liability is predicated on respondeat superior and defense raised by employee is not personal to him but goes to the merits, defense pleaded by employee inures to benefit of employer.

10. Appeal and error 🔑1061(4)

In action against truck driver and alleged employers, wherein truck driver

pleaded defense of contributory negligence but alleged employers did not, granting of alleged employers' motion for directed verdict on ground that plaintiffs failed to establish an employer-employee relationship between them and truck driver, was not prejudicial to plaintiffs, where plaintiffs' right to recover against alleged employers was predicated on respondeat superior, and jury exonerated truck driver.

11. Appeal and error 🔑882(3)

Where plaintiffs' pleadings based action against truck driver's alleged employers on ground of respondeat superior and plaintiffs so stated in their brief, plaintiffs could not urge on appeal that even though alleged employers were independent contractors they would still be liable, where negligent instructions are given to the independant contractor, the work is of an inherently dangerous character, or the duty is nondelegable.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Carl J. Freeman and Winifred M. Freeman against Dale Churchill, C. O. Sparks, and the Mundo Engineering Company, a corporation, to recover for the wrongful death of the plaintiff's minor child and the injuries sustained by Winifred M. Freeman when Dale Churchill, who was driving a truck while in the alleged employ of C. O. Sparks and the Mundo Engineering Company, a corporation, collided with an automobile driven by Winifred M. Freeman. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

Prior opinion, 174 P.2d 26.

Russell H. Pray, of Long Beach, Pierson & Block, of Compton, E. W. Sheridan, of Long Beach, Henry F. Walker, of Los Angeles, and D. W. Doddridge, of Long Beach, for appellants.

Parker, Stanbury & Reese, Raymond G. Stanbury, Spray, Davis & Gould and Karl Davis, all of Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs were unsuccessful in their action for the alleged wrongful death of their minor child and the personal injuries of plaintiff, Winifred Freeman, the child's mother. The jury returned a verdict in favor of defendant, Dale Churchill, the operator of the truck, and pursuant to a direction so to do, in favor of the defendants, C. O. Sparks and Mundo Engineering Company, the alleged employers of Churchill.

The accident occurred in Compton in an area neither residential nor business in character. Atlantic Avenue extends north and south, crossing Olive Street which runs east and west. Both streets are four lane arteries, the lane next to the center line being about ten feet in width and the outer lane considerably wider. A double white line divides each street in the center. The intersection of the streets is controlled by four automatic traffic signals, one at each corner. Each has three lights, green, amber, and red. The light changes from green to amber, then to red, followed by green on the cross street. The amber light shows for three seconds. It indicates caution—a warning that the red stop light will soon appear.

At 4 p. m. on a clear day defendant Churchill was driving a truck, heavily loaded with hot asphalt, south on Atlantic approaching its intersection with Olive. Plaintiff, Mrs. Freeman, was driving her automobile east on Olive and approaching the intersection. Both were planning to continue on the respective streets on which they were traveling after traversing the intersection. A car heading east on Olive was halted in the lane next to the center line at the west crosswalk of the intersection waiting for the signal to change in its favor. Mrs. Freeman drove her car in the right lane, to the right of the above-mentioned car and passing it, entered the intersection. She testified that she was traveling 25 to 30 miles per hour when approaching the intersection and it showed a red light; that it changed to green when she was 25 feet from it (her speed at that time was 10 to 15 miles per hour) and she proceeded to enter the intersection in high gear. She did not retard her speed or apply her brakes. She looked north but did not see the truck until it was five feet from her, although the driver of the car she passed at the entrance of the intersection saw the truck 150 feet from the intersection. She did not see the car she passed.

Defendant Churchill testified that his speed was not over 25 miles per hour and that he entered the intersection on the amber light for north-south traffic. He observed the light as green about 100 feet before the intersection. He did not observe it change from green to amber. The collision occurred in the southeast quarter of the intersection. He commenced applying his brakes at the entrance of the intersection and left skid marks from there to the point of impact. He was traveling in the outside lane (his right-hand lane), but curved left after entering the intersection to avoid the collision. His truck was approaching a position parallel to Mrs. Freeman's car when the collision occurred. His truck shoved her car for a considerable distance. A witness to the collision, Player, testified that Churchill was near the middle of the intersection when Mrs. Freeman was about 10 feet in the intersection.

Plaintiffs assert that the evidence establishes as a matter of law that defendant Churchill was negligent and Mrs. Freeman was free from contributory negligence.

[1] It is clear that the jury could have found (inasmuch as it found for defendant Churchill, it may have decided that Churchill was not negligent, or that Mrs. Freeman was contributorily negligent) plaintiffs had failed to sustain their burden of proving negligence. In addition to the function of assessing the credibility of the witnesses and the weight of the evidence, it may have concluded that Churchill entered the intersection on the amber light and that, acting as a person of ordinary prudence, he was justified in so doing, considering the speed at which he was traveling, the weight of his vehicle and load, and the dangers accompanying a stop under these circumstances. He stated that the light for north-south traffic was green when he was 100 feet away and that he did not apply his brakes with full force at the entrance to the intersection because it would throw the truck out of control. He saw Mrs. Freeman's car when he entered the intersection, and she at that time had commenced to enter it. He then applied his brakes. The amber light when following the green indicates (under the law effective at the time of the accident) that traffic facing it shall stop before entering the intersection "but if such stop cannot be made in safety a vehicle may be driven cautiously through the intersection or past such signal." Vehicle Code, sec. 476. True, a jury's finding of negligence would have found support in the evidence, but with that we are not concerned.

[2] On the issue of contributory negligence the jury could have likewise found its presence or absence, but if necessary to support the judgment it may be assumed that it found the existence of it. Assuming Churchill was properly in the intersection (a matter above discussed) Mrs. Freeman when facing a "go" signal was authorized to proceed through the intersection, "But vehicular traffic shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or adjacent crosswalks at the time such signal is exhibited." Vehicle Code, sec. 476. See, also, Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 838, 161 P.2d 673, 164 A.L.R. 8. She testified that she looked but did not see the truck until it was five feet away, although the driver of the car she passed (Berry) which was halted on Olive at the west side of Atlantic saw it before it entered the intersection. She did not even see the Berry car. While her view may have been obstructed some of the time the jury might have decided that she should have seen it. The impact occurred in the southeast quarter of the intersection, meaning she had to cross the west half of Atlantic. Although she testified she was 25 feet from the intersection when the light turned green, it could be inferred from the location of the impact, her speed and Player's testimony as to the position of the truck near the center of the intersection when she was 10 feet into it, that she entered the

intersection at least immediately upon the change of the signal from red to green. Under all those circumstances we cannot say as a matter of law that a finding of contributory negligence would not be supported.

[3] Plaintiffs urge error in instructions to the jury. At Churchill's request the jury were advised that if they found both vehicle operators negligent (which negligence proximately contributed to the accident), "you may not compare the negligence of one with that of the other for the purpose of attempting to determine which, if either, was more negligent than the other. This is because there is no such thing as comparative negligence in the law of this State. Any negligence on the part of a plaintiff which proximately contributes to an accident bars a recovery whether the defendant was more or less negligent." Plaintiffs' complaint is that the use of the words "any negligence" in the last sentence advised the jury that even a slight *degree* of negligence by Mrs. Freeman, as distinguished from ordinary negligence, contributing in any degree, proximately to cause the accident, would bar the recovery. See Robinson v. Western Pac. R. Co., 48 Cal. 409; 19 Cal.Jur. 648. It is very doubtful that such a construction may be reasonably placed on the language. The instruction was concerned with cautioning the jury not to compare the negligence of plaintiff with that of defendant. Any doubt that may have been created was certainly clarified by other instructions. See Metcalfe v. Pacific Electric Ry. Co., 63 Cal.App. 331, 218 P. 486. Instructions were given that to establish contributory negligence defendant must prove that Mrs. Freeman "was negligent and that such negligence contributed in some degree as a proximate cause of the injury"; that both drivers were required to exercise ordinary care and "The same degree of care was required of each of them."; that "Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains. One who is guilty of contributory negligence may not recover from another for the injury suffered. The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation," and negligence was fully defined.

[4-6] The jury was instructed that both drivers were required to exercise the same care and "Each was required to maintain a reasonable lookout for other traffic lawfully using the highways, as such lookout would have been maintained by persons of ordinary prudence in their positions. Neither of them had the right to assume that the way was clear, if the facts were such that persons of ordinary prudence so situated would not so have assumed", and plaintiffs assert that thereby the jury were told that a person of ordinary prudence would have kept a lookout; that is, the jury was advised as a matter of law of the duty of a person of ordinary prudence. The use of the word "as" may have a meaning of "because" or "in the same way, manner, degree or extent." Under the latter meaning the instruction would require a lookout in the same way or extent that a person of ordinary prudence would maintain, and by the second sentence the parties were required to exercise ordinary care with regard to observing other traffic. It should be clear that for a person to meet the test of ordinary care, he must maintain a *reasonable* lookout for traffic *lawfully* on the highway. The question of whether Churchill was lawfully in the intersection was left to the jury, and, as we have seen, it could have concluded he was. As to him, other persons, including Mrs. Freeman, should be required to make reasonable (also left to the jury) observations. When entering signal controlled intersections on the "go" signal the entrant should look to see if cross traffic which has lawfully entered the intersection has cleared it. The cases relied upon by plaintiffs are not in point. Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631; Long v. Barbieri, 120 Cal.App. 207, 7 P.2d 1082, and Nickell v. Rosenfield, 82 Cal.App. 369, 255 P. 760, involved the question of whether a *continuous* lookout was essential. Under the instructions in the instant case Churchill must have been law-

fully in the intersection (to be determined by the jury) and the lookout required of Mrs. Freeman was such as a reasonable person would maintain. In Taylor v. Sims, 72 Cal.App.2d 60, 164 P.2d 17, the defendant had entered the intersection on a red light and was not lawfully in the intersection. Finally the jury was fully instructed at the request of the plaintiffs and defendants of the duties of persons entering signal controlled intersections, and at Churchill's request (not objected to), as to the duties of observation.

[7] At Churchill's request the jury was instructed that the fact that there was a criminal action arising out of the accident should not influence their consideration in any way and "It has been material to refer to it in this trial only because statements made by persons who testified previously may be shown on cross-examination to test the accuracy of testimony given by them in this trial." The instruction was manifestly given because references were made several times to a criminal trial of Churchill and reference was made to his testimony there given. Plaintiffs assert that the last sentence limited the use of the former testimony to impeachment, whereas it contained admissions of Churchill. Plaintiffs allude to evidence given at the criminal trial to the effect that

"Q. When you say you applied your brakes as you entered the intersection, do you recall whether or not the wheels were locked, causing them to skid at that time? A. As I recall, yes.

"Q. When you first applied them? A. Do I recall if they were locked?

"Q. Yes. A. Why, no."

Plaintiffs claim that that shows an admission by defendant Churchill that he locked his wheels when he first entered the intersection, allegedly contrary to his testimony at the trial. On the contrary, read as a whole, it merely means he did not recall whether they were locked. Moreover, at the trial he testified that:

"Q. When you first saw this car coming into the intersection, when you saw the orange light at the signal, did you apply your brakes lightly? A. No, sir.

"Q. Did you apply them hard? A. I applied my foot to the pedal lightly, which would apply the brakes hard, yes, hard enough to cause the heavy tire marks slowing the truck perceptibly."

In any event, very little significance may be attached to the occurrence. It certainly was not prejudicial error. Moreover plaintiffs did not request an instruction giving broader scope to the testimony given at the criminal trial, and from all that appears from the record that testimony was used for the purpose of impeaching Churchill rather than as independent evidence.

The motion of defendants Sparks and Mundo Engineering Company for a directed verdict on the grounds that plaintiffs had failed to establish an employer-employee relationship between them and defendant Churchill was granted and that is claimed as error. Those defendants reply that if such were error it could not be prejudicial to plaintiffs for their right to recover against those defendants being predicated upon respondeat superior could not prevail unless the employee Churchill was liable.

[8-10] It is the firmly established rule that a judgment on the merits favorable to an employee in an action by a third person for a tort of the employee is a bar to an action by the third person against the employer where the latter's asserted liability for the tort rests upon respondeat superior and not his independent tort. Jentick v. Pacific Gas & Elec. Co., 18 Cal.2d 117, 114 P.2d 343; Will v. Southern Pacific Co., 18 Cal.2d 468, 116 P.2d 44; Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171; see 16 Cal.Jur. 1112; McNamara v. Chapman, 81 N.H. 169, 123 A. 229, 31 A.L.R. 194; Good Health Dairy Products Corp. of Rochester v. Emery, 275 N.Y. 14, 9 N.E.2d 758, 112 A.L.R. 404; Doremus v. Root, 23 Wash. 710, 63 P. 572, 54 L.R.A. 649; Rest., Judgments, 96; Freeman on Judgments, 5th Ed., secs. 451, 469, 470-479. And the rule is the same whether the actions are separate or the employee and employer are joined in the same action. See authorities, supra. A similar result should follow when the

employer does not, but the employee does, plead the defense of contributory negligence, as was true in the case at bar, although that defense must be pleaded to be available. It would be anomalous to say that if they were sued separately the judgment exonerating the employee would be res judicata in a subsequent suit against the employer where he would make no plea except res judicata, but would not where they are both sued in the same action and the employer fails to plead the defense. Suppose in the instant case the judgment on the directed verdict for the alleged employers (defendants Sparks and Mundo Engineering Company) were reversed, before retrial those defendants could amend to plead as res judicata the judgment exonerating Churchill, and that would be the end of the case. There is no necessity for pursuing such a devious course. It may well be said that, although it is generally true that the defense of one defendant does not inure to the benefit of his codefendants, in situations such as where the liability is predicated upon respondeat superior and the defense raised by the employee (the codefendant being the employer) is not personal to him but goes to the merits of the case (plaintiffs cannot recover if Mrs. Freeman was contributorily negligent), the defense pleaded by the employee inures to the benefit of the employer. Plott v. York, 33 Cal.App.2d 460, 91 P.2d 924; Beddow's Adm'r v. Barbourville Water, Ice & Light Co., 252 Ky. 267, 66 S.W. 2d 821; 49 C.J. 209. Plaintiffs rely upon Skow v. Elwell, 129 Minn. 324, 152 N.W. 755, and Kirk v. Santa Barbara Ice Co., 157 Cal. 591, 108 P. 509, 511. In view of the foregoing discussion we do not believe the Skow case is sound. In the Kirk case the action was against the defendant ice company and Pike to whom it had delegated the repair of a sidewalk which it had torn up. Plaintiff was injured by an obstruction in the walk and it was held that even though Pike was an independent contractor the ice company was liable because of its duty with regard to the walk. The verdict exonerated Pike and held the ice company and the latter appealed, complaining of a jury instruction that stated that it could exonerate Pike and hold the company even though plaintiff was contributorily negligent, for Pike but not the company had pleaded the defense. The court held that inasmuch as there was no evidence of contributory negligence the instruction was harmless. It went on to say: "If the instruction were erroneous, and if the jury had found plaintiff guilty of contributory negligence while finding in favor of Pike and against the ice company, *then, perhaps, the latter would have cause for complaint;* but we cannot see how harm resulted to it, in view of the finding that there was no contributory negligence. We think, however, that the instruction as an abstract proposition of law is correct, although its bearing upon the case as disclosed by the statement is not obvious." The statement is ambiguous in that it states the instruction is abstractly correct but casts doubt upon it in the same breath. In any event it is obviously dictum and in so far as it expresses views contrary to the foregoing it is disapproved.

[11] Finally, plaintiffs urge that even though Sparks and Mundo Engineering Company were independent contractors they would still be liable where negligent instructions are given to the independent contractor, the work is of an inherently dangerous character or the duty is nondelegable. See Rest., Torts, sec. 409 et seq.; Prosser on Torts, p. 483 et seq.; 13 Cal.Jur. 1046 et seq. But plaintiffs' pleadings base their action on the ground of respondeat superior and so state in their brief, hence there can be no doubt of the application of the rule above announced.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 463

MUDD v. McCOLGAN, Franchise Tax Com'r (five cases).

L. A. 19663.

Supreme Court of California.

July 15, 1947.

1. Taxation 🔑363½

The statutes prohibiting collection of deficiency income tax unless notice of proposed deficiency is given taxpayer within specified time after filing of return provide the procedural means for ascertaining and giving notice of assessment of deficiency and are essentially provisions looking to enforcement of tax liability. St.1935, p. 1112, § 19; Gen.Laws, Act 8494, § 19.

2. Taxation 🔑336(1), 572

Provisions for summary methods of ascertaining and collecting taxes are recognized enforcement measures. St.1935, p. 1112, § 19; Gen.Laws, Act 8494, § 19.

3. Taxation 🔑363½

An income taxpayer's liability for deficiency is part of his liability for the total tax, and is a continuing liability based on net income correctly reported, and is not a new and distinct liability created by statute prohibiting collection of deficiency income tax unless notice of proposed deficiency is given taxpayer within three years after filing of return, and hence the time provision of the statute is statute of limitations which bars remedy for enforcement of deficiency if notice is not timely mailed, and is not a condition precedent to existence of right to recover deficiency. St. 1935, p. 1112, § 19; Gen.Laws, Act 8494, § 19.

4. Taxation 🔑318, 589

Statutes limiting the time within which the assessment and collection of taxes may be made are statutes of limitations. St. 1935, p. 1112, § 19; Gen.Laws, Act 8494, § 19.

5. Constitutional law 🔑107
Limitation of actions 🔑6(1)

An amendment enlarging period of limitation applies to pending matters where not otherwise expressly excepted, and such legislation affects the remedy and is applicable to matters not already barred, without retroactive effect, and because the operation is prospective rather than retrospective, there is no impairment of vested rights.

6. Constitutional law 🔑107
Limitation of actions 🔑6(1)

A party has no vested right in running of statute of limitations prior to its expiration, and he is deemed to suffer no injury if, at time of amendment extending period of limitation for recovery, he is under obligation to pay.

7. Limitation of actions 🔑6(9)

A limitation statute reviving matters that have already been barred by lapse of time operates retroactively.

8. Statutes 🔑219

An administrative application of language of act is entitled to respect by the courts and, unless clearly erroneous, is a significant factor to be considered in ascertaining the meaning of a statute.

9. Taxation 🔑327

The provision in the act, effective in July, 1939, amending Personal Income Tax Act, that the amendatory act should be applied in computation of taxes accruing subsequent to December 31, 1938, is a general provision for retroactive operation from January 1, 1939, in the matter of computing tax liability for taxable years beginning January 1, 1939, and is intended to prevent application of different taxing provisions for part of calendar year antedating effective date of amendatory act, and does not preclude application to pending matters of amendatory provision extending from 3 to 4 years the time for mailing to taxpayer the notice of proposed deficiency tax. St.1935, p. 1112, § 19; St.1939, p. 2566, § 23; Gen.Laws, Act 8494, §§ 16(f), 19; St.1941, p. 3086, § 24.

10. Taxation 🔑327

The Legislature can properly provide that taxing statute enacted in course of tax year should relate back to beginning of year in computation of tax liability for current year.

11. Statutes 🔑225¾

Administrative interpretation of a prior provision of income tax law and subsequent legislative definition in accord therewith is acceptable evidence of the legislative intent. St.1935, p. 1112, § 19; St.1939, p. 2566, § 23; Gen.Laws, Act 8494, §§ 16 (f), 19; St.1941, p. 3086, § 24.

12. Taxation ⚿363½

Notice of income tax deficiency for 1936, mailed more than three but less than four years after return was filed, was timely, notwithstanding that personal income tax act of 1935 prescribed three-year period from filing of return for mailing notice of deficiency, where applicable 1939 amendment changed from three to four years the period for mailing notice of deficiency. St.1935, p. 1112, § 19; Gen.Laws Act 8494, § 19.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Consolidated actions for refund of deficiency of 1936 personal income taxes assessed and paid by Harvey S. Mudd, and by Harvey S. Mudd as trustee (sic Seeley G. Mudd, as trustee), and by Mildred E. Mudd, and by Dorthy D. Mudd, and by Seeley G. Mudd against Chas. J. McColgan, Franchise Tax Commission of the state of California. From a judgment in each case for the defendant, each of the plaintiffs appeal.

Affirmed.

Prior opinion 174 P.2d 646.

Boyle, Holmes, Fry & Garrett and John W. Holmes, all of Los Angeles, for appellants.

Robert W. Kenny (Former Atty. Gen.), Fred N. Howser, Atty. Gen., and John L. Nourse, Daniel N. Stevens, and James E. Sabine, Deputy Attys. Gen., for respondent.

SHENK, Justice.

The plaintiffs, five taxpayers, sued separately for refund of deficiency of 1936 personal income taxes assessed and paid. The actions were consolidated for trial. Judgment in each case was for the defendant Franchise Tax Commissioner, and each of the plaintiffs appealed.

The facts are similar in each case except for differences in amounts and dates. Details in the case of Harvey S. Mudd, No. 483412, will be given and the parties will be referred to as plaintiff and defendant.

The plaintiff filed his state personal income tax return for the calendar year 1936, on or before April 15, 1937. His report of net income showed a tax due of $26,972.33, which he paid. On August 28, 1940, the defendant mailed to the plaintiff a notice of additional personal income tax proposed to be assessed for the year 1936 in the amount of $5,317.88, plus interest. The plaintiff duly protested payment of the alleged deficiency, relying among other things upon the provision of section 19 of the Personal Income Tax Act of 1935 (Stats.1935, p. 1090) which prescribed a three year period from the filing of the return for mailing notice of deficiency. A hearing followed, subsequent to which the plaintiff received notice of redetermination of deficiency for 1936 in the sum of $4,408.42 plus interest, which he paid. Within due time he filed a claim for refund of the alleged overpayment and upon rejection commenced the present action.

By similar proceedings deficiency assessments were paid for the year 1936 and refunds sought by the other plaintiffs, Seeley G. Mudd as trustee, in the sum of $32,678.44; Mildred E. Mudd in the sum of $34,342.14; Dorothy D. Mudd, $2,151.72; and Seeley G. Mudd, $3,313.19—plus interest. In each case the notice of deficiency was mailed more than three years after the return was filed. Each plaintiff relied on the three year limitation provided by the 1935 act.

The trial court ruled that the applicable statute of limitations was section 19 of the Personal Income Tax Act of 1935, as amended in 1939, Stats.1939, p. 2528, 2557, Gen.Laws, Act 8494, which changed from three to four years the period for mailing notice of deficiency. As to each plaintiff the change became effective prior to the expiration of the three year period, and the notice of deficiency was mailed within the four year period.

The principal differences in matters of computation between the plaintiffs and the defendant grew out of the liquidation of Mayflower Associates, Inc., in which the plaintiffs owned large numbers of shares, and the consequent necessity for correctly computing the cost of the shares to the plaintiffs and the resulting taxable gain. The findings and conclusions of the trial court, however, reveal that any asserted error of the defendant in arriving at the amount of net taxable income was not in issue, and it is not made a ground of appeal. The question presented is whether the trial court correctly ruled that the mailing of the notice of deficiency was timely.

Section 19 of the 1935 act provided that the commissioner should examine the return as soon as practicable after filing and determine the correct amount of the tax; that if an underpayment was disclosed he should mail notice of deficiency tax within three years after the return was filed. The amendments of 1939, effective July 25, 1939, included a change from the three year to a four year period for mailing notice of deficiency.

Section 23 of the 1939 act declared: "This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of section 1 of Article IV of the Constitution, take effect immediately, and shall be applied in the computation of taxes accruing subsequent to December 31, 1938."

The plaintiff contends that the time provision of section 19 is a condition precedent to the exercise of a right and not a statute of limitation. Before the 1939 amendment the pertinent language of the section was: "[E]very notice of a proposed deficiency tax shall be mailed to the taxpayer within three years after the return was filed and no deficiency shall be assessed or collected with respect to the year for which such return was filed unless such notice is mailed within such period." The only change was the substitution of the word "four" for "three".

In this connection the plaintiff's main reliance is on 34 Am.Jur. p. 16, sec. 7, which states with supporting authorities: "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right." For examples of application of the quoted principle, see Texas Portland Cement Co. v. McCord, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893, creditors' liability on bond; Davis v. Mills, 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067, special statutory liability of directors; The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358, cause in admiralty against vessel causing death by negligence committed on high seas.

[1, 2] In order that the time element in the mailing of the notice of deficiency constitute a condition precedent, the statute must create a new and distinct liability as to such deficiency. However, the plaintiff's liability to pay the deficiency tax is not a liability created by section 19. For if it were so created, the ascertainment of the extent thereof would be governed by the provisions of the 1939 act. The adoption of the plaintiff's contention would therefore not avoid the application of the four year period. But it may not be questioned that the plaintiff's total tax liability for 1936, including any deficiency, is governed by the statutory measure applicable to that year. His liability for a deficiency is part and parcel of his liability for the total tax. In fact the word "deficiency" negatives any concept of a new or distinct liability. On the contrary, implicit therein is its relationship to the total tax. The basis of the plaintiff's total tax was a correct computation of net income. The tax became due upon the filing of the return. Any portion thereof not discharged was chargeable to and collectible from the plaintiff as a deficiency. These considerations render inconceivable any theory that the liability to pay a deficiency tax is other than a continuing liability, based on net income correctly reported, and which is not discharged upon payment of a tax determined from incorrectly reported net income. The plaintiff's

duty to discharge the unpaid amount of the total tax continued as a liability to pay the deficiency tax. Section 19 of the act provided the procedural means for ascertaining and giving notice of the assessment of the deficiency. It is essentially a provision looking to enforcement. Provisions for summary methods of ascertaining and collecting taxes are recognized enforcement measures. People v. Skinner, 18 Cal.2d 349, 115 P.2d 488, 149 A.L.R. 209; People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029.

[3, 4] The quoted provision of section 19 is therefore a statute of limitation which bars the remedy for enforcement in the event that notice be not mailed within the prescribed time. It is sufficient for present purposes to note that the language barring assessment or collection unless the notice be so mailed does not affect the character of the time limitation as a bar to enforcement. It remains a provision which bars enforcement—by assessment or collection—in the event of failure to give timely notice. Statutes limiting the time within which the assessment and collection of taxes may be made are referred to as statutes of limitation. See Paul and Mertens, Law of Federal Income Taxation, Vol. 5, pp. 498 et seq., secs. 50.01, 50.02, 50.47, 50.75, 50.76, 50.90 and cases cited; cf. sec. 50.85 referring to a statute also providing for extinguishment of liability.

[5-7] It is the settled law of this state that an amendment which enlarges a period of limitation applies to pending matters where not otherwise expressly excepted. Such legislation affects the remedy and is applicable to matters not already barred, without retroactive effect. Because the operation is prospective rather than retrospective, there is no impairment of vested rights. Moreover a party has no vested right in the running of a statute of limitation prior to its expiration. He is deemed to suffer no injury if, at the time of an amendment extending the period of limitation for recovery, he is under obligation to pay. Davis & McMillan v. Industrial Accident Comm., 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Weldon v. Rogers, 151 Cal. 432, 90 P. 1062; Swamp Land District No. 307 v. Glide, 112 Cal. 85, 90, 44 P. 451; California Employment etc. Comm. v. Smileage Co., 68 Cal.App.2d 249, 253, 156 P.2d 454; see also State Tax Comm. v. Spanish Fork, 1940, 99 Utah 177, 100 P.2d 575, 131 A.L.R. 816. In Campbell v. Holt, 115 U.S. 620, at page 628, 6 S.Ct. 209, 29 L. Ed. 483, it was said that statutes shortening the period or making it longer have always been held to be within the legislative power until the bar was complete. See also Florsheim Bros. Dry Goods Co. v. United States, 280 U.S. 453, 50 S.Ct. 215, 74 L.Ed. 542; Sutherland, Statutory Construction, 3d ed., sections 1936, 2210, and cases cited. Thus true retroactive operation of a limitation statute is such as would revive mattters that had already been barred by the lapse of time.

It is the plaintiff's contention, however, that section 23 of the 1939 act expressly excepts from the operation of the amended remedial provisions tax liability attaching prior to December 31, 1938.

The 1939 act amended eighteen sections of the Personal Income Tax Act of 1935, and added six new sections. The amendments and additions related to such subjects as gross income, exemptions, credits, capital gains and losses, deductions from gross income, items not deductible, and many details in connection therewith; also to procedural matters, payment of interest, enforcement, penalties, and the like. Section 16(f) concerned computation of the tax if changes became effective during the taxpayer's taxable year where it differed from the calendar year. Section 23 provided that the act should "be applied in the computation of taxes accruing subsequent to December 31, 1938."

Early in the administration of the act the question arose whether the four year period provided by amended section 19 applied to deficiencies for taxable years prior to 1939. On December 17, 1940, the Attorney General addressed to the Franchise Tax Commissioner an opinion to the effect that the four year period was applicable in all cases not already barred on the effective date of the amendment. In his letter the Attorney General distinguished the many changes dealing with gross income deductions, personal exemptions, credits, and other matters affecting the amount of the tax, from provisions concerning withholdings, penalties, procedural and remedial matters. He pointed out that the former class of provisions dealt with the computation of taxes; that the latter referred to the enforcement of the tax. He stated: "If the amendatory act had stopped after providing 'shall * * * take effect immediately * * *' the provisions relating to the computation of taxes would have had entirely prospective application and would not have been applicable in the computation of taxes accruing prior to July 25, 1939 (the effective date of the amendatory act) * * *. The legislature, in enacting section 23 * * * did not stop after the words 'shall * * * take effect immediately,' but added the following: 'and shall be applied in the computation of taxes accruing subsequent to December 31, 1938.' * * * Its plain purpose is to overcome the presumption against retroactivity, and to provide for a limited retroactivity of the provisions relating to the computation of taxes." He concluded that the effect of section 23 was to make retroactive the sections relative to computation of taxes, without limiting the application of the remainder of the act which became immediately controlling as to all matters of assessments, refunds, collections, and the like, excepting those which on July 25, 1939, were already barred by prior law. He added: "This conclusion is in accord with that reached in Opinion NS1998a, and with your administrative interpretation as shown in Articles 19–2 and 20–1 of the Regulations." It is in evidence that this effect of the 1939 amendments has been consistently and uniformly followed to apply the four year limitation in the administration of the enforcement provision of section 19 where such enforcement was not already barred on the effective date of the act.

[8] An administrative application of the language of an act is entitled to respect by the courts, and unless clearly erroneous is a significant factor to be considered in ascertaining the meaning of a statute. Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1, and cases cited; California Drive-in Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028; Hunstock v. Estate Development Corporation, 22 Cal.2d 205, 211, 138 P.2d 1, 148 A.L.R. 968; Bodinson Mfg. Co. v. California Employment Comm., 17 Cal. 2d 321, 325, 326, 109 P.2d 935, and cases cited; Dillman v. McColgan, 63 Cal. App.2d 405, 409, 146 P.2d 978.

[9-11] In the absence of an express provision that the changes or additions relating to assessment and collection did not apply to existing tax liability, it would follow that the four year statute governs in the present cases. The language of section 23 that the act, effective in July, 1939, should be applied in the computation of taxes accruing subsequent to December 31, 1938, is a general provision for retroactive operation from January 1, 1939, in the matter of computing the tax liability for the taxable years beginning January 1, 1939. It is usual and proper for the legislative body to provide that a taxing statute enacted in the course of a tax year should relate back to the beginning of the year in the computation of tax liability for the current year. See United States v. Hudson, 299 U. S. 498, 57 S.Ct. 309, 81 L.Ed. 370; Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 176, 177, 55 S.Ct. 127, 79 L.Ed. 264; Florsheim Bros. Dry Goods Co. v. United States, supra, 280 U.S. 453, 50 S.Ct. 215, 74 L.Ed. 542; American States Water Service Co. of California v. Johnson, 31 Cal.App.2d 606, 613, 88 P.2d 770; Note, 109 A.L.R. 523 and cases cited. In this case the obvious purpose of the relation back was to prevent application of different taxing provisions for the portion of the calendar year antedating the effective date of the statute. The relation back achieves the plain object of the Legislature to impose liability for the entire current and following years on the basis of the revised taxing provisions. Such retroactive operation is not inconsistent with the recognized prospective effect of the amended enforcement provisions, unless the Legislature has also expressly declared that changed enforcement and time limitation provisions are not to apply to pending matters. Manifestly a declaration that the provisions of the act are to apply retroactively to computation of taxes in order

to determine the new tax liability does not amount to a declaration that amended enforcement provisions are not to apply to existing liability. There is therefore no express declaration in section 23, or otherwise, that the enforcement provisions of the act should not apply to such liability. Furthermore, in 1941, in again amending the Personal Income Tax Act, Stats. 1941, p. 3042, the Legislature, by a change in the language of the section providing for immediate effect, appears to have adopted the administrative application of the limited retroactive provision of section 23 of the 1939 act. The language of section 24 of the 1941 act restricts the general retroactive clause to provisions effecting changes in the computation of taxes, meaning those affecting income, deductions, rates, methods of calculating tax, exclusions, exemptions and credits. The Legislature also implied that the change in wording was not to indicate that a change in meaning was intended. In White v. Winchester Country Club, 315 U.S. 32, 62 S.Ct. 425, 86 L.Ed. 619, administrative interpretation of a prior provision in a revenue law and subsequent legislative definition in accord therewith was held acceptable evidence of the legislative intent. We see no reason why such evidence is not equally acceptable here. There is no showing that the administrative application is erroneous. On the contrary it is in accord with legal principles, and places no strain upon the statutory language.

The plaintiff's reliance upon Russell v. United States, 278 U.S. 181, 49 S.Ct. 121, 73 L.Ed. 255, is unavailing to control a different result. That case involved a provision in a taxing statute which increased from five to six years the period for collection after assessment, but which also provided that it should not affect any assessment made, or distraint or proceeding in court begun, before the enactment thereof. The Supreme Court concluded that the obvious design was to deprive the provision of any possible application to cases where assessment had been made prior to the effective date. But compare Pacific Coast Steel Co. v. McLaughlin, supra, 288 U.S. 426, 53 S.Ct. 422, 77 L.Ed. 873, as to the effect of the same provision on waivers in respect to assessments made before the effective date of the amendment. The Russell case therefore involved an express exception of pending matters from the operation of the amended time limitation provision. The decision in that case and cases following it (see Commissioner of Internal Revenue v. Ricker, 9 Cir., 77 F.2d 810; Dobbins v. Commissioner of Internal Revenue, 3 Cir., 31 F.2d 935; Rasmussen v. Brownfield-Canty Carpet Co., 9 Cir., 31 F.2d 89) is consistent with the conclusion that here there is an absence of an express exception and that the contrary result should obtain. That conclusion is in accord with the general rule as to the applicability of remedial provisions to pending causes and matters unless expressly excepted; and the foregoing discussion demonstrates that the rule applies in the matter of enforcing existing tax liability.

[12] The trial court therefore correctly ruled that section 19 of the Personal Income Tax Act of 1935 as amended by the 1939 statute governed in the present cases, and that the mailing of the notice of deficiency in each was timely.

The judgment in each case is affirmed.

GIBSON, C. J., EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., and PEEK, Justice pro tem.

30 Cal.2d 472

EDISON CALIFORNIA STORES, Inc., v. McCOLGAN, Franchise Tax Com'r (two cases).

L. A. 19603, 19604.

Supreme Court of California.
July 15, 1947.

1. Taxation ⚿376(4)

The allocation formula can be used in determining franchise tax imposed on that portion of a unitary business located within the state, whether business is carried on by incorporated or unincorporated wholly controlled branch. Gen.Laws, Act 8488, §§ 4, 10, 12, 14; Const. art. 13, § 16.

2. Taxation ⚿108

Persons may adopt any lawful means for lessening of burden of taxes which in one form or another may be laid upon properties or profits, and Legislature can enact measures to prevent avoidance of taxes otherwise properly laid.

3. Statutes ⚿245

Courts cannot, by implication, extend provisions of statutes levying taxes beyond clear import of language used or enlarge upon their operations so as to embrace matters not specifically included, and in case of doubt construction is to favor taxpayer rather than government.

4. Taxation ⚿376(4)

The mere production of a separate accounting system for one of the branches of unitary business is insufficient without more to overthrow ascertainment of franchise tax by means of formula allocation based on appropriate factors of sales, property, and pay roll, and only if taxpayer can meet burden of showing by sufficient evidence that allocation formula does not apportion to California that part of the entire net income reasonably attributable to business done in California, will the court disapprove use of formula in a particular case, and the evidence introduced to overcome formula method of allocation must go to each element of the formula equation. Gen.Laws, Act 8488, §§ 4, 10, 12, 14.

5. Taxation ⚿376(4)

The power to apply formula allocation in imposing franchise tax on that portion of unitary business located in California is not derived from authority to require filing of consolidated returns, but flows from authorized method of ascertaining income attributable to taxpayer's activities within the state, and authority to pursue the method is present whenever activities are partially within and partially without state, whether or not integral parts of system are separately incorporated, or accounting system of taxpayer does not clearly reflect the income. Gen.Laws, Act 8488, §§ 10, 12, 14.

6. Taxation ⚿376(4)

The separate accounting method is appropriate to determine true income of separate business for franchise tax purposes, but, when business is not separate and is integral part of larger and unitary system, the separate accounting is inadequate in ascertaining true result of activities and values attributable to the business, and, if operation of portion of business done within state is dependent upon or contributes to operation of business without the state, the operations are unitary so as to permit application of formula allocation, but business within state may be considered to be separate where there is no such dependency. Gen.Laws, Act 8488, §§ 10, 12, 14.

7. Taxation ⚿376(4)

The ascertainment of income for franchise tax purposes by apportionment method is not necessarily a disregard of corporate entity nor an extension of provisions of bank and corporation franchise tax act by implication, but formula allocation is merely a method of ascertaining the true income attributable to taxpayer's business in California and is a method of ascertainment authorized by such act. Gen.Laws, Act 8488, §§ 10, 12, 14.

8. Taxation ⚿376(4)

The application of formula allocation in imposing franchise tax on that portion of unitary business located in California was justified, notwithstanding that parent and subsidiary corporations conducting the business were differently named. Gen. Laws, Act 8488, §§ 10, 12, 14.

9. Taxation ⚿376(4)

Where evidence on issue of propriety of formula allocation method to reflect taxpayer's income for franchise tax purposes was sufficient when unitary method of ownership, use, and operation of business of parent and subsidiary corporations was established, it was then incumbent on taxpayer to produce evidence to meet burden devolving on taxpayer to show that formula allocation method was arbitrary and unreasonable, and taxpayer's evidence, consisting solely of presentation of its separate accounting, and accuracy and reasonableness of entries thereof, did not overcome correctness of each element of formula equation nor reasonableness of the application thereof to ascertain net income. Gen. Laws, Act 8488, §§ 10, 12, 14.

10. Taxation ⚷376(4)

Tax evasion is not a factor which must be present before formula allocation method may be employed in determining franchise tax imposed on that portion of a unitary business located within the state. Gen. Laws, Act 8488, §§ 10, 12, 14.

11. Taxation ⚷20

To compute for franchise tax purposes the income allocable to one state of a unitary business operated in several states by a reasonable formula method is not unconstitutional as taxing extraterritorial values. Gen.Laws, Act 8488, §§ 10, 12, 14.

12. Taxation ⚷407

Notice of additional franchise tax for 1937, mailed to taxpayer on November 22, 1940, more than 3 years after return was filed, was timely, notwithstanding statute requiring notice of additional tax to be mailed within 3 years after filing of return, where statute, before expiration of such 3 year period, was amended to provide that notice be mailed within 4 years after filing of return. Gen.Laws, Act 8488, § 25; St. 1939, p. 2973, § 21.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

On rehearing.

Prior opinion 176 P.2d 697.

Judgments reversed.

Robert W. Kenny (Former Atty. Gen.), Fred N. Howser, Atty. Gen., and John L. Nourse, Daniel N. Stevens, and James E. Sabine, Deputy Attys. Gen., for appellant.

Loewenthal & Elias and Paul Loewenthal, all of Los Angeles, for respondent.

A. Don Duncan and Brobeck, Phleger & Harrison, all of San Francisco, and Boyle, Holmes, Fry & Garrett, of Los Angeles, amici curiae.

SHENK, Justice.

[1] On rehearing counsel for the plaintiff have expressed great concern lest the tax laws be misapplied by an adherence to our former opinion. However accepting, as we must, the application of the law to unincorporated wholly controlled branches or businesses located in other jurisdictions as set forth in Butler Brothers v. McColgan, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, the conclusion is irresistible that the same rule should apply to incorporated wholly controlled branches or businesses so located. This is demonstrated by the following portions of our former opinion dealing with that subject.

The plaintiff, a California corporation, brought these two actions to recover franchise taxes paid under protest for the taxable years 1937 and 1938. The trial court rendered judgment for the plaintiff in both actions and the defendant appealed. The appeals are presented on a single set of briefs.

Prior to 1929 Edison Brothers engaged as partners in the retail shoe business in Atlanta, Georgia. They expanded their operations to include stores in Louisiana, Alabama and Tennessee. In 1926 the business was organized as a corporation under the laws of the state of Georgia. In 1929 a corporation, Edison Brothers Stores, Inc., was organized under the laws of Delaware and acquired all of the capital stock of the Georgia corporation. The Delaware corporation established and operated stores in several other states, including Missouri, Illinois, Ohio, Tennessee and California. In 1930 the stores in Missouri and Tennessee were incorporated under the laws of those states. An Illinois corporation was also organized. In 1932 the plaintiff was incorporated under the laws of this state.

In all, fifteen subsidiary corporations were formed. They are located in as many states and their capital stock is owned and controlled by the Delaware corporation. Members of the Edison family, who reside in St. Louis, Missouri, constitute the officers and directors of all the subsidiary corporations and of the Delaware, or parent, corporation. A central management division, a central purchasing department, a central distributing department, a central store operations department, a central advertising department, and various other central administrative departments function in St. Louis. These centralized departments determine operating policies and keep the main accounting records for all of the subsidiaries. The parent corporation manufactures no goods, but purchases ladies' shoes, shoe findings, accessories, hand bags, hosiery and costume jewelry for distribution and retail sale by itself and each of its subsidiaries. The quantity of merchandise for shipment to each store for resale is determined in St. Louis from a statistical analysis of daily reports sent in by the store managers. The foregoing services are performed by the Delaware corporation pursuant to agreements between it and each subsidiary by which the cost of merchandise plus a specified percentage is charged to each subsidiary, in addition to a proportion of the general overhead.

The plaintiff sells the merchandise received by it from the parent corporation exclusively within the state. It conducts no interstate sales. For each of the taxable years 1937 and 1938 it filed a franchise tax return showing gross receipts less claimed deductible expenses in accordance with a separate accounting system based on the agreement between the subsidiary and the parent corporation. For the taxable year 1937 the plaintiff showed a net (1936) income of $68,299.90, and a tax computed thereon of $2,731.99, which it paid. Subsequently the plaintiff received a notice of additional assessment in the sum of $12,329.73. After protest and oral hearing the additional assessment was recomputed and redetermined at $5,161.09 with interest thereon, which the plaintiff paid under protest, and thereupon filed a claim for refund which was denied. The return for the taxable year 1938 reported a net (1937) income of $17,808.58 (although there was an increase of $900,000 in sales) as to which the plaintiff paid a franchise tax of $712.34. Similarly the franchise tax commissioner assessed an additional tax of $13,789.70, which after hearing on the plaintiff's protest was reduced to $6,313.35. This sum with interest the plaintiff paid under protest and filed a claim for refund which was rejected.

The additional assessments resulted from the commissioner's application of a three-factor formula to allocate the net income of the plaintiff, considered as an intregal unit in an entire business comprising the parent and all of its subsidiary corporations. The commissioner, with reliance on Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, contended that on the basis of the asserted unitary relationship, the figures submitted reflected the true net income attributable to the business done within this state.

By a finding that the plaintiff transacted only intrastate business the trial court drew the conclusion that the separate accounting method, as distinguished from the method based on formula allocation, properly reflected the net income attributable to business done within the state. The court also found that the plaintiff's book entries were accurate and reasonable. Implicit in the findings is the conclusion that there was no falsification or bad faith in the manner of bookkeeping employed by the plaintiff, nor in the entry of any of the items contained therein, nor any intent thereby to reflect an improper income or create an artificial loss. The judgments may therefore be proper if the fact of the organization of the California business as a domestic corporation distinguishes it in principle from the case of Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 111 P.2d 334; Id, 315 U.S. 501, 62 S.Ct. 701, 86 L. Ed. 991.

[2, 3] Persons may adopt any lawful means for the lessening of the burden of taxes which in one form or another may be laid upon properties or profits. Pioneer Express Co. v. Riley, 208 Cal. 677, 687, 284

P. 663. It was also reiterated in that case that courts, in interpreting statutes levying taxes, may not extend their provisions, by implication, beyond the clear import of the language used, nor enlarge upon their operation so as to embrace matters not specifically included. In case of doubt, construction is to favor the taxpayer rather than the government. But unquestionably the legislature may enact measures to prevent avoidance of taxes otherwise properly laid.

In this state the legislature has enacted the Bank and Corporation Franchise Tax Act, Stats. 1929, p. 19, as amended, Deering's Gen.Laws, Act 8488, herein referred to as the Act, pursuant to the power vested in it by section 16 of Article XIII of the state Constitution. By section 4 of the Act a corporation doing business within the limits of the state, for the privilege of exercising its corporate franchise in the state, is subject to an annual tax measured by four per cent of its net income earned during the preceding fiscal or calendar year, the minimum tax being $25.00.

Section 10 of the Act, in effect during the period involved, provided that if the entire business of the corporation is not done within the state, the tax should be measured by that portion thereof derived from business done within the state, determined by a method of allocation upon the basis of sales, purchases, expenses of manufacture, payroll, value and situs of tangible property, or any of them or of other factors, or by such other method of allocation as may be fairly calculated to assign to the state the portion of net income reasonably attributable to business done within the state.

Section 12 provided that the net income should be computed in accordance with the method of accounting regularly employed by the taxpayer, but if that method does not clearly reflect the income, "the computation shall be made in accordance with such method as in the opinion of said commissioner does clearly reflect the income."

Section 14, in effect during the period involved, dealt with two or more corporations owned or controlled directly or indirectly by the same interests, with authority in the commissioner to apportion or allocate the income or deductions among them if he deemed it necessary to prevent evasion of taxes, or to require a consolidated report or such other facts as might be deemed essential to determine the amount of net income.

Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, involved the application of section 10 of the Act to determine the net income attributable to business done within this state by a foreign corporation exercising its corporate franchise here. Butler Brothers was an Illinois corporation engaged in purchasing dry goods and general merchandise from manufacturers and distributing them to wholesale houses owned by it in seven states, including California, for resale to retailers only. It maintained a central buying division. The cost of goods and the transportation charges were entered on the books of the house which received the goods. The actual cost of operating the central buying division was allocated among the houses, as also were common expenses, such as executive salaries, accounting and advertising. No question was raised as to the accuracy of the charges to each house. By the method of computation employed by it the taxpayer reported a loss of $82,851 for the year 1935 from operations in California. But in that year operations of all houses yielded a net profit of $1,149.677. The commissioner, pursuant to section 10 of the Act, by a method of formula allocation—that is by averaging the percentages which (1) the value of real and tangible personal property, (2) wages, salaries, commissions and other compensation paid to employees, and (3) gross sales, less returns and allowances, attributable to the California house, bore to the corresponding items of all houses—allocated to California 8.1372 per cent of the entire net profit. Instead of a loss of $82,851 for operations in California, this method attributed to California business a net profit of $93,500. The facts also showed that of the gross sales of $66,326,000 by all the houses, $5,206,000 thereof were by the California house, and that the gross volume of sales in California was substantially in the same proportion to the entire gross business as the percentages resulting from the formula allocation method. The use of the formula method of allocating the amount of business attributable to operations in California was upheld by this court and by the Supreme Court of the United States. This court said (17 Cal.2d at page 667, 668, 111 P.2d at page 336): "It is only if its business within this state is truly separate and distinct from its business without this state, so that the segregation of income may be made clearly and accurately, that the separate accounting method may properly be used. Where, however, interstate operations are carried on and that portion of the corporation's business done within the state cannot be clearly segregated from that done outside the state, the unit rule of assessment is employed as a device for allocating to the state for taxation its fair share of the taxable values of the taxpayer." This court pointed out that the general test for the unit rule of assessment was the unity of use and management; that is, if the operations in California contributed to the net income derived from the entire operations in the United States, then the entire business is so clearly unitary as to require a fair system of apportionment by the formula method in order to prevent either overtaxation or undertaxation. It was also observed that the purchasing and the sales activities were interdependent and supplemented each other to form one single, unitary business; that purchase price differentials were affected by the unitary power; and that sales in each of the states must be proportionately credited with the profits resulting from the purchasing power which such sales in the aggregate produced. Other factors in addition to purchasing which indicate the unitary character of the business were pointed out, namely, the central advertising, accounting and management divisions. The employment of the allocation method in any case of unitary business was approved so long as it was not intrinsically arbitrary and produced no unreasonable result; also that where a business is unitary in character, so that its separate units could not fairly be considered by themselves and the whole business in the several states derived a value from the unity of use, allocation of income upon a reasonable formula was sustainable. This court declared that the burden was upon the taxpayer to show that the method was arbitrary or produced unreasonable results. It was considered that the unitary nature of the business was definitely established by (1) unity of ownership; (2) unity of operation evidenced by central purchasing, advertising, accounting and management; and (3) unity of use in the centralized executive force and general system of operation. It was concluded that the application of the formula to allocate the proportion attributable to this state of net income of an entire unitary system was within the purview of the statute which measured the tax on the income derived from business done within the state.

At the time of the Butler Brothers decision the latest expression of the Supreme Court of the United States upholding the propriety of the use of formula allocation where unitary management was shown, was said to be in 1936. North American Cement Corporation v. Graves, 269 N.Y. 507, 199 N.E. 510; Id., 299 U.S. 517, 57 S.Ct. 311, 81 L.Ed. 381. In 1941 that court affirmed the decision of this court in the Butler Brothers case with an opinion upholding the formula method of allocation in such cases. It was held that one who attacks a formula of apportionment assumes the burden of showing that it has resulted in the taxation of extraterritorial values. It was there declared that since all the factors in the conduct of the Butler Brothers business were essential to the realization of profits, the business was properly treated as unitary; that the apportionment formula based on property, payroll and sales was not inappropriate where the contribution of the California branch to the advantages of centralized management of the unitary enterprise and to the entire net income earned was not questioned; and that the employment of the formula method was fairly calculated to assign to California that portion of the net income reasonably attributable to business done within the state.

[4] The Butler Brothers case demonstrates that the mere production of a separate accounting system for one of the branches of an entire or unitary business is insufficient without more to overthrow an apportionment formula based on the appropriate factors of sales, property and payroll. The fairness of the three-factor formula was thereby settled. Only if the taxpayer can meet the burden of showing by sufficient evidence that the allocation formula does not apportion to California that part of the entire net income reasonably attributable to the business done in the state will the court disapprove its use in the particular case. The evidence introduced to overcome the formula method of allocation must go to each element of the formula equation. Butler Brothers v. McColgan, supra, 17 Cal.2d at page 677, 678, 111 P.2d 334.

In the present case all of the elements of a unitary business are present—unity of ownership, unity of operation by centralized purchasing, management, advertising and accounting, and unity of use in the centralized executive force and general system of operation. The business of the parent and all of its subsidiaries is owned and managed under one centralized system, to the same extent as in the Butler Brothers case and other cases considered therein. Thus the business is unitary regardless of the fact that in the Butler Brothers case there was but one corporation involved, owning as parts of the unitary system seven different branches in as many states, and that in the present case there is a parent corporation owning and controlling as units of one system fifteen different branches organized as corporations in as many states. No difference in principle is discernable. If the crux of the matter is to ascertain that portion of the business which is done within this state, then the same considerations justify the use of the formula allocation method in the one case as in the other.

The plaintiff contends that the statute does not authorize the commissioner to apply the apportionment formula when the taxpayer is a California corporation, and is not the foreign (parent) corporation as in the Butler Brothers case.

[5, 6] It may be assumed that section 14 of the Act, which authorizes the commissioner to require a consolidated return, contemplates two or more corporations both or all of which are taxable as doing business within the state. See Bay Cities Transp. Co. v. Johnson, 8 Cal.2d 706, 68 P.2d 710. Power to apply the formula allocation in this or in the Butler Brothers case is not derived from the authority to require the filing of consolidated returns, since the latter indicates that the income of the group will be taxed as a unit. The power flows from the authorized method of ascertaining the income attributable to a taxpayer's activities within the state; and by a parity of reasoning the authority to pursue the method is present whenever activities are partially within and partially without the state (section 10), as in the case of a unitary system, whether the integral parts of the system are or are not separately incorporated; or (under section 12) the accounting system of the taxpayer does not clearly reflect the income, which may be the case when it is part of a unitary system. The legislature by enacting the foregoing sections, and the courts in the Butler Brothers decisions, recognized that the separate accounting method is appropriate to determine the true income of a separate business; but that when the business is not separate, and is an integral part of a larger and unitary system, the separate accounting is inadequate and unsatisfactory in ascertaining the true result of the activities and values attributable to that business. If the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state, the operations are unitary; otherwise, if there is no such dependency, the business within the state may be considered to be separate. Within that test it may not properly be contended that the taxpayer in the present case is doing a separate business.

[7] The ascertainment of income by the apportionment method is not necessarily a

disregard of the corporate entity nor an extension of the provisions of the statute by implication. Formula allocation is merely a method of ascertaining the true income attributable to the plaintiff's business, and is a method of ascertainment authorized by the statute. In Re Morton Salt Co., 150 Kan. 650, 95 P.2d 335, at pages 338, 339, the propriety of disregarding the corporate form by the allocation method of ascertaining income in a unitary business was indicated, with citation of other cases. By a memorandum opinion in People ex rel. Federal Motor Truck Co. of New York v. Lynch, 264 N.Y. 679, 191 N.E. 623 (certiorari denied 296 U.S. 588, 56 S.Ct. 99, 80 L.Ed. 416), the New York Court of Appeals upheld the determination of the state tax commissioner modifying an assessment against a subsidiary corporation upon the basis of the combined net income and combined segregated assets of the parent, a Michigan corporation, and its subsidiaries of which only the relator had property or did business in New York State.

Reliance on Burroughs Adding Machine Co. v. Wisconsin Tax Commission, 237 Wis. 423, 297 N.W. 574, does not avail the plaintiff. See also Northern States Power Co. v. Tax Comm., 237 Wis. 433, 297 N.W. 578. The court in that case rejected a particular ratio method of ascertaining the income of the taxpayer as unauthorized by the statute. There the taxpayer was a subsidiary corporation of a foreign corporation parent. The court conceded the fairness of an appropriate authorized allocation method to reach the desired objective, that is, to ascertain the amount of income in the state of the taxpayer as a member of a unitary system, whether the system was operated by one corporation, or by a parent and subsidiary corporations.

Cases, such as Hans Rees' Sons v. State of North Carolina, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879, where the court refused to approve the result reached by the formula allocation method because the part of the taxpayer's entire income apportioned to the state was not reasonably attributable to the processes conducted within its borders, are in harmony with the foregoing conclusions.

[8] In any event, since the business transacted by the parent and its subsidiaries in the present case was a unitary business, the accident of different labels which may have attached to the various subsidiaries does not change the result. The factors by which the local branch contributed to the realization of profits to the entire business in the Butler Brothers case are likewise present in this case.

The plaintiff contends that nevertheless the application of the formula allocation produced an arbitrary and unreasonable result. The contention is based on the assertions that there was no proof by the commissioner that the formula method was proper or truly reflected the taxpayer's income; that there was no issue of tax evasion; and that, as the court found, the accounts of the plaintiff were accurate and reasonable. The court made no express finding on the reasonableness of the application of the formula method employed by the commissioner.

[9, 10] The evidence on the issue of the propriety of the formula allocation method to reflect the plaintiff's income was sufficient when the unitary method of ownership, use and operation of the business of the parent and its subsidiaries was established. It was then incumbent upon the plaintiff to produce evidence to meet the burden devolving upon it to show that the formula allocation method was arbitrary and unreasonable. The plaintiff's evidence, however, consisted solely of the presentation of its separate accounting, and the accuracy and reasonableness of the entries thereof. That evidence did not overcome the correctness of each element of the formula equation, nor the reasonableness of the application thereof to ascertain net income in this case. Tax evasion is not a factor which must be present before the formula allocation method may be employed. Reliance upon the accuracy and reasonableness of the separate accounting and the entries thereof is merely an argument for the application of a different formula, namely, a "fair price" standard. The plaintiff does not establish the unreasonableness of the formula allocation method by showing the reasonableness of its book entries.

Its burden is to establish affirmatively that the formula equation produces an arbitrary and unreasonable result. The plaintiff makes no contention that the percentage of the entire net income allocated to this state by the formula equation had no reasonable relation to the proportion which the total sales in California bore to the total sales of the unitary business. Its position in this respect is explainable, inasmuch as the California sales for each of the years involved amounted to more than twenty per cent of the total sales of the unitary business for that year, which was a higher percentage in each instance than that allocated to California by the commissioner. There is no necessary inconsistency between the accuracy and fairness of the taxpayer's accounting and the different result obtained by the formula method of allocating income. For taxation purposes the one does not impeach the other. Butler Brothers v. McColgan, 315 U.S. at page 507, 62 S.Ct. 701, 86 L.Ed. 991. There is therefore no evidence to support a finding, had one been made, of unreasonableness in the employment of the formula allocation method to ascertain the plaintiff's share of the income of the unitary business. On the contrary it affirmatively appears that the result from the method pursued was just and reasonable.

[11] The Supreme Court of the United States has answered the plaintiff's constitutional objections by its holding in the Butler Brothers case (315 U.S. at page 507, 62 S.Ct. 701, 86 L.Ed. 991; see also Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293), that to compute the income allocable to one state of a unitary business operated in several states by a reasonable formula method is not to tax extraterritorial values.

That the authority existed to ascertain the net income of the plaintiff on a formula allocation basis in the absence, as here, of any equity which would prevent it, is made manifest by the foregoing observations. The trial court therefore incorrectly concluded that the plaintiff was immune from the appropriate exercise of that authority.

[12] It is also contended by the plaintiff that the notice of the additional tax for the taxable year 1937 was not mailed within the prescribed time. The notice was dated November 22, 1940, and it may be assumed was mailed on that date. Section 25 of the act as amended in 1933 provided that notice of additional tax must be mailed within three years after the return was filed. The return for the taxable year 1937 was filed March 15, 1937. According to the computation of the time limitation as enacted in 1933, the notice should have been mailed before March 15, 1940, and having been mailed on November 22, 1940, was mailed late. However, in 1939 the Legislature again amended section 25 to provide that the notice should be mailed within four years after the return was filed. This extension became effective before the expiration of the former three-year period for mailing notice of additional tax for the 1937 taxable year. Section 21 of the 1939 amendatory act provided that, since the act prescribed a tax levy for the usual current expenses of the state, it should take effect immediately and be applied in the computation of taxes accruing subsequent to December 31, 1938. In invoking the three year rather than the four year statute, the plaintiff makes the same contentions that were disposed of in the case of Mudd v. McColgan, 30 Cal.2d 463, 183 P.2d 10. That case involved the Personal Income Tax Act of 1935. A 1939 amendment, Stats.1939, p. 2528, increased from three to four years the time for mailing a notice of a deficiency tax. Section 23 of the amendatory act contained the same provision as section 21 of the 1939 act amendatory of the Bank and Corporation Franchise Tax Act. In that case likewise the amendatory act became effective prior to the expiration of the three year period, and the notice of deficiency tax was mailed after the three year but within the four year period. We held that the four year statute was applicable. What was said there affords a complete answer to the plaintiff's arguments here, and the result

in that case is controlling. The additional tax in this case, as the deficiency tax in the case of Mudd v. McColgan, was a continuing liability and the Legislature had the power before the expiration of the prior period to extend the time within which enforcement could be commenced in the absence, as here, of an express declaration to the contrary.

It follows that the assessment of the additional tax in each case was proper.

The judgments are reversed.

GIBSON, C. J., EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., and PEEK, Justice pro tem., concur.

In re HOWE'S ESTATE.
METZ v. HOWE et al.
Civ. 15617.

District Court of Appeal, Second District,
Division 3, California.

July 18, 1947.

Hearing Granted Sept. 15, 1947.

1. Courts 🔑39

The initial duty of a court is to inquire into its own jurisdiction.

2. Appeal and error 🔑23, 185(1)

If a reviewing court determines in course of inquiry that trial court was without jurisdiction, judgment should be reversed upon that ground, notwithstanding the fact that parties had not challenged the jurisdiction of either court.

3. Appeal and error 🔑20

A reviewing court should not act to give effect to or enforce an order or judgment made in excess of its jurisdiction.

4. Courts 🔑23

Jurisdiction of superior court sitting in probate is purely statutory, and it may competently proceed only in manner provided by statute and parties to its proceedings cannot enlarge its statutory jurisdiction by any conduct on their part.

5. Executors and administrators 🔑507(1)

A trial of title to property between executor and decedent's estate normally is had in the hearing upon settlement of executor's final account.

6. Executors and administrators 🔑82

Probate court was without jurisdiction, upon executor's petition for instructions, to enter order directing executor to exclude from testator's estate all of assets of business owned and operated by testator at time of his death on ground that assets had become individual property of executor by virtue of agreement he had made with testator to serve as manager of the business, since determination of title to property between executor individually and the estate could be had in hearing upon settlement of executor's final account. Probate Court, § 588.

7. Executors and administrators 🔑82

The statute authorizing instructions to executor does not provide alternative procedure, and issues as to how estate is to be distributed, which are triable upon partial or final distribution, may not be determined on a petition of an executor for instructions. Probate Court, § 588.

8. Estoppel 🔑68(3)

Where executor was obliged to operate business owned and operated by testator at time of death either under executor's individual claim of ownership by virtue of employment agreement that he had entered into with testator or in behalf of the estate, either under authority of the will or order of court, executor, by seeking authority to operate business as executor, did not waive his claim of ownership.

9. Estoppel 🔑53

An intention to forego or abandon a right is an essential element of waiver.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of George Edward Howe, also known as

George Ed Howe and George E. Howe, deceased. John C. Netz, executor of decedent's will, filed a petition for instructions, opposed by Myra B. Howe, decedent's widow, and Alvin Langdon Coburn, legatee. From order directing executor to exclude from decedent's estate all of the assets of the hardware, plumbing and heating business owned and operated by decedent at time of his death, decedent's widow appeals.

Reversed.

Hugh Gordon, of Los Angeles, Sanford A. Waugh, of San Francisco, and Powers & Bernard and W. A. Strong, all of Los Angeles, for appellant.

Charles E. Beardsley, of Los Angeles, for respondent John C. Netz.

SHINN, Acting Presiding Justice.

This is an appeal by Myra B. Howe, widow of George E. Howe, deceased, from an order of the superior court sitting in probate instructing and directing John C. Netz, the executor of Howe's will, to exclude from said decedent's estate all of the assets of the hardware, plumbing, and heating business owned and operated by decedent at the time of his death. The order declares the assets of this business to be the individual property of Netz by virtue of an agreement he made with Howe in 1928 to serve as manager of the business. The order is appealable. Probate Code, sec. 1240.

[1-3] The sole question raised and argued by the parties on this appeal is whether this employment agreement is void as an invalid testamentary disposition. The presentation evidences much research and care in the preparation of the briefs and the question is one of importance. We have concluded with some reluctance that it is not properly before us, and we therefore shall not decide it. The initial duty of the court, in any case before it, is to inquire into its own jurisdiction. If a reviewing court determines in the course of this inquiry that the trial court was without jurisdiction, the judgment of such court should be reversed upon that ground, notwithstanding the fact that the parties have not challenged the jurisdiction of either court. Smith v. Westerfield, 88 Cal. 374, 380, 381, 26 P. 206; United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 80 L. Ed. 1263; Clark v. Paul Gray, Inc., 306 U.S. 583, 586, 59 S.Ct. 744, 83 L.Ed. 1001; Board of Assessors v. Suffolk Law School, 295 Mass. 489, 4 N.E.2d 342, 346. Stated otherwise, in such a situation the appellate jurisdiction should be exercised only to correct this fundamental error. United States v. Corrick, supra; 4 C.J.S., Appeal and Error, § 45, pages 127-129. Inasmuch as we have determined that the order was in excess of the jurisdiction of the trial court, it is our duty to reverse it on our own motion, just as we should dismiss an attempted appeal from a nonappealable order. Rosenberg v. Knesboro, 80 Cal.App. 2d 36, 180 P.2d 750; Collins v. Corse, 8 Cal.2d 123, 64 P.2d 137. The merits of the appeal should not be considered. It is fundamental that a reviewing court should not act to give effect to or enforce an order or judgment of a trial court made in excess of its jurisdiction.

[4] The jurisdiction of the superior court sitting in probate is purely statutory. Consequently it may competently proceed only in the manner provided by statute. Texas Co. v. Bank of America, 5 Cal.2d 35, 39, 53 P.2d 127. Its jurisdiction is entirely circumscribed by statute. Estate of Lund, 65 Cal.App.2d 151, 155, 150 P.2d 211. Parties to its proceedings cannot enlarge its statutory jurisdiction by any conduct on their part. See Harrington v. Superior Court, 194 Cal. 185, 188, 228 P. 15; Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 559, 59 P.2d 119; Marin Municipal Water District v. North Coast Water Co., 178 Cal. 324, 328, 173 P. 473.

[5-7] This case came before the trial court on Netz' petition for instructions. The only authorization for such procedure is found in section 588 of the Probate Code. This section expressly provides, however, that its procedure is to be used only "where no other or no different procedure is provided by statute." The jurisdictional question is thus presented whether or not there existed other or different

procedure provided by statute which Netz might have used. This question may be answered only in the affirmative in view of the issue raised by Netz' petition. Netz sought by this petition for instructions to try title to the decedent's business as between himself, the executor, and the estate. The trial of title to property between the executor and the estate normally is had in the hearing upon settlement of the executor's final account. Waterland v. Superior Court, 15 Cal.2d 34, 39, 98 P.2d 211; Bauer v. Bauer, 201 Cal. 267, 271, 256 P. 820; Stevens v. Superior Court, 155 Cal. 148, 150-151, 99 P. 512; Estate of Basso, 68 Cal.App.2d 294, 299, 156 P.2d 476; Best v. Coloneus, 56 Cal.App.2d 285, 132 P.2d 260. By reason of the existence of this other and different procedure for the trial of title to property between the executor and the estate, the trial court was without power to try such an issue upon a petition for instructions. It was held in Estate of Thramm, 67 Cal.App.2d 657, 658-659, 155 P.2d 119, and Estate of Clippinger, 75 Cal. App.2d 426, 171 P.2d 567, that section 588 does not provide alternative procedure and that issues as to how the estate is to be distributed, which are triable upon partial or final distribution, may not be determined on a petition of an executor or administrator under section 588. The scope of the section is limited by its express provisions.

Accordingly, since the trial court did not act in the manner prescribed by statute and since its jurisdiction in probate is entirely statutory, it exceeded its jurisdiction and its judgment and order instructing Netz is void. Parker v. Shell Oil Co., 55 Cal. App.2d 48, 53, 130 P.2d 158; Spreckels Sugar Co. v. Industrial Accident Commission, 186 Cal. 256, 260, 199 P. 8; see Rescue Army v. Municipal Court, 28 Cal.2d 460, 463-464, 171 P.2d 8; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287-291, 109 P.2d 942, 132 A.L.R. 715; Fortenbury v. Superior Court, 16 Cal.2d 405, 407-408, 106 P.2d 411; Rodman v. Superior Court, 13 Cal.2d 262, 269, 89 P.2d 109.

[8, 9] We realize that the executor was obliged to operate the business under his claim of ownership or on behalf of the estate, either under authority of the will or order of court, but this situation presented no serious problem. If he had sought or hereafter seeks authority to operate it as executor, this would not constitute a waiver of his claim of ownership. It is elementary that an intention to forego or abandon a right is an essential element of waiver.

The order is reversed.

WOOD, J., and KINCAID, J. pro tem., concur.

80 Cal.App.2d 958

In re WIGNALL'S ESTATE.
KEELEY et al. v. WIGNALL.
Civ. 15775.

District Court of Appeal, Second District, Division 3, California.

July 23, 1947.

Hearing Denied Sept. 18, 1947.

1. Wills 🔑448, 449

Where two interpretations of a will are possible, that interpretation is to be preferred which will prevent total or partial intestacy. Probate Code, § 102.

2. Wills 🔑466

Though the word "pay" usually refers to the satisfaction of a debt or obligation, it will be construed as importing a bequest or devise where it appears that the testator so intended.

See Words and Phrases, Permanent Edition, for all other definitions of "Pay".

3. Wills 🔑548

The words "to be paid" and "pay" as used in provision of will that if legatees did not survive distribution, bequests were "to be paid" to their surviving issue, and if no issue survived, then to the surviving spouse and that executor should "pay" enumerated bequests, referred to all bequests and not merely to bequests of money.

4. Wills ⚷448

The fact that testatrix did not change her will from the time of the death of her brother, who was named as residuary legatee, until her death, almost four years later, strongly indicated that testatrix believed that the will as written disposed of her entire estate, even in the event that her brother should predecease her.

5. Wills ⚷548

Where testatrix whose heirs at law consisted of a brother and 13 cousins, in her will, made small bequests to only three of her cousins and a somewhat larger bequest to her brother's wife, and provided that if such legatees did not survive distribution, bequests were to be paid to their surviving issue, and if no issue survived, then to the surviving spouse, and provided that the remainder of her estate should go to her brother, and the brother predeceased testatrix by almost four years, the brother's widow, rather than the 13 cousins, was entitled to the residuary estate. Probate Code, § 102.

6. Executors and administrators ⚷314(12)

Where trial court held that testatrix' 13 cousins were entitled to testatrix' residuary estate rather than the widow of the residuary legatee, but two thirteenths of the residuary estate were ordered distributed to the widow as assignee of two of testatrix' cousins under assignments previously obtained, and widow on her appeal did not appeal from the portion of the decree ordering two thirteenths of the residuary estate distributed to her, she did not waive the right to appeal, in toto, by allowing the interests to be distributed to her. Code Civ.Proc. § 938.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Edith Alberta Wignall, deceased, wherein Joseph E. Keeley filed a petition against George H. Linaker and others, distributees, and Ada C. Wignall, wherein Ada C. Wignall filed objections. From a judgment holding that the distributees were entitled to residuary estate of deceased, Ada C. Wignall appeals.

Judgment reversed with instructions to distribute residuary estate to objector.

Daly S. Robnett, of Los Angeles, for appellant.

George E. Cryer and R. Alston Jones, both of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

This is an appeal by Ada C. Wignall, surviving wife of Alonzo Charles Wignall, brother of deceased, Edith Alberta Wignall, from a decree of distribution. Appellant's contention is that under the will of Edith she, Ada, was entitled to take the residuary estate which had been left to decedent's brother Alonzo, for the reason, as claimed by her, that it was the expressed intention of testatrix that she should take the same as the surviving wife of Alonzo.

The will declared testatrix to be a single person, named an executor, directed him to pay her debts, and provided as follows:

"Third: I direct my Executor to pay out of the residue of the estate, the following bequests subject to the following conditions:

"The persons named herein are to receive the bequests set forth provided they survive distribution of the estate. This provision is applicable to each person named as though the same were repeated after each person's name. In the event they do not survive distribution, the bequests are to be paid to their surviving issue and if no issue survive, then to the surviving spouse. Subject to the said provision, I direct my Executor to pay the sum of Two Hundred Dollars ($200.00) to each of my cousins, whose names and addresses are as follows:

"Arthur H. Linaker, Los Angeles, California.

"Earl Wilkinson, Clinton, Iowa.

"Fourth: The sum of One Hundred Dollars ($100.00) to Annie W. Dingee of San Diego, California.

"Fifth: The sum of Five Hundred Dollars ($500.00) to Ada C. Wignall, wife of my brother, Alonzo Charles Wignall.

"Sixth: I give, devise and bequeath the following personal property to the following persons:

"Books to Earl Wilkinson, Clinton, Iowa.

"Haviland China Tea set to Mrs. Willard Webber, 1530 Grand View Avenue, Glendale, California.

"Beleek tea set consisting of one tray, four cups and saucers, tea pot, sugar bowl and cream pitcher, to Josephine Shepherd, Hawthorne Farm, Libertyville, Illinois.

"Oil paintings and drawings done by my mother; also family portraits, to George H. Linaker, McGee, Arkansas.

"Seventh: After the above legacies have been paid and the personal property herein described, has been distributed, I direct that the remainder of my estate go to my brother Alonzo Charles Wignall.

"Eighth: I have, except as otherwise in this Will provided, intentionally omitted and with full knowledge, all persons who may claim to be entitled to share in my estate.

"Ninth: In the event that any provisions of the Will be adjudged unenforceable in law, I direct that, disregarding such provisions, the remainder hereof shall subsist and be carried into effect.

"In Witness Whereof, I have hereunto set my hand and seal this twenty-second day of April A. D. 1939.

"Edith Alberta Wignall."

The question is: Was Alonzo one of "the persons named herein" whose issue or surviving spouses were to take the bequests if the named person (or persons) should not survive distribution. The trial court held that Alonzo was not included and, hence, that appellant does not take the residue as his widow. As a result of this construction decedent was held to have died intestate as to her residuary estate, which was of the approximate value of $50,000. The residuary estate was distributed to eleven cousins, an undivided one-thirteenth interest each, and to appellant as the assignee of two other cousins an undivided two-thirteenths interest. The seven persons named in the Third, Fourth, Fifth, and Sixth paragraphs were living at the time of distribution and took their several bequests of money and other personal property.

[1] Certain familiar rules for the interpretation of wills have application here. Of two interpretations, that is to be preferred which will prevent a total intestacy. Probate Code, sec. 102. This rule operates to avoid partial as well as total intestacy. In re Estate of Olsen, 9 Cal.App.2d 374, 50 P.2d 70; In re Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607; In re Estate of Soulie, 72 Cal.App.2d 332, 164 P.2d 565. The very fact of making a will raises a presumption that the testatrix intended to dispose of all of her property. 26 Cal.Jur. 899. It must therefore be assumed that testatrix intended to dispose of her entire estate. This, of course, she accomplished by the residuary clause and the rule above stated was thereby partially satisfied, but the reason for the rule should, we think, be taken into consideration in the interpretation of the contingent provisions. In making a complete disposition of her estate Miss Wignall had in mind the possibility that all the beneficiaries might not survive distribution. It was her plan to provide for that contingency and she did so. The question is, then, such being her plan, whether she believed she had accomplished it as to the residue of the estate, or understood that she had not done so, and that upon the death of Alonzo, during her lifetime, the residue would go to her heirs at law. We think it should be presumed that she intended and believed the contingent provisions to be complete. Reasons for this view will be developed later in our discussion of the will.

Respondents' argument in support of the decree is two-fold: They point to the statement in paragraph Third, "In the event they do not survive distribution, the bequests are to be paid to their surviving issue and if not issue survive, then to the surviving spouse. Subject to the said provision, I direct my Executor to pay the sum of Two Hundred Dollars ($200.00) to each of my cousins, whose names and addresses are as follows", etc., and they contend that it would be unreasonable to suppose that testatrix intended the issue or surviving spouse to take the interest of any beneficiary whose bequest was not in the form of money. They say: "And may we reasonably ascribe to the testate an intention to give to the surviving spouse of one of the legatees named in the Sixth paragraph of the will any one of the articles of personal property specifically bequeathed in that paragraph? These articles are of little intrinsic value. They are of a class customarily given to specific legatees for special or sentimental reasons. Is it not highly improbable that these articles were intended to go to the surviving issue or spouse of the legatee? Can we imagine that the testate intended to give her Haviland China tea set to the surviving husband of her friend Mrs. Willard Webber, or her Beleek tea set to the surviving husband of Josephine Shepard, if she has one, or the Linaker family portraits to the widow of the legatee—a stranger to the blood, to whom they would doubtless be of no interest?" But is it less reasonable to believe that she would have wished her Haviland China tea set to go to the surviving husband of Mrs. Willard Webber than to thirteen cousins, only three of whom were remembered with specific legacies? And the same as to the books, the Beleek tea set and the oil paintings "done by my mother" and the family portraits? If she wished her cousin Arthur H. Linaker to have the oil paintings and the family portraits, why should she not also have wished that they be kept in his family in the event he should predecease her, as well as in the event he did not and would have them to pass on to his family?

[2, 3] We pass now to the phraseology upon which respondents base the second phase of their argument. The basis of the provision relating to the contingency that some beneficiary might not survive distribution is the clause, "the persons named herein are to receive the bequests set forth, provided they survive distribution of the estate." There is no limitation to cash bequests. Then, "This provision is applicable to each person named as though the same were repeated after each person's name." There is no limitation here. The language applies to all persons named in the will. Then follow the words "be paid" and "pay" in succeeding sentences. Respondents insist that these words are applicable only to the bequests of money, but we cannot agree. Although they usually refer to the satisfaction of a debt or obligation, they will be construed as importing a bequest or devise where it appears the testator so intended. In Re Estate of Spreckels, 162 Cal. 559, 123 P. 371, it was held that a direction to trustees to "pay over" certain amounts to beneficiaries amounted to a direct bequest to such beneficiaries, and the court said (at page 574 of 162 Cal. at page 377 of 123 P.): "The word 'pay' is not properly applicable to the conveyance of real property; and a direction to pay over such property in itself imports a direct devise to the party or parties who are, according to the testator's intent, to receive the property [In re] Estate of Dunphy, 147 Cal. [95] 101, 81 P. 315." See also Chase National Bank of the City of New York v. Schleussner, 117 Conn. 370, 167 A. 808; Appeal of Clarke, 70 Conn. 195, 39 A. 155; Mason v. Jones, 2 Barb., N.Y., 229, 248; Roosa v. Harrington, 171 N.Y. 341, 64 N.E. 1; Neblett v. Smith, 142 Va. 840, 128 S.E. 247. Here the words cannot be given their ordinary meaning. There were no debts or obligations due the beneficiaries. The words "to be paid" and "pay" mean no more than the words "are to receive" as used in the first sentence of the paragraph.

[4] We should look to the circumstances under which the will was made. Testatrix was a spinster, approximately 73 years of age. Her nearest relative was her brother Alonzo, and after him came thirteen cousins, nine male and four female. She had a few personal friends whom she wished to remember, but she did not wish to leave anything to the female cousins, and remembered only three of the nine male cousins, namely, Arthur H. Linaker, to whom she left $200, Earl Wilkinson, who was given $200 and her books, and George H. Linaker, to whom she left her paintings. Her estate amounted to about $50,000, and the money bequests to only $1,000. Practically all of the estate was left to Alonzo. Next in the affections of testatrix, as indicated by the will, was the wife of Alonzo, appellant herein, who was left a bequest of $500. As stated in the Eighth paragraph, testatrix had in mind "all persons who may claim

to be entitled to share in my estate," which would include the ten cousins to whom she left nothing, and in that paragraph she stated that she intentionally omitted making provision for them. Alonzo died February 13, 1941. Testatrix died December 29, 1944. The fact that no change was made in her will during the intervening time would strongly indicate that she was of the belief that the will as written disposed of her entire estate, in accordance with her general plan, even in the event that Alonzo should predecease her. She undoubtedly knew that practically her entire estate, which she was leaving to Alonzo, would probably go to appellant should she survive Alonzo. Are we to believe that in this period of almost four years after the death of Alonzo testatrix understood that the residue of the estate would not go to appellant, as Alonzo's widow, and was content to have it go to the thirteen cousins, three only of whom were considered by her to be deserving of remembrance? And could we come to this conclusion by giving to the words "be paid" and "to pay" a meaning which would render the plan of the will largely incomplete, when it is clear that they were used as words of bequest in the statement of that plan? Respondents say that if testatrix had intended that the residue of the estate should go to appellant as the widow of Alonzo, it would have been easy to so provide. True, and if she had intended the residue of the estate to go to the cousins whom she recalled with indifference, it would have been easy to so provide. It is beyond question that she had an intention to make provision for the surviving issue and spouses of the several beneficiaries, and the will negatives a purpose to make provisions for the ten unmarried cousins. The terms of the will and the circumstances which we have mentioned strongly indicate that Miss Wignall did attempt to provide for the surviving issue and spouses of *all* beneficiaries and believed she had made such provision. The existence of that belief would furnish a safe guide to the meaning of the contingent provisions of a third paragraph. What she believed the will said is, in the eyes of the law, what it says, if it is subject to a reasonable construction consistent with her belief. We do not doubt that the limitation of these contingent provisions to cash bequests, or to all bequests with the exception of the one to Alonzo, would defeat the wishes of testatrix and fail to give the effect to the language of paragraph Third which she intended it to have, and which she believed it did have.

[5] We conclude that appellant is entitled to take the residuary estate.

[6] As already noted two-thirteenths of the residuary estate was ordered distributed to appellant as assignee of two of the cousins under assignments previously obtained. She did not appeal from this portion of the decree and it is now urged by respondents that she has waived the right of appeal, in toto, by allowing these interests to be distributed to her. The rule that one may not accept the fruits of a judgment and yet appeal from it does not apply. Upon a reversal of the judgment appellant will be entitled to retain the interests which she acquired by assignment and also will receive the remainder of the residuary estate. She could not have appealed from the portions of the judgment that were favorable to her (Code Civ.Proc., sec. 938; In re Estate of Hughes, 80 Cal.App.2d 550, 182 P.2d 253), and is not estopped to prosecute her appeal. In re Estate of Clark, 190 Cal. 354, 212 P. 622.

The judgment is reversed with instructions to distribute the residuary estate to appellant.

WOOD, J., and KINCAID, J. pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

81 Cal.App.2d 89

WEST v. LAURENCE et al.

Civ. 3659.

District Court of Appeal, Fourth District, California.

July 28, 1947.

1. Appeal and error ⚿931(1), 1011(1)

Conflicts in the evidence are settled in the trial court, and an appellate court must accept as true the credible evidence supporting the verdict and judgment.

2. Automobiles ⚿206

A driver of a vehicle on a public highway who is himself not negligent and who is obeying the law, may rely on the assumption that another driver will obey the law only so far as it is not apparent that he will violate it.

3. Appeal and error ⚿1008(1)

In action by motorist against owners of truck and semi-trailer for injuries sustained by motorist at night when his automobile struck semi-trailer which did not display clearance lights as required by vehicle code, after automobile had safely cleared the truck which had been driven partially onto left side of highway preparatory to making turn into private driveway, whether motorist was guilty of contributory negligence in failing to drive further to his right onto shoulder of highway and thus avoid colliding with the semi-trailer, was for trier of the facts. Vehicle Code, § 625.

4. Automobiles ⚿167(1)

Though it is not always negligence for a motorist to travel on his left side of the highway in order to turn into a private drive, the motorist should only do so when an ordinarily prudent person would believe the movement could be made in safety.

5. Appeal and error ⚿1008(1)

In action by motorist against owners of truck and semi-trailer for injuries sustained by motorist at night when his automobile struck semi-trailer which did not display clearance lights as required by vehicle code, after automobile had safely cleared the truck which had been driven partially onto left side of highway preparatory to making turn into a private driveway, whether truck driver was negligent in driving partially onto his left side of highway in making the turn into the private driveway was for the trier of the facts. Vehicle Code, § 625.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Truman West against W. V. Laurence and another, to recover for damages sustained by plaintiff as result of a collision between an automobile which plaintiff was driving and a semi-trailer owned by the defendants and driven by W. K. Kemp. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Harry W. Horton, of El Centro, for appellants.

Clarence B. Smith, of El Centro, for respondent.

MARKS, Justice.

This is an appeal from a judgment in the sum of $10,633.05 for damages sustained by plaintiff as a result of a collision between an automobile which he was driving south on a public highway in Imperial County, and a semi-trailer being driven north on the same road by W. K. Kemp. It was owned by Kemp and W. V. Laurence and was being operated on their business. The accident happened about 9 o'clock p. m. on August 9, 1944. The night was clear, but dark, and the roadway was dry. The case was tried before the court without a jury and a motion for new trial was denied.

The collision occurred on the old Brawley-Calipatria Highway which runs north and south and has a paved center 16 feet wide with an 8 foot traversable shoulder on the west side, and another about 6 feet wide on the east side. There is a canal with a substantial west bank on the east side of the road. About 60 feet north of the point of impact is a private road leading into the Stahl Ranch which lies east of the highway and was the destination of defendants' truck. This private road crosses the canal by means of a bridge 14 feet wide. It was stipulated that a vehicle of the length of defendants' truck and semi-trailer could not make the turn into the private road without crossing to the west half of the pavement because of the narrow bridge, although Kemp testified that he could make this turn from the east half of the pavement and that no part of his vehicle was ever west of the center of the highway. The error in this last statement seems to be demonstrated beyond question by the physical facts as well as other evidence and the briefs and arguments of counsel for both parties are based on the assumption that the truck and semi-trailer were straddling the center of the pavement with their west sides west of the center.

Kemp was driving a stake bodied truck to which was attached a long semi-trailer 84½ inches wide. Plaintiff and his wife were riding in a 1934 model sedan. Both testified there were no clearance lights burning on the semi-trailer; that the only illuminated lights on defendants' vehicle at the time of the collision were its headlights which were similar in appearance to those of an ordinary truck or automobile so that they had no warning that a semi-trailer was attached to the truck until just before the collision.

Plaintiff turned onto the highway about 1 mile north of the point of collision and proceeded south on his own right hand side of the pavement at a speed of not more than 20 miles an hour. He was driving with his left hand on the steering wheel, his left arm resting on the left front door. (The window was rolled down.) His elbow was protruding about 2 inches beyond the body of the car and inside of the line of the running board. After turning onto the highway, he and his wife both saw the headlights of the approaching truck. When about 200 feet from it they observed that the truck was straddling the center of the highway and inclining further to the west. Plaintiff slowed down and turned his car to the west and when about 60 feet from the truck he drove 2 or 3 feet still further to the west. When he had passed the headlights of the truck he saw the semi-trailer for the first time. He cleared the truck without hitting it. The left front wheel of his automobile came into contact with some portion of the left front of the semi-trailer and plaintiff's elbow came into contact with its left front corner, shattering the elbow and seriously and seriously and permanently injuring his left arm. The left front tire of the automobile blew out and that wheel was bent. Tire burns and scratches on the pavement started from the point of impact which was between 2 and 3 feet (probably about 2½ feet) east of the west edge of the pavement and bore south easterly in an arc until the car came to rest on the bank of the canal to the rear of the truck. Drops of blood paralleled the tire burns about 6 inches north easterly from them. It is evident that the right wheels of the automobile were between 2 and 3 feet west of the west edge of the pavement and that the semi-trailer occupied 4 or 5 feet of the west, its left, half of the pavement at the time of the collision.

Mrs. West described the movements of the vehicles just before the collision, as follows:

"Q. And did your husband change the course of your car any by the time you came opposite the Stahl Ranch entrance? A. Yes.

"Q. What change, if any, did he make? A. Well, by the time we were opposite the entrance to the Stahl Ranch, I would say he had pulled west to the shoulder of the road, the wheel of our car was possibly a foot off the pavement.

"Q. About how far away was the other car from you when you were there, if you know? A. Well possibly forty maybe 50 feet and maybe not that far.

"Q. Well where was your car travelling on the highway when you were opposite the Stahl Ranch? A. Well, the car, what we thought was a car, was over on the west side, pulled over to the west side of the highway.

"Q. How much was it on the west side? A. Well, I would say—

"Q. With reference to the center of the road where was it travelling? A. Possibly over the center of the road around maybe 3 feet, 2½ to 3 feet at that time.

"Q. At the time you saw it, when you were opposite the entrance to the Stahl Ranch? A. Yes.

"Q. Did you proceed down south? A. Yes.

"Q. How far did you go before anything happened? A. Well, I would say we went around maybe 15 to 20 feet and we noticed the truck made a severe turn, turned sharply to the west side of the pavement and at that time my husband pulled our car over to where the right front wheel was at least three feet off the pavement, to 3½ feet off the pavement and the left front wheel maybe 2½ feet on the pavement.

"Q. About how far was it from the front of your car to the front of that vehicle when your husband pulled over that last time? A. When he made the pull over the last time?

"Q. Yes. A. Eight or ten feet when we last pulled over. * * *

"Q. The semi-trailer was a flat bed? A. Yes."

[1] There is evidence in the record contradicting some of the foregoing statements which we will not detail as conflicts in the evidence are settled in the trial court and an appellate court must accept as true the credible evidence supporting the verdict and judgment.

Defendants state their grounds for reversal of the judgment as follows: "May a plaintiff, who claims to have seen a truck being driven straddling the center line of the highway and who is forewarned of the truck's continued operation in that position, fail to give way and avoid the accident when he has ample room so to do?" In their argument they maintain (1) that Kemp was not guilty of any negligence as it was stipulated that it was necessary for him to drive to his left of the center of the highway in order to make the turn over the bridge into the Stahl Ranch, and (2) that plaintiff was guilty of primary or contributory negligence in not driving further to his right onto the perfectly traversable shoulder and thus have avoided colliding with the semi-trailer. They cite and rely on many cases which they maintain support these arguments.

[2] They first state, and we believe correctly so, that a driver of a vehicle on a public highway who is himself not negligent and is obeying the law, may rely on the assumption that another driver will obey the law only so long as it is not apparent that he will violate it. From this they argue that when plaintiff and his wife saw Kemp driving his truck over the center of the highway, and continue to do so, plaintiff should have driven further to his right so as to have insured that there would have been no collision. While the premise is correct the deductions from it are entirely erroneous under the facts in evidence.

Defendants cite the case of Bauhofer v. Crawford, 16 Cal.App. 676, 117 P. 931, in which an automobile ran into a milk wagon parked on its left hand side of the street. A motion for non-suit was granted and the judgment for defendant was reversed on appeal. That accident happened on February 3, 1909, and the case was decided on July 25, 1911, which dates were both before the adoption of the California Vehicle Act and before the statutes were passed which regulate the parking and operation of vehicles on streets. That case cannot assist defendants in view of the statutes now in effect. (Shedd v. Downie, 31 Cal.App.2d 104, 87 P.2d 395.)

Defendants also cite Todd v. Orcutt, 42 Cal.App. 687, 183 P. 963, where an accident happened when the defendant's car was to its left of the center line of the street. All that is held in that case is that it not always negligence for a driver to operate his vehicle on his left hand side of the street when it may be "impracticable" to drive it on the right half. Zohner v. Sierra Nevada Life & Casualty Co., 114 Cal.App. 85, 299 P. 749, is much to the same effect.

The cases of Hanson v. Cordoza, 106 Cal App. 500, 290 P. 62; Inouye v. Gilboy Co., 115 Cal.App. 25, 300 P. 835; Huber v. Scott, 122 Cal.App. 334, 10 P.2d 150, and Spear v. Leunberger, 44 Cal.App.2d 236, 112 P.2d 43, all involved accidents which happened when the plaintiff drivers were turning from the right half of a street across the left half to enter a private driveway. All of those cases hold that it is not always negligence to make such a turn; that what is required of a driver making such a turn is that he exercise due care in doing so; that in such cases the questions of negligence and contributory negligence are of fact for the trier of fact and not for an appellate court

Hagenah v. Bidwell, 46 Cal.App. 556, 189 P. 799; Straten v. Spencer, 52 Cal,App. 98, 197 P. 540; Anderson v. Dahl, 121 Cal.App. 198, 8 P.2d 883; Lowe v. City of San Diego, 8 Cal.App.2d 440, 47 P.2d 1083; Abrams v. Hubert, 10 Cal.App.2d 404, 51 P.2d 884; Jolley v. Clemens, 28 Cal.App.2d 55, 82 P. 2d 51; and Finney v. Wierman, 52 Cal.App. 2d 282, 126 P.2d 143, all involved situations where the drivers of automobiles were confronted with sudden peril.

[3] The question of the contributory negligence of plaintiff here must be measured by the facts of this case. The accident happened at night. The semi-trailer was 84½ inches wide and should have displayed the clearance lights required by section 625 of the Vehicle Code. The absence of these lights caused plaintiff to believe he was meeting an ordinary truck or automobile. Had there been clearance lights to warn him he could, and testified he would have driven far enough to his right to clear the semi-trailer. He only had warning of an ordinary vehicle approaching him and did turn far enough to his right to avoid it, but not the semi-trailer. Having no warning of the approach of the semi-trailer it was not negligence as a matter of law for him to fail to get entirely off the pavement to avoid it.

[4, 5] The negligence of Kemp is abundantly established. While it may be assumed that he had the right to go onto his left hand side of the highway to make this turn, he should have chosen a proper time to do so, when the movement would not have endangered another lawfully using the highway, and when it would not have placed the semi-trailer immediately in the path of plaintiff's automobile. The absence of clearance lights was also a major cause of the accident which concurred with Kemp's driving onto his left side of the highway at the wrong time as the proximate cause of the collision. He was not confronted with any sudden emergency to excuse his veering to his left, which he did solely for his own convenience in making the turn into the Stahl Ranch. The headlights on the sedan were lighted so Kemp should have been warned of its approach. While it is not always negligence for a driver to travel on his left side of the highway to make a turn into a private drive, he should only do so when an ordinarily prudent person would believe the movement could be made in safety. Whether or not the movement could be so made was a question of fact for the trial judge who resolved the question against defendants. That decision is final here as there is a preponderance of the evidence supporting it, and also the conclusion that the sole proximate cause of the accident was the negligence of Kemp in the particulars we have outlined.

The judgment is affirmed.

BARNARD, P. J., concurs.

80 Cal.App.2d 875

PEOPLE v. MATTHEWS.

Cr. 4112.

District Court of Appeal, Second District, Division 1, California.

July 17, 1947.

Rehearing Denied July 27, 1947.

Hearing Denied Aug. 14, 1947.

1. Criminal law 🔑260(11)

Where appellant was convicted of murder and of assault with a deadly weapon by trial judge without a jury, whether evidence sustained conviction was required to be determined by a review of the evidence, and District Court of Appeal was not required to analyze and account for trial judge's comments on the evidence in judge's summary of the evidence at conclusion of trial.

2. Criminal law 🔑260(11)

In prosecution for murder and assault with a deadly weapon the weight to be given conflicting evidence was for the trial court's determination where a jury had been waived.

3. Assault and battery 🔑92
Homicide 🔑250

Evidence sustained conviction of murder and assault with a deadly weapon.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Jessie Grant Matthews was convicted of murder and assault with a deadly weapon and he appeals.

Affirmed.

Leola Buck Kellogg, of Los Angeles (Montgomery G. Rice, of Los Angeles, of counsel), for appellant.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

A jury having been waived, defendant, adjudged guilty by the court of the offenses of murder and assault with a deadly weapon, appeals from the judgment and the order denying a motion for a new trial.

The evidence reveals that Mrs. Hattie Brown, the victim of the assault with a deadly weapon offense, lived with her nine year old daughter at the rear of 718 East 43d Street in Los Angeles; she and her husband were separated. Defendant lived about a block away at 819½ East 43d Street; he and his wife were separated. Mrs. Brown and the defendant had been friends for a couple of years and each had visited the other. There was evidence of affection on the part of defendant for Mrs. Brown; evidence of presents in sums of money given by him to her although defendant testified that this was for services rendered in the form of clerical work. Defendant also drove Mrs. Brown to and from work.

The offenses occurred about 9:45 p. m.; at this time Mrs. Brown had left her house and had walked out to the street to meet Lonnie Eskridge and Ples Eskridge with whom she had an appointment. At this time and place the defendant appeared and engaged Mrs. Brown in a conversation; Mrs. Brown testified as follows:

"Q. Did you talk with him then? A. Yes.

"Q. Was there any discussion about what you were going to do or where you were going? A. He asked me where I was going and I told him out with some friends.

"Q. Is that about the substance of it? A. And then I asked him—during that time there was a strike on the busses and the street cars were on a strike and he carried me to work, several mornings and I asked him if I should expect him by on the next morning and he said he would be there and then he walked away.

"Q. Now, when the defendant walked away, had you seen Lonnie Eskridge or his automobile? A. While I was talking to Mr. Matthews, Lonnie Eskridge and Ples Chester Eskridge were driving up.

"Q. In other words you recognized them in the car? A. That is right.

"Q. Was it somewhat light around there? A. Yes, there is a street light right east—well, it is in the center of the street but it is east of where I was standing.

"Q. So that it was not very dark there? A. No.

"Q. Then, will you relate what happened from that time on? A. Well, Mr. Matthews walked east and I didn't go immediately out, I paused a second, and when I got to the sidewalk from this position where I was standing, I didn't see Mr. Matthews going east on 43d, * * *.

* * * * * *

"Q. By Mr. Johnson: You may go ahead. A. Then I walked to the—after leaving the position on the driveway, I walked to the rear of Lonnie Eskridge's car and then around to the south side of the car, which the car was facing west, and I went around the opposite side of the car which would be the south side, and got in the front seat beside Chester Eskridge.

"Q. When this car stopped across the street, was it just about opposite from where you were standing with the defendant or was it east or west? A. Well, I was standing facing south on the driveway and they drove with the car facing east, they drove almost opposite from where I was standing on the driveway across the street.

"Q. And did you notice over there near where the car was parked anywhere, a fire hydrant? A. Yes, I did.

"Q. Was it parked east or west of that, as you observed it? A. Well, I believe it was a little to the west of the fire hydrant, I am not sure.

"Q. And when you went across the street to the car, did you walk around the rear or the front of the car? A. I walked around the rear, I believe.

"Q. You said you got into the car? A. Yes.

"Q. Now, go ahead. A. I got into the car and Lonnie—after I had gotten seated, Lonnie started to get into the car and Chester spoke up and said, 'Here is that guy coming back', in the meantime I believe when I was getting into the car, Chester asked me, 'Who was that guy?' And I—before I could tell him, he said, 'Here is that guy coming back toward the car, who is he?' And about that time the gun started firing, the man started shooting.

"Q. Did you yourself observe who it was? A. Yes.

"Q. That was headed back toward the car? A. Yes.

"Q. Who was it? A. It was Mr. Matthews.

"Q. When the gun started firing did you observe who that was? A. Yes.

"Q. Who was shooting? A. Yes, Mr. Matthews.

"Q. The defendant here? A. Yes."

The defense was an alibi.

[1] It is appellant's contention that the evidence of defendant's guilt is "inherently improbable", and that "it is clear that at the time of that statement the court actually entertained a reasonable doubt that appellant was even present at the time of the shooting and that the court's mind was in that condition because he was considering *only* the identification by Mrs. Brown and the evidence of several witnesses as to alibi". (Italics included.) The "statement" refers to a summary of the evidence together with comments thereon by the trial judge at the conclusion of the trial. The "statement" which was somewhat extensive embraces ten pages of the reporter's transcript. Regardless of what the trial judge may have stated, the fact remains that the defendant was adjudged guilty. And the question as to whether the evidence is sufficient to sustain the judgment is determined by a review of the *evidence*. On appeal, the court is not required, under the law, to analyze and account for the trial judge's comments on the evidence. An examination of the record discloses nothing inherently improbable as a matter of law in the evidence relied on to support the judgment.

[2] Evidence of other circumstances which it is argued tend to support appellant's contentions, such as evidence of a powder burn and the number of shots fired, merely reflect a conflict in the evidence as to details; the weight to be given to such evidence was for the trial court's determination.

[3] The evidence is abundantly sufficient to support the judgment and there being no errors in the record, the judgment and the order denying a motion for a new trial is affirmed.

YORK, P. J., and WHITE, J., concur.

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80 Cal.App.2d 898

COYNE v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY.

Civ. 13466.

District Court of Appeal, First District, Division 1, California.

July 21, 1947.

Rehearing Denied Aug. 20, 1947.

Hearing Denied Sept. 18, 1947.

1. Forcible entry and detainer 🔑40

Where superior court had no jurisdiction of unlawful detainer action and jurisdiction was in a justice court, a writ of possession of the superior court was void, and superior court had duty upon demand to quash the void writ which had been used to dispossess another.

2. Forcible entry and detainer ⚷46

Where District Court of appeal determined that superior court had no jurisdiction of unlawful detainer action and reversed judgment of superior court issuing writ of possession and directed cause retransferred to justice court which had jurisdiction to be tried, superior court could quash its void writ and restore the status quo without violating the terms of the remittitur notwithstanding superior court had not been directed specifically to quash the writ.

3. Mandamus ⚷16(1)

Where superior court had no jurisdiction of unlawful detainer action and jurisdiction was in a justice court so that writ of possession issued by superior court was void, proceeding in District Court of Appeal to quash the writ of possession was moot, where a final judgment of justice court had entitled one other than petitioner to possession so that ordering the superior court writ quashed would be a useless gesture.

4. Judgment ⚷485

Petitioner in proceeding in mandamus to compel superior court to quash a writ of restitution and to issue writ restoring petitioner to possession of realty could not collaterally attack final judgment in justice court entitling one other than petitioner to possession where final judgment was not void on its face.

◆

Mandamus proceeding by Lucille Coyne against the Superior Court of the State of California in and for the County of Santa Clara to compel the Superior Court of Santa Clara County to quash a writ of restitution and to issue its writ restoring petitioner to possession of certain real property.

Alternative writ discharged and petition for peremptory writ denied.

Jerome F. MacDonald, of Redwood City, for petitioner.

Owen D. Richardson, of San Jose, for respondent.

PETERS, Presiding Justice.

Petitioner seeks by this proceeding in mandamus to compel the Superior Court of Santa Clara County to quash a writ of "restitution," and to issue its writ restoring petitioner to possession of certain real property. The alternative writ was issued upon the averment in the verified petition that the desired relief had been requested of and denied by the trial court. It now appears that no such demand was made in the trial court. This failure to seek relief in the first instance in that court, it not appearing that such demand would be futile, would alone be sufficient ground upon which to deny the application for the peremptory writ. But, inasmuch as such holding would not finally dispose of the case, and inasmuch as we are of the opinion that the entire proceeding is now moot, we prefer to place our holding on that ground rather than upon any procedural point.

[1, 2] The facts are as follows: Barney Higgins brought an unlawful detainer action against Lucille Coyne in a Class "A" justice's court. That court, of its own motion, upon the ground that the answer raised an issue involving the title to real property, transferred the cause to the superior court. That court rendered judgment for Higgins and ordered Coyne to deliver possession of the real property to him. It issued a writ of possession, Coyne was evicted, and the successors in interest to Higgins given possession. They took possession with actual notice of the claims of Coyne. Coyne appealed. This court, on June 21, 1946, reversed the judgment of the superior court on the ground that the justice's court had jurisdiction of the controversy and was not ousted of such jurisdiction by the allegations of the answer. Higgins v. Coyne, 75 Cal.App.2d 69, 170 P.2d 25. The necessary implication of the opinion is that the superior court had no jurisdiction of the controversy. The order of this court reads, 75 Cal.App.2d at page

75, 170 P.2d at page 29: "The judgment of the superior court is reversed, with directions to retransfer the cause to the justice's court to be tried and determined in accordance with the law as laid down in the Hewitt [Hewitt v. Justice's Court, 131 Cal. App. 439, 21 P.2d 641] and Cheney [Cheney v. Trauzettel, 9 Cal.2d 158, 69 P.2d 832] cases." The Supreme Court denied a hearing, and, in due course, the remittitur issued. It is to be noted that this court failed to order the trial court to quash the writ of possession under which Coyne had been evicted. It was upon the allegation that such relief had been demanded of and denied by the trial court that the alternative writ issued. It was our belief then that, since the superior court had no jurisdiction, its writ of possession was void, and that since a void order had been used to evict Coyne it was the duty of the court that issued the void order to right the wrong it had committed, and that it should quash the void writ. Such is no doubt the law. Evans v. Superior Court, 20 Cal.2d 186, 124 P.2d 820. It was our opinion then that, although this court had failed to direct specifically that the writ be quashed, the superior court retained jurisdiction to quash its void writ and restore the status quo, that such action would not violate the terms of the remittitur, and that the superior court should have granted such relief upon demand. But not only has the allegation of the petition that such demand was made been shown to be false, but events that have subsequently occurred demonstrate that it would now be a futile and useless gesture to compel the superior court to quash the writ.

[3] The record shows that the superior court, pursuant to the remittitur of this court, on October 17, 1946, transferred the case back to the justice's court. The minutes of the court show that the attorney for Coyne made no objection to the order of transfer and that no request to quash the writ of possession was then made. This petition for a writ of mandate was filed April 3, 1947. The record further shows that the justice's court tried the case and issued its judgment in favor of Higgins on April 7, 1947. That fact was not disclosed to this court until the answer of the superior court was filed in this mandamus proceeding on May 2, 1947. The answer alleges that on April 7, 1947, the justice's court rendered its judgment in favor of Higgins and against Coyne decreeing that Higgins was entitled to the "possession and restitution of the premises * * * and that a writ of restitution issue therefor." At the oral argument in this court it was stipulated that that judgment was then final, that no appeal was then pending, and that the time for appeal had elapsed. Thus there is a final judgment that Higgins is entitled to the possession of the property. It would be a futile and useless gesture to order the superior court to quash its writ of possession and to restore Coyne to possession only to have her immediately evicted under the writ issued by the justice's court. For this reason the present proceeding is moot and should be dismissed.

[4] The only argument of petitioner worthy of noting in opposition to this conclusion is that it was improper for the justice's court to retry the unlawful detainer suit when she, the petitioner, was not in physical possession of the property. What the theory of the justice's court was does not appear, and is not here involved. All we know is that there is a final judgment entitling Higgins to possession. That judgment is not void on its face. It is a final judgment. Coyne cannot collaterally attack that judgment in this proceeding. That being so, the controversy over the superior court writ is now moot.

The alternative writ is discharged and the petition for a peremptory writ is denied.

WARD and BRAY, JJ., concur.

80 Cal.App.2d 970

DAVAULT et ux. v. ESSIG et al.

Civ. 3652.

District Court of Appeal, Fourth District, California.

July 24, 1947.

Hearing Denied Sept. 18, 1947.

1. Taxation ⚷805(2)

Action by original owners to quiet title to lots sold to State for delinquent taxes and deeds recorded to State in 1934 and 1935 respectively, brought more than three years after June 1, 1941, against State's grantee was barred by one-year statute of limitations, notwithstanding attack was made on jurisdictional and constitutional grounds raising point that original proceedings which led to sale to State was entirely invalid. Revenue and Taxation Code, § 3521.

2. Limitation of actions ⚷4(1)
Taxation ⚷805(1)

Statute providing that proceedings based on alleged invalidity or irregularity of any deed to State for taxes, or of any of proceedings leading up to such deed, must be commenced within one year is statute of limitation and repose, providing a reasonable period, but not a curative act, and is valid. Revenue and Taxation Code, § 3521.

3. Limitation of actions ⚷166

The principle that curative acts will not cure jurisdictional defects does not apply to statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given the party to enforce his right.

4. Limitation of actions ⚷4(1)

Legislature had authority to enact statute providing that a proceeding based on any alleged invalidity or irregularity of any deed to State for taxes, or of any of the proceedings leading up to such deeds, must be commenced within one year after date of recording deed to State or within one year after June 1, 1941, whichever is later. Revenue and Taxation Code, § 3521.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Duncan E. Davault and wife, as joint tenants, against Mathias L. Essig and others and Charlotte Erickson to quiet title to certain lots. From a judgment quieting title in second-named defendant, plaintiffs appeal.

Affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellants.

Virgil S. Kipp, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment quieting title to certain lots in San Diego in the respondent.

It was stipulated that the appellants were the owners of the land unless deprived of their ownership by virtue of the tax deeds, under which the respondent claims. One parcel was deeded to the state on August 1, 1934, because of delinquent taxes assessed for the year 1928. The other two parcels were deeded to the state on August 1, 1935, because of delinquent taxes assessed for the year 1929. All three parcels were deeded from the state to the respondent by deed dated August 28, 1944. All of these deeds were duly recorded, the deeds to the state on October 1, 1934 and August 12, 1935, respectively, and the deed from the state to the respondent on September 11, 1944. All of the taxes here in question included assessments for local improvements, levied under the Mattoon Act, St.1925, p. 849, and collected with the county taxes. This action was filed on September 26, 1944, nearly ten years after the recording of one of the deeds to the state and more than nine years after the recording of the other two deeds to the state, and over three years after June 1, 1941, the last date for the commencement of the running of the limitation provided for in section 3521 of the Revenue and Taxation Code. The action was in the ordinary form to quiet title and the respondent's answer alleged, among other things, that the cause of action set forth in the complaint was barred by the provisions of section 3521. After a trial, the court found in favor of the respondent finding, among other things, that this action was barred by section 3521. Judgment was entered accordingly and this appeal followed.

The appellant contends that although this property was sold to the state for delinquent taxes assessed in 1928 and 1929 it was not properly advertised because it was not included in the delinquent lists for taxes assessed for 1934 and 1935 which were published in June, 1935, and June of 1936, respectively, after the respective deeds to the state; that the various tax deeds are void because the taxes levied, beginning with the year 1928, were excessive due to the fact, as claimed, that in the various years other lands within Acquisition and Improvement District No. 1, which had theretofore been deeded to the state, were improperly omitted from the assessment rolls, in so far as district assessments were concerned; that the two deeds to the state dated August 1, 1935, are void because in each instance the property was actually sold for one cent less than the amount advertised; that all of the property in question was sold for excessive amounts because the omission from the tax rolls of lands within the improvement district, which had theretofore been deeded to the state, resulted in increasing the assessment against other lands within the district assessed for district purposes; and that the special statute of limitations provided by section 3521 of the Revenue and Taxation Code has no application here.

[1, 2] Since we agree with the trial court's holding that this action was barred by the provisions of section 3521 it will be unnecessary to consider the other points raised. That section provides that a proceeding based on any alleged invalidity or irregularity of any deed to the state for taxes, or of any of the proceedings leading up to such a deed, must be commenced within one year after the date of recording the deed to the state or within one year after June 1, 1941, whichever is later. This action was commenced more than three years after June 1, 1941. Section 3521 is not a curative act, but is a statute of limitation and repose governing actions based on claimed errors in the proceedings up to and including the issuance of a deed to the state. Another section of that code, section 3725, provides a similar limitation for an attack against the validity of the deed from the state to an individual, which attack is directed against the proceedings provided for in that chapter, which relates to the manner in which the state may sell and convey the property. Section 3725 is not applicable here as no complaint was made as to the regularity of any proceedings taken in accordance with the provisions of that chapter of that code.

The appellants' objections at the trial court and here are in no wise directed against the deed from the state, except indirectly through the contention that the proceedings leading up to deed to the state were defective. The contention that these lands were improperly omitted from the delinquent lists, respectively, published the year after they were deeded to the state could affect only the title which the state received, and is in no way an attack on the proceedings outlined in the chapter governing the making of a deed from the state. The attacks made are all directed against proceedings leading up to the deed to the state, it being claimed that because certain lands were improperly omitted from the assessment rolls, because certain notices were not properly published, and because of errors in amounts, the proceedings were so defective that the state received no title which it could convey.

The appellants argue that section 3521 does not apply in such a case as this where the attack is made on jurisdictional or constitutional grounds, raising the point that the original proceedings which led to the sale to the state were entirely invalid. This contention is without merit since section 3521 is not a curative act but is a statute of limitation and repose, providing a reasonable period of limitation. Title Guarantee & Trust Co. v. Woody, 63 Cal.App.2d 209, 146 P.2d 252. The principles applied in Mercury-Herald Co. v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111, are applicable here. If the shortening of the period of redemption, where a reasonable time is allowed in which to act, is not violative of constitutional rights it would seem to be even more clear, under principles which are frequently applied, that a right exists to fix some reasonable limitation upon the time within which a constitutional right may be exercised, by which a limitation is placed on the time within which an action may be commenced to attack the validity of a deed to the state, which deed is given after the five-year period of absolute right of redemption has expired.

[3] In Meigs v. Roberts, Comptroller, 162 N.Y. 371, 56 N.E. 838, 840, 76 Am.St. Rep. 322, after mentioning the general principle that curative acts will not cure jurisdictional defects, the court said: "This principle does not apply to a statute of limitations; for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right." To the same effect see Turner v. New York, 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392; Saranac Land & Timber Co. v. Roberts, Comptroller, 177 U.S. 318, 20 S. Ct. 642, 44 L.Ed. 786.

In Rand v. Bossen, 27 Cal.2d 61, 162 P. 2d 457, 459, a case involving a different statute but principles similar to those here applicable, the court said: "Likewise, in the instant case the Legislature is authorized to place reasonable limitations upon a constitutionally protected right."

[4] Upon principle and authority, we have no doubt that the legislature had the right to enact the statutory limitation provided in section 3521 and that such limitation is a reasonable one. No reason appears why this limitation is not applicable here. No attack was made upon the alleged irregularities here complained of until this action was filed, some seventeen years after the assessments were made, during most of which time the appellants could have redeemed the property. If any of the errors alleged could be substantiated, the legislature was well within its rights in eventually placing a limitation upon the time within which that might be done. The appellants did not act until more than two years after that limitation had expired.

The judgment is affirmed.

MARKS, J., concurs.

Hearing denied; CARTER, J., dissenting.

80 Cal.App.2d 974

PEOPLE v. BASHAW.

Cr. 705.

District Court of Appeal, Fourth District, California.

July 24, 1947.

Hearing Denied Aug. 21, 1947.

1. Criminal law 🔑**696(1), 1168(4)**

Motion to strike opinion of witness as to how entrance into burglarized building had been accomplished should have been granted but error in denying motion was not prejudicial where it was proven beyond question by several witnesses that entrance had been made through window from which screen had been torn.

2. Criminal law 🔑**1141(1), 1163(1)**

The District Court of Appeal cannot presume error or prejudice.

3. Criminal law 🔑**1119(5)**

Where reporter's transcript showed that after recess both counsel stipulated that jury was present and that taking of evidence proceeded without further incident, alleged delay on part of two jurors in returning to courtroom after recess on second day of trial was not ground for reversal.

◆

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Claude Bashaw was convicted of an offense. From an order denying motion for new trial and from judgment adjudging defendant an habitual criminal defendant appeals.

Affirmed.

Whitelaw & Whitelaw, of El Centro, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from an order denying a motion for new trial, and from the judgment pronounced on defendant adjudging him an habitual criminal with five prior convictions, and sentencing him to imprisonment for the term prescribed by law

Benito Chavez conducted a business established in El Centro in Imperial County. In it were a bar, a restaurant, and a pool room with a cash register in each department. The place was securely locked at midnight of October 17, 1946. Some of the windows were open but metal screens were over all of them. Change had been left in the cash registers for use the next morning. When the establishment had been closed a search disclosed no other person in the building aside from the three mentioned below.

About 4:30 o'clock on the morning of October 18, an employee of the owner who was sleeping on the premises with another employee and a third person, was awakened by a light being turned on. The employee found defendant in the lavatory with one of the cash registers broken open. The change in it had been removed.

The employee called his employer who called the police and defendant was taken to police headquarters for booking. The officers were new to their duties and were uncertain as to the charge to be placed against defendant. Defendant told them it should be "first degree burglary".

They searched defendant and found $16.00 in currency and $28.06 in change on him. The currency and 90 cents belonged to him. The officers testified that defendant told them that he obtained the balance of the change "out of the cash registers * * * By taking the plate off the big cash register in the pool hall over the small change drawer." Both officers testified that defendant was not intoxicated when arrested shortly after 4:30 a. m. on October 18th.

An examination of the premises disclosed that a screen over one of the windows had been ripped open.

Defendant became a witness in his own behalf and testified that he was so intoxicated that he remembered nothing between about 11 o'clock p. m. on October 17th and the time when he came to in the jail the next morning.

Two grounds are presented for reversal of the judgment: (1) Error in refusing to strike out an answer of one of the witnesses for the People, and, (2) Alleged delay on the part of two jurors in returning to the court room after the morning recess on the second day of the trial.

[1] The motion to strike should have been granted as the answer contained the opinion of the witness as to how the entrance into the building had been accomplished. However the error was not prejudicial as it was proven beyond question by several witnesses that the entrance had been made through the window from which the screen had been torn.

[2, 3] The record does not support the second alleged error. It was first mentioned by defendant in connection with the proceedings for new trial, when he said: "Judge, your Honor, I would like to make a motion to have an appeal from this trial, because the last day of the trial, in the morning at recess, two of the jury stayed out after the others had come into the court room."

An examination of the reporter's transcript shows that after the recess both counsel stipulated that the jury was present and the taking of evidence proceeded without further incident. We cannot presume error or prejudice. There is no merit in this contention. People v. Yeager, 194 Cal. 452, 229 P. 40; McDowd v. Pig'n Whistle Corporation, 26 Cal.2d 696, 160 P.2d 797.

In fairness to counsel we make the following observations. At the close of the trial, counsel for defendant asked to be relieved from further representing him but prepared his notice of appeal at the request of the trial judge. Defendant asked this court to appoint an attorney to represent him on appeal and the Presiding Justice asked counsel to act which they consented to do.

The order and judgment are affirmed.

BARNARD, P. J., concurs.

80 Cal.App.2d 921

BERNSTEIN v. BERNSTEIN.

No. 13329.

District Court of Appeal, First District,

Division 1, California.

July 22, 1947.

1. Divorce ⟹296, 303(1), 312

Trial court has a broad discretion in determining custody and control of minor child in divorce action and to modify such order upon a proper showing, and a clear abuse of discretion must appear before appellate court can interfere with trial court's determination.

2. Divorce ⟹303(3)

Generally, a request for modification of divorce decree with respect to custody of parties' minor child will be refused in absence of showing of some change in circumstances rendering such modification advisable from standpoint of child's welfare, but courts have jurisdiction to modify such custody orders without such showing.

3. Divorce ⟹303(3)

In acting upon husband's application for modification of interlocutory and final divorce decree with respect to partial custody of minor child of parties, trial court had right to determine credibility of witnesses and what weight should be given to expert testimony.

4. Evidence ⟹571(1)

In acting upon husband's application for modification of interlocutory and final divorce decree with respect to partial custody of minor child of parties, trial court was not concluded by testimony of expert pediatrician that granting custody of child to father for two Sundays a month would be inadvisable as interfering with child's routine, especially where husband was himself a practicing physician with some experience and practice in pediatrics, and he testified that his plans with reference to child would cause it no harm.

5. Divorce ⟹299

Failure of divorced husband to accept name given to minor child of the parties by the wife over his objection was no ground for depriving him of right to see, visit, or have child with him.

6. Divorce ⟹298(4)

A "custody proceeding" with respect to custody of a minor child as between divorced parents is not one to discipline one parent for such parent's shortcomings as an individual nor to reward the other for any wrong suffered therefrom.

See Words and Phrases, Permanent Edition, for all other definitions of "Custody Proceeding".

7. Divorce ⟹298(1)

In proceeding between divorced parents respecting custody of minor child, the welfare and best interests of the child is the paramount question.

8. Divorce ⟹303(1)

An order modifying interlocutory and final divorce decrees with respect to partial custody of parties' minor child upon divorced husband's application by granting husband custody of child on first and third Sundays of each month from hours of 9 a. m. to 5 p. m. was not an abuse of discretion.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action for divorce by Janet Cross Bernstein against Samuel Leonard Bernstein, wherein a decree was entered granting a divorce to plaintiff. From an order modifying the interlocutory and final decree of divorce wtih respect to partial custody of a minor upon defendant's application, the plaintiff appeals.

Affirmed.

Goldstein, Barceloux & Goldstein, of San Francisco, for appellant.

Leland J. Lazarus and Henry Gross, both of San Francisco, for respondent.

BRAY, Justice.

The trial court, upon application of defendant, modified the interlocutory and final decrees of divorce with respect to partial custody of the minor.

On June 4, 1944, the child was born to the parties, who were then husband and wife. On October 10, 1944, an interlocutory decree of divorce was granted plaintiff upon the ground of extreme cruelty. The final decree was entered October 11, 1945. Both decrees followed the property settlement agreement executed by the parties in awarding the care, custody and control of the child to the plaintiff—"provided, however, that defendant shall have the right to visit said minor child at any and all reasonable times" (interlocutory decree); and "with the privilege granted to defendant to visit said minor child at all reasonable times and places" (final decree).

The agreement and both decrees provided that defendant should pay plaintiff for the support and maintenance of the child the sum of $50 per month. On November 23, 1945, plaintiff filed a petition asking that the decrees be modified to increase the support and maintenance to $200 per month. On December 10, 1945, in open court, the parties stipulated that the allowance be increased to $137.50 per month, and that plaintiff be allowed the sum of $200 for attorney's fees on the prosecution of the motion. The minute order made at that time provides further: "With consent of plaintiff the defendant at this time makes oral motion to modify said decrees as follows: That defendant be permitted to have the care, custody and control, of said minor child one day per week; and said oral motion is argued to the Court and submitted to the Court for consideration and decision, and the Court having fully considered the same and being duly advised in the premises orders that said decrees be modified as follows; that defendant have the care, custody and control of said minor child two Sundays in each month, and shall return said minor child to the plaintiff at a reasonable time on said Sundays; that defendant have the right to visit said minor child at all reasonable times."

On January 11, 1946, a stipulation of the parties was filed by which it was agreed that the court should vacate that portion of the above minute order which dealt with the custody of the child and that a further hearing should be held on that subject.

At this hearing, May 20, 1946, evidence was offered by both parties, and the court modified the decrees by providing "That commencing forthwith, the defendant, Samuel Leonard Bernstein be, and he is hereby permitted to take custody of said minor child, Barrie Jae Bernstein, and remove her from the home of plaintiff on the first and third Sundays of each month from the hours of 9:00 A.M. to 5:00 P.M." Plaintiff's appeal is from this portion of the order.

[1] Plaintiff concedes that as the trial court has a broad discretion in determining the custody and control of minors in a divorce action, and to modify such order upon a proper showing, a clear abuse of discretion must appear before this court can interfere with the determination of that court. Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791; Taber v. Taber, 209 Cal. 755, 290 P. 36; Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654. Plaintiff contends there was that clear abuse of discretion in that the evidence "overwhelmingly" shows that the order made was against the best interests of the child.

[2] In her opening brief plaintiff contended that there was no evidence of any change of circumstances between the entry of the decrees and the time of application for modification. However, on the argument, plaintiff abandoned this point, as well she might, because the evidence showed that there was a decided change of circumstances. First, the child had grown older. At the time of the interlocutory decree the child was four months old; at the time of the final decree sixteen months old; at the time of the hearing it was practically two years old. It is now three years old. The child had changed from an infant requiring close attention and constant care to a youngster requiring less immediate attention and entitled to start getting acquainted with its father. Secondly, both parties had remarried. Defendant is now in a position to give the child, while it is with him, in addition to his own care, that of his present wife. Moreover, there being a stepfather in the picture now, it becomes more necessary for the child to become better acquainted with her natural father. Thirdly, the evidence shows that the moth-

er made it difficult for the father to see the child, would not permit him to see the child in the absence of herself or relatives, particularly the mother's parents, between whom and defendant a bitter feeling exists; and on occasions would not let him take the child out of her house.

In her brief appellant contended that cases such as Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, and Moon v. Moon, 62 Cal.App.2d 185, 144 P.2d 596, holding that to justify a modification there must be a change of circumstances arising after the original decree was entered, controlled here. This contention overlooked the evidence in the case, and the fact that, even though there were no such evidence, the rule in question is not a hard and fast one without any exception. The rule is best stated in a case arising as here, where originally the court held no hearing to determine the best interests of the child in the matter of custody, but followed the agreement as to custody made by the parties and in which case the court refers to the Foster case above mentioned. In Peterson v. Peterson, 64 Cal.App.2d 631, 633, 149 P.2d 206, 208, the court said:

"The rule of 'changed circumstances' might well be termed a creature of judicial expediency. It is not statutory. It is a means to end the turmoil of litigation so often attendant with matters involving questions of custody and to make it impossible for a dissatisfied party to keep the courts continually occupied with his or her grievances concerning former orders. Accordingly the courts have generally held that in absence of a showing of some change in circumstances making it advisable from the standpoint of the welfare of the child that the former order be modified, a request for a modification will be refused.

"However, that is not to say that the courts have no jurisdiction to modify previous orders in the absence of such a showing nor do the decisions wherein the rule is enunciated 'deny the power of the court to make such modification of its orders relative to the custody of children.' Bogardus v. Bogardus, 102 Cal.App. 503, 506 283 P. 127, 128. It is not an iron-clad rule to which there can be 'no possible exception.' Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, 723."

It is not necessary to detail here the evidence adduced at the hearing. Suffice it to say, there was ample evidence to support the action of the trial court. It is true that in most respects, the evidence was conflicting. The plaintiff and her mother and father endeavored to picture the defendant as a person of "vile nature and contemptible disposition," using "obscene language even in the child's presence" and showing a "manifest lack of interest in the child and her welfare over the entire period of time from her birth to the date of the last hearing herein." The defendant denied these charges. The court had the witnesses before it and obviously believed the defendant against the plaintiff and her parents, who cannot be characterized as wholly unbiased. An examination of the evidence justifies the conclusion that the opposition of the mother to the father having the child a portion of two Sundays a month is based more upon a desire to harass the father than on any probability of injury to the child. That, contrary to the claims of the mother, the father has a real affection for his child, is shown, among other things, by the fact that he stipulated that the amount for her support might be increased from $50 to $137.50 per month.

[3, 4] Plaintiff lays great stress upon the testimony of a competent pediatrician who stated that in his opinion, allowing the father to have the child from 9 a. m. to 5 p. m. two Sundays a month would not be advisable as it would interfere with the child's routine. The father indicated that on these Sundays he intends to take the child to his home in Pittsburg, a round trip from San Francisco of about 90 miles. The pediatrician testified that this would be against the child's welfare. His testimony was weakened somewhat by his assumption that the child while with her father would be with a "stranger," and his statement that "it would be better if it [the child] didn't get to know its father until later." However, the testimony showed that the defendant is a practic-

ing physician with some experience and practice in pediatrics, and that in his opinion his plans with reference to the youngster would cause it no harm. Here again the trial court had the right to determine the credibility of the witnesses and also what weight should be given the expert testimony. The court was not concluded by the testimony of the expert pediatrician, and could give it such weight as the court deemed it was entitled to be given. 10 Cal.Jur. 971. It was stretching the credulity of the court considerably to expect it to believe that placing a two year old child for eight hours twice a month in the custody of its father, a successful practicing physician, would cause the child any great harm even though on those occasions the father might take it for a 90 mile automobile trip.

[5, 6] Plaintiff in her brief states, in effect, that this court, as a matter of law, should hold that the trial court abused its discretion because of the situation with reference to the child's name. Upon her birth, without the consent and over the objection of the defendant, the plaintiff named the child "Barrie Jae," and had her name so entered upon her birth certificate. The father has consistently refused to call her by that name. He has named her "Barbara Leora" and calls her by that name on all occasions. He testified that he intends to continue to call her by that name, and will not call her by the name given her by her mother. While it would seem that reasonable people should be able to find a name for their child which would be mutually acceptable, and that in this case both parents are unnecessarily stubborn on this subject, no court can say that the failure of a father to accept the name given to the child by the mother over his objection is grounds for depriving the father of the right to see, visit, or have the child with him. Both parents here are somewhat inclined to use the child as a means of getting even with the other parent for the failure of their marriage. They should remember that "A custody proceeding is not one to discipline one parent for such parent's shortcomings as an *individual,* nor to reward the other for any wrong suffered therefrom." Washburn v. Washburn, 49 Cal.App.2d 581, 588, 122 P.2d 96, 100.

[7, 8] The paramount question in cases of this kind is the welfare and best interests of the child. Washburn v. Washburn, supra. A study of the evidence in this case impels the conclusion, that far from abusing its discretion, the trial court exercised a wise discretion in finding, as it did, that the welfare and best interests of the child require that it be given a better chance to get acquainted with its father than it has had, and that the modification made by the court in the decrees was reasonable and proper.

The order appealed from is hereby affirmed.

PETERS, P. J., and OGDEN, Justice pro tem., concur.

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81 Cal.App.2d 12

WOOCK et ux. v. SCHLINK et ux.

Civ. 7367.
Sac. 5825.

District Court of Appeal, Third District, California.

July 26, 1947.

Rehearing Denied Aug. 22, 1947.
Hearing Denied Sept. 22, 1947.

1. Appeal and error 🔑1009(2)

In quiet title action questions of fact are for trial court whose findings will not be reversed unless there is no evidence or reasonable inference from evidence to sustain such findings.

2. Appeal and error 🔑900

Appellate courts must indulge in every reasonable presumption in support of judgments of trial courts.

3. Appeal and error 🔑907(1)

On appeal from judgment evidence must be considered in its aspects most favorable to prevailing party.

4. Deeds 🔑211(3)

In action to quiet title to vineyard an undivided half interest in which was conveyed by plaintiffs to defendants, evidence sustained findings that defendants were not guilty of fraud, warranting a judgment for defendants.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Walter R. Woock and his wife against William E. Schlink and his wife to quiet title to certain land. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Charles L. Gilmore, of Sacramento, for appellants.

Rutherford, Jacobs, Cavalero & Dietrich, Newton Rutherford and Stephen Dietrich, all of Stockton, for respondents.

ADAMS, Presiding Justice.

Plaintiffs, appellants here, brought this action to quiet title to 40 acres of vineyard located near Lodi, in San Joaquin County. The complaint was in the usual form in such actions, merely alleging that plaintiffs were the owners and entitled to the possession of the land, that defendants claimed some interest therein, but that neither of them had any right, title or interest therein. Defendants answered the complaint, denying that plaintiffs were the owners of the land, and alleging that plaintiffs were the owners of an undivided half interest, and that defendants were the owners of the other undivided half interest. After trial of the issues the court made findings in conformity with the allegations of defendants' answer, and a decree was entered accordingly.

From the decree aforesaid plaintiffs have taken this appeal, setting forth in their opening brief three questions which they state include the points on appeal and show that the findings and the judgment are not supported by the evidence.

The three questions set out are as follows: "1. In a quiet title action, may evidence of fraud in the procurement of a deed be properly brought before and considered by the Court, absent any pleading of fraud in the complaint? 2. Is an antecedent promise as part of an oral agreement, never, at any time, performed by the grantee, sufficient consideration to validate a deed? 3. Does the physical delivery of a deed absolutely bar, in all cases without exception, proof that no delivery was intended?"

Under the first heading appellants merely argue that in an ordinary quiet title action the plaintiff may introduce any evidence that may go to the validity of the title of a defendant. It is not contended by appellants that upon the trial of the cause they were in any wise restricted in the introduction of evidence, or that there was any ruling of the trial court to the contrary which is contended to be error. As far as this appeal is concerned, then, the question is purely academic and calls for no answer.

As for the second question propounded, a categorical answer would avail appellants nothing. Appellants assert that the evidence in the case shows without conflict that plaintiff Woock and defendant Schlink had an oral understanding and agreement before the property was acquired by Woock, "to not only go into a general grape brokerage business in the Lodi area, but likewise to acquire and operate the real property herein as a mutual business"; that defendant Schlink violated his promises, and by means of "wily machinations" obtained possession of the deed (of an undivided one-half interest in the property); that the case presents "a clear, clean cut case of a person obtaining interests in a valuable piece of property, where the only consideration was a promise, never at any time fulfilled, and a promise that was made without any intention of performing it"; and that "this is actual fraud."

[1] Assuming, as plaintiffs contend, that their complaint is sufficient, and that the allegations of defendants' answer are sufficient—there being no contention to the contrary—the record shows that the findings of the trial court follow the allegations of the pleadings and that that court found that defendants are the owners of the undivided one-half interest which they claimed. While there are no specific findings regarding fraud or sufficiency of con-

sideration for the deed from plaintiffs to defendant Schlink, it is not contended that the findings are deficient in this respect, or that plaintiffs requested other or different findings. We must assume, then, in support of the judgment, that the trial court conclude that the evidence relied upon by plaintiffs to show fraud and lack of consideration for plaintiffs' deed to defendants was insufficient, and that it found that the conveyance to defendants was valid. As counsel for appellants well knows, questions of fact are for the trial court in such an action, and unless it can be said that there is no evidence, or reasonable inference from evidence, to sustain the findings of such court, an appellate court is powerless to reverse. 2 Cal.Jur. pp. 912, 913.

Therefore, when appellants pose to us the question as to whether an antecedent promise as part of an agreement never performed by the grantee is sufficient consideration to validate a deed, they assume that there was such an agreement, that as part of same there was an antecedent promise on the part of defendant Schlink, and that there was no other consideration for the deed—all of which premises are impliedly negatived by the finding of the trial court in favor of defendants.

Appellants' third question, whether the physical delivery of a deed, without exception, bars proof that no delivery was intended, is based upon an assumption that the delivery of the deed executed by plaintiffs to defendant Schlink and by plaintiff Walter R. Woock delivered to the grantee was a qualified delivery. The record does not show that any question of qualified delivery of the deed was raised in the trial court by pleading or otherwise. But even if it was, the findings of the trial court impliedly deny any basis of fact for a conclusion that the delivery was qualified.

[2] The arguments presented by appellants in their briefs are such as might properly have been, and probably were, directed to the trial court. But in view of the limitations imposed upon appellate courts as to determination of matters of fact and the obligation of such courts to indulge in every reasonable presumption in support of the judgments of trial courts, appellants' whole argument can be considered only in so far as it is pertinent to the question whether there is sufficient evidence in the record to sustain the findings of the trial court whether actual or implied.

[3, 4] Considering the evidence, in its aspects most favorable to the prevailing party, we cannot say that it is insufficient for that purpose. It shows that respondent Schlink was a broker engaged in purchasing and selling grapes. In the latter part of April, 1944 the appellants called on Schlink at his home in Stockton at which time Mr. Woock stated he was contemplating moving back to Lodi and was interested in finding something to do. Mr. Schlink explained to appellants what he had been doing during the 1943 season and Mr. Woock wanted to know if there wasn't a chance for him to come and work for Mr. Schlink. Oral arrangements were then made for Schlink and Woock to work together in purchasing and selling grapes, independent of Schlink's personal brokerage business, and a sharing of commissions was agreed upon. Several days later appellants again called on Schlink at his home and stated that Mr. Seibel, the owner of the vineyard now in controversy, might consider selling it with the grape crop on it. Appellants were without means to handle the deal and sought the aid of Schlink, who agreed to co-operate. Appellants then procured from Seibel an option to purchase the vineyard with the crop thereon for $75,000.00, a down payment of $15,000.00 being required and an additional payment of $15,000.00 out of the 1944 grape crop. Schlink had been doing a grape business with wineries in Fresno, particularly with Morello's Winery owned and operated by E. Morello. At the solicitation of appellants, Schlink went to see Morello who agreed to lend the parties $16,000.00 for the purpose of acquiring the property. At that time Morello did not know and had never met Woock. Morello understood that the $16,000.00 was to be used by Woock and Schlink to purchase the vineyard. When Morello advanced the $16,000.00, Schlink withheld therefrom $100.00 to cover long-distance calls and the expenses of his trip to Fresno to see Morello, and delivered the remaining $15,900.00 to Woock. Out of the $15,900.00 Woock made the down

payment of $15,000.00 on the purchase price of the vineyard, and placed the remaining $900.00 in a trust account, as per his agreement with Schlink, to be applied on the expenses of operating the vineyard. During the conversations and negotiations between Woock and Schlink there was an oral agreement made between them that the title to the property would be vested in them in equal shares.

The vineyard was conveyed by John J. Seibel and his wife to the appellants by a deed dated June 3, 1944; and by a deed prepared by Mr. Woock, dated July 3, 1944, appellants conveyed to respondents an undivided one-half of the property. Woock testified that he personally delivered the deed to Schlink. That deed contained the following provision: "This deed is subject to any and all obligations of record and off record pertaining to the herein described property, and all further obligations are to be paid jointly by parties of the first and second part."

At the time Seibel deeded the vineyard to appellants, the latter had executed to Seibel their promissory note for $60,000.00 and secured the payment thereof by a deed of trust on the property. After the vineyard was thus conveyed to appellants, a contract in writing was made with Morello's winery by Woock—but presented to Morello by Schlink—by which the 1944 grape crop, estimated at 400 tons, was to be sold to Morello's winery. Out of the proceeds from the crop $1,250.00 was to be applied to payment of costs of harvesting the crop, etc., and $15,000.00 was to be applied on the purchase price of the vineyard. After the grape contract had been made with Morello, only a part of the 1944 crop was delivered to Morello's winery because the grape market went higher than Morello could pay and Woock wanted to ship the grapes east to get a higher price. Thereupon, Morello called at the vineyard and there met and conversed with both Woock and Schlink. Woock said Morello's winery was not paying enough for the grapes and as he wanted to make more money he asked Morello if he would consent to Woock's shipping the grapes east because he could get at least $50.00 a ton more than Morello was paying. It was then agreed that the grapes could be shipped east and the proceeds, above $50.00 a ton, were to be divided equally between Woock, Schlink and Morello. In that conversation Woock told Morello that Schlink was his partner. On cross-examination by counsel for appellants Morello was asked if he knew at the time he made the crop contract with Woock that Woock and Schlink were partners and he replied: "They were buying the ranch in partners;" that that was the basis upon which he advanced the $16,000.00, and that when he advanced that sum it was understood it was to be used to purchase the property.

Because of the unusual provision in the deed from appellants to Schlink, the trial court permitted considerable testimony regarding what the respective parties intended and understood by such language. Woock explained that it was meant that the grantee should share in expenses of operation such as irrigating, pruning and picking the grape crop, taxes, interest on the note to Seibel for the unpaid balance of the purchase price, etc. There was also considerable testimony regarding the failure of Woock and Schlink to account to one another—most of which testimony might have been relevant in an action for accounting, but was probably irrelevant in this action to quiet title. The evidence shows that the parties had agreed that Woock was to receive $250.00 a month for managing the property, and that he deducted such amounts from the proceeds of the crop. Schlink apparently did not do any work on the vineyard, but he did arrange for trucks to handle the crop, and collaborated with Woock in the disposition of it.

Woock claimed that the agreement between him and Schlink provided that the former should receive one-half of commissions earned by the latter on grapes shipped, and that Schlink had failed to account to him for his share of same. There is likewise evidence that Woock failed to account to Schlink regarding the operation of the vineyard, that the latter employed an accountant to examine Woock's accounts in this connection, and that such examination revealed that Woock had used $5,000.00 of the proceeds of the vineyard to buy other property for himself alone.

In substance the evidence shows that there was negligence on the part of both in the matter of accounting to one another; but the trial court, in an opinion filed in the case, stated that the preponderance of the evidence did not indicate that Schlink was guilty of fraud. We agree with that conclusion, and are satisfied that the evidence supports the findings and judgment.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

80 Cal.App.2d 815

CLINTON et al. v. HOGAN et al.

Civ. 15634.

District Court of Appeal, Second District,
Division 3, California.
July 14, 1947.

1. Specific performance 🔑121(3)

In action by prospective purchasers against vendors for specific performance of contract to sell portion of orchard, wherein the vendors contended that contract was contingent on the closing on a certain date of an escrow relating to another portion of the orchard, between vendors and third persons, and that third persons had not completed the escrow by that date, evidence sustained finding that vendors were responsible for failure of third persons to complete the escrow on time by leading third persons into a position of false security.

2. Specific performance 🔑59

Prospective purchasers were entitled to specific performance of contract for purchase of portion of orchard, though contract was contingent on the closing of an escrow relating to another portion of the orchard, between vendors and third persons on a certain date, and though third persons had not completed the escrow by that date, where the vendors were responsible for failure of third persons to complete the escrow on time.

3. Judgment 🔑202

Where actions were consolidated for trial, there should have been but one set of findings and one judgment, and though separate findings and judgments were made, they operated in favor of the several plaintiffs in the same manner as if the plaintiffs had brought a single action, and the two sets of findings and judgments would be considered as one document.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge pro tem.

Action by Howard D. Clinton and others against Thomas J. Hogan and Elsie C. Hogan for specific performance of contract to sell portion of walnut orchard. From a judgment in favor of plaintiffs, the defendants appeal.

Judgment affirmed.

Thomas B. Reed, of Covina, and Nichols, Cooper & Hickson, of Pomona, for appellants.

Paul R. Matthews, of Los Angeles, for respondents.

WOOD, Justice.

In this action for specific performance the defendants appeal from the judgment in favor of plaintiffs. Plaintiffs Howard D. Clinton, Geraldine A. Clinton, Clarence R. Dunham, and Theresa A. Dunham entered into a written agreement, evidenced by escrow instructions, with defendants Thomas J. Hogan and Elsie C. Hogan, whereby plaintiffs agreed to buy from defendants and defendants agreed to sell to plaintiffs certain real property, being a portion of a walnut orchard owned by defendants. The orchard is known as lot 167 of a certain tract. The escrow instructions, made on November 17, 1944, provided as follows: That the escrow was to be closed on or before January 18, 1945; that the buyers would pay $9,000 cash in escrow and deliver a note and trust deed in escrow for the balance of the purchase price, which price was to be determined at the rate of

$1,000 per acre by a survey to be made; that the sellers would deliver in escrow a deed and certain shares of water stock. (About December 21, 1944, as a result of the survey the price was found to be $17,476.) A further provision in the instructions was that: "It is understood that this escrow is contingent upon the successful completion of Escrow No. 2963, wherein the sellers are deeding a portion of Lot 167 to Brashear and Winbourne." It was also provided therein that: "An agreement covering expenses of care of pipe line and walnut crop to be delivered into escrow before close of escrow, signed by the parties hereto."

At the same time and place that defendants entered into said escrow with plaintiffs, the defendants also entered into an escrow, No. 2963, with J. B. Brashear and Tom Winbourne, relating to the sale by defendants to Brashear and Winbourne of another portion of the orchard for $2,798. That escrow also was to be closed on or before January 18, 1945. It provided that said buyers would pay $950 cash in escrow, which amount represented commission payable by defendants to Brashear for his services as a real estate broker in the sale to plaintiffs; that said purchasers were to deliver a note and trust deed in escrow for the balance of the purchase price; that the sellers would deliver in escrow a deed and 3 shares of water stock. That escrow included a provision that it was contingent upon the successful completion of escrow No. 2961 between the plaintiffs and defendants. It also included a provision that an agreement covering expenses of care of pipe line would be delivered into escrow before the close of escrow, signed by the parties to the escrow.

The sellers retained about 6 acres of the lot. The source of water supply for the whole lot was in front of the property retained by the sellers, and the water pipe line extended across that property and onto the two portions of the lot sold to plaintiffs and to Brashear and Winbourne. There was no other water supply for the two portions sold, and the sellers and purchasers agreed that they would enter into a written agreement that the owners of the 3 parcels of land would share in the expenses of the upkeep of the part of the pipe line which crossed the parcel retained by the sellers, and that the proportions of such expenses to be paid by the owners of each parcel would be agreed upon later and stated in the written agreement.

The plaintiffs deposited in escrow, before January 18, 1945, the money and note and trust deed required of them by the instructions. Within a few days after the escrow instructions had been signed by the parties, the plaintiffs, with the consent of defendants, moved upon the premises which they had agreed to purchase, and they have lived there since that time, taking care of the walnut trees, selling the walnuts, and impounding the proceeds of the sales subject to the final determination of this case.

Brashear and Winbourne deposited in escrow, before January 18, 1945, the cash required of them, but did not deposit before that date the note and trust deed. On January 19, 1945, the defendant Thomas J. Hogan, by his attorney Thomas B. Reed, notified the escrow holder in writing that "the completion of each escrow being contingent on the other, and Brashear and Winbourne having failed to place in escrow the papers and money required of them to complete the escrow, and the time for completion thereof having expired," he cancelled both escrows.

Brashear and Winbourne commenced an action for specific performance against these same defendants. These two actions were tried at the same time. At the trial it was not contended that plaintiffs had failed in any respect to comply with their escrow instructions, but it was asserted as to them that the "only thing that had not been completed" in their escrow was "that there never was a completion of the Brashear-Winbourne escrow," upon which the plaintiffs' escrow was contingent. As to Brashear and Winbourne it was contended at the trial that they failed to deposit the note and trust deed within the time required. The note and trust deed were taken to the escrow holder (Covina National Bank) sometime after January 25, 1945, and before January 29, 1945, but the escrow holder refused to accept them. After such refusal Brashear sent the note and trust deed to the escrow by registered mail, and they were received by the escrow holder on January 29, 1945, and retained by it. The agreement regarding the pipe line, which agreement was to be signed by all the parties to both transactions and was to be delivered into escrow *before the close of escrow,* was never prepared, and of course was not delivered into escrow. Brashear and Winbourne asserted at the trial, as justification for not having delivered the note and trust deed in escrow before January 18, 1945, that since the said agreement was to be prepared by the attorney for defendants Hogan (according to letters from the escrow holder and to statements made by Mr. Hogan), and was to be signed by all the parties and delivered in escrow before the close of escrow, and since the agreement had not been prepared before January 18, 1945, Brashear and Winbourne had a right to assume that the escrow would not be closed on that day and would not be closed before the agreement was so prepared and was signed by all the parties to both escrows and delivered into escrow.

On December 26, 1944, the escrow holder wrote a letter to Mr. Hogan, enclosing the deeds to be signed by him, and stated therein, among other things, "The agreements covering expenses of care of pipe line should also be handed into escrow." On December 28, 1944, the escrow holder wrote a letter to Mr. Brashear stating, "Mr. Hogan is having the agreement for the pipe line, etc., drawn by his Attorney and it will come to you for signatures before close of escrow." On the same date the escrow holder wrote a letter to these plaintiffs stating, "We understand that Mr. Hogan is having his Attorney draw the agreement regarding pipe line, etc., which will come to you for signature before close of escrow."

Mr. Brashear testified that the agreement about the water was important to him because he wouldn't have any water on his land without it; that after the escrow instructions were made he asked Mr. Hogan about the pipe line agreement, and Mr. Hogan told him that Mr. Reed, his attorney, was going to draw the pipe line agreement; that when they talked about the agreement at a later time Mr. Hogan said that his attorney had been busy, but he was going to draw it, and that he (Brashear) "didn't need to worry about it"; that soon after January 11, 1945, he received a letter from Mr. Reed stating that the "return by you of papers in the Hogan escrow" to the bank "is endangering completion of the escrow"; that soon after receiving that letter he told Mr. Hogan about it and also told him that he had received a letter from the bank stating that the pipe line agreement would be sent to him for signature before the closing of the escrow; that Mr. Hogan said, in reply thereto, that "he was going to contact Mr. Reed and see that it [the agreement] was taken care of."

Mr. Clinton, one of the plaintiffs, testified that in the first part of December, 1944, Mr. Hogan told him and Mr. Dunham that "he would give Mr. Reed the fundamentals of this agreement [pipe line agreement] so that he could draw it up, and we could sign it before the escrow." It was stipulated that Mr. Dunham would testify substantially the same as Mr. Clinton had testified. In addition thereto, Mr. Dunham testified that on another occasion, when he and Mr. Hogan observed leaks in the pipe line, Mr. Hogan told him, in effect, "that he was going to have Mr. Reed draw up an agreement whereby that pipe line would have to be taken care of by all parties."

The attorney for Brashear and Winbourne, Mr. Miles, testified that in a conversation with Mr. Reed in the latter part of January, 1945, Mr. Reed said that Mr. Hogan had called at his office with respect to having him prepare the pipe line contract, but he (the attorney) had been very busy and had forgotten about it at the time he sent the notice of cancellation.

Mr. Reed testified that he was attorney for defendants Hogan and also for the bank, the escrow holder; that prior to entering into the escrows all the parties were in his office and the transaction was discussed, including the pipe line agreement and the location of the pipe line, but he did not recall anything being said about who was to draw it.

Mr. Hogan testified that about two weeks after the escrow instructions were signed he gave in a general way to Mr. Reed the necessary information for the preparation of a pipe line agreement, and explained to him where the line was, across what property it extended, and what was necessary with reference to an agreement for maintenance of the line; that he did not authorize him to prepare the agreement; that neither Mr. Clinton nor Mr. Dunham asked him about the agreement; that he did not remember whether he told them that his attorney said it would take time to get the agreement out; that he spoke to Mr. Winbourne and Mrs. Clinton "about the agreement being drawn up at everybody's expense"; that he did not remember any conversation with Mr. Brashear to the effect that he (Mr. Hogan) said his attorney would prepare the agreement; that he did not remember receiving the letter of December 26th from the escrow stating that the pipe line agreement should be handed into escrow. He testified further:

"Q. You asked him [Mr. Reed] at that time, did you not, to prepare such an agreement? A. No; I just talked about it. I said we would all have to get together.

"Q. Did you ever make any effort to get together with any of these people? A. I didn't make much of an effort, because I thought Mr. Dunham out on the front of the grove told me we wouldn't have to have a pipe line agreement drawn up."

[1, 2] Defendants contend on appeal that since Brashear and Winbourne did not deposit the note and trust deed in escrow before January 18, 1945, defendants had a right to cancel the escrow with plaintiffs. They do not assert that plaintiffs failed to do anything required of them, but assert as to plaintiffs that their escrow failed only because Brashear and Winbourne failed to deposit the note and trust deed within the time limit of their escrow. Defendants do not contend that plaintiffs or Brashear and Winbourne should have prepared the pipe line agreement. The evidence was sufficient to support a finding that defendants Hogan stated to plaintiffs and Brashear and Winbourne that defendants would have the pipe line agreement prepared for the signatures of the parties, and that defendants caused plaintiffs and Brashear and Winbourne to rely upon said statement and to believe that it would not be necessary for Brashear and Winbourne to deposit the note and trust deed in escrow until the pipe line agreement was signed by the parties, and to believe that the escrows would not be closed or cancelled before the agreement was deposited in escrow. The findings herein are not as specific as they should be, and are findings only by reference to paragraphs of the complaint and answer with a statement as to whether the allegations in the paragraphs are true or untrue. The trial court found that Brashear and Winbourne deposited all documents required of them by the escrow instructions to be deposited in escrow within the sixty days specified in the escrow instructions, and that plaintiffs and Brashear and Winbourne did all things required of them to be done on or before January 17, 1945, and neither escrow was closed or completed solely and entirely by reason of the fault, failure and deliberate refusal by the defendants to deposit the grant deeds and deliver the water agreements required of them. Defendants assert that this finding is not supported by the evidence, since it was admitted that the note and trust deed were not delivered in escrow until January 29, 1945. It is to be noted that the above mentioned finding does not state that Brashear and Winbourne deposited the note and trust deed in escrow on or before January 17, 1945, but states that they deposited all documents required of them within the sixty days, and did all things required of them on or before January 17, 1945. Since it was admitted that the note and trust deed were not deposited in escrow until after January 18, 1945, and since the finding states that the escrows were not completed solely by reason of the fault of defendants, it is implied in said finding that the note and trust deed were not required, by reason of the circumstances herein, to be filed before January 18, 1945. Since the principal point in the trial was whether Mr. Hogan made the alleged statements to the effect that he would have the agreement prepared and that Mr. Brashear should not worry about it, it is implied in said finding that Mr. Hogan made such statements and that the circumstances herein which excused the filing of the note and trust deed before January 18th were statements and conduct

of Mr. Hogan which led the buyers into a position of false security regarding an extension of time for closing the escrow. The evidence is sufficient to support that finding, and the findings are sufficient to support the judgment.

[3] Since the two actions were consolidated "for trial," no doubt pursuant to section 1048, Code of Civil Procedure, there should have been but one set of findings and one judgment, and although separate findings and judgments were made the same operate in favor of the several plaintiffs in the same manner as if plaintiffs had brought a single action. Union Lumber Co. v. Simon, 150 Cal. 751, 762, 89 P. 1077, 1081; Willamette Etc. Co. v. Los Angeles College Co., 94 Cal. 229, 232, 29 P. 629; Coghlan v. Salvatore Quartararo, 15 Cal. App. 662, 667, 115 P. 664. The two sets of findings and judgments will be considered as one document. Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 287, 105 P.2d 984. We have heretofore ordered brought up for consideration upon the appeal the findings and judgment in Brashear and Winbourne v. Hogan.

The court made express findings, entitled in that case, covering the matters implied in the findings herein and rendered judgment in favor of the plaintiffs. The court found expressly that Brashear and Winbourne complied fully with the terms of their escrow instructions; that defendants Hogan promised and agreed to prepare the pipe line agreement and to submit it to those plaintiffs, and it was their duty to so prepare and submit it; that those plaintiffs, Brashear and Winbourne, had a right to rely upon defendants' promise to prepare and submit said agreement; that defendants having failed to prepare said agreement and submit it to those plaintiffs, said escrow was not subject to cancellation on January 18, 1945; that the attempt by defendants to terminate said escrow on January 19, 1945, was therefore premature and of no effect; that the failure to deliver the note and trust deed before January 18, 1945, was not due to any fault of those plaintiffs, but was due to the failure of defendants to prepare the said agreement. Plaintiff herein may rely upon the findings and judgment in favor of Brashear and Winbourne to overcome the defense that Hogan properly cancelled their escrow upon the ground that the Brashear and Winbourne escrow was not closed within the time agreed upon.

As to the matter of requiring specific performance of the agreement to prepare and execute the pipe line agreement, it was stated by the parties at the trial that if plaintiffs were entitled to judgment for specific performance as to the contract of sale of the land it was quite probable that the parties could arrive at an equitable agreement as to the pipe line. It was thereupon stipulated orally that the parties waived any right which they might have to insist upon specific performance with respect to the preparation of an agreement for the care and maintenance of the pipe line.

The judgment is affirmed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.

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80 Cal.App.2d 796

PEOPLE v. COLLINS.

Cr. 4100.

District Court of Appeal, Second District,
Division 1, California.
July 10, 1947.

Licenses 🔑42(4)

In prosecution for violating Corporate Securities Act by selling certificates of interest in oil, gas and mining title in lease without obtaining a permit from Commissioner of Corporations, evidence supported implied finding of trial judge that locus delicti was established. Gen.Laws, Act 3814.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

John T. Collins was convicted of violating the Corporate Securities Act in selling certificates of interest in oil, gas and mining title in lease without first having applied for and received from the Commissioner of Corporations a permit so to do and he appeals.

Affirmed.

Grant B. Cooper, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County defendant was accused in seven separate counts of violation of the Corporate Securities Act. Gen.Laws, Act 3814. All of the counts charged the sale and issuance of certificates of interest in an oil, gas and mining title and lease, being certificates of interest in the Chi-Rango Exploration Company, organized for the purpose of engaging in the business of mining, milling, producing, refining, manufacturing and selling natural resources of all kinds, without first having applied for and received from the Commissioner of Corporations of the State of California a permit so to do. Save and except for the difference in the date of issuance of the certificate and the person to whom it was issued, all counts are of like nature.

Defendant pleaded not guilty to each count of the information, and following trial before the court sitting without a jury, was adjudged guilty on all counts except count II, upon which he was found not guilty. Following denial of his application for probation, defendant was sentenced to serve one year in the county jail upon each of the six counts upon which he was convicted, the sentences to run concurrently. From the judgments of conviction defendant prosecutes this appeal.

Appellant challenges only the judgment of conviction of the offense charged in count IV, resting that challenge on the claim that the evidence does not show jurisdiction over the offense charged in said count in the county where the information was filed and the trial had.

Examination of the record reflects evidence that appellant had his office at 626 South Anderson Street. From the testimony of the complaining witness in count I it is readily apparent that appellant's office was located in the City of and County of Los Angeles. There was testimony that the complaining witness mentioned in count IV had almost daily conversations with appellant in the latter's office prior to the day of the offense charged. There is evidence that the check given by the complaining witness in consummation of the transaction forming the gravamen of count IV was delivered in appellant's office to a Mrs. Steele, who was one of the partners in the enterprise and had been present at conversations between the complaining witness and appellant. This check bore the indorsement of appellant, and was drawn on a Los Angeles bank. The receipt for the money invested was issued in appellant's office. The transaction referred to in count IV was the culmination of many previous conversations between the complaining witness and appellant, all of which are shown by the record to have taken place in the latter's office, which as heretofore indicated was shown to be in Los Angeles.

A reading of the entire record in this case, leaves no doubt that there is contained therein sufficient evidence to support the implied finding of the trial judge that the locus delicti was established.

As was said by this court in People v. Carter, 10 Cal.App.2d 387, 389, 52 P.2d 294, 295: "The state gives no assurance to its feloniously insubordinate citizens that the venue of their crimes will be fixed beyond a reasonable doubt; that doctrine applies only to the issue of guilt. People v. McGill, [10 Cal.App.2d 155], 51 P.2d 433; Underhill on Criminal Evidence, vol. 1, § 36, p. 45. The defendant and appellant, therefore, is in no position to complain because the location of the offense was not established to a degree of certainty more to his liking."

For the foregoing reasons, the judgments appealed from are, and each of them is, affirmed.

YORK, P. J., and DORAN, J., concur.

80 Cal.App.2d 827

PETERSON v. CALIFORNIA SHIPBUILDING CORPORATION et al.

Civ. 15774.

District Court of Appeal, Second District, Division 2, California.

July 15, 1947.

1. Master and servant ⚷70(3)

Provision of employees' profit-sharing trust agreement, that member employees whose employment was terminated by reason of substantial curtailment of employer's shipbuilding operations should receive all amounts credited to their respective accounts, referred to employees required by employer to quit, and member employee who voluntarily terminated his employment because of curtailment of operations and belief that presently operations would cease entirely was not entitled thereunder to all amounts credited to his account.

2. Master and servant ⚷70(3)

Enlistment in United States Merchant Marine did not constitute "induction into armed services" within provision of employees' profit-sharing trust agreement that a member employee upon induction into armed services of United States could withdraw entire amount credited to his account.

See Words and Phrases, Permanent Edition, for all other definitions of "Induction Into Armed Services".

3. Discovery ⚷51

Complaint, alleging on information and belief that employer had not contributed annually to employees' profit-sharing trust the percentages of income and net profits specified in trust agreement, which also provided that such contributions should not exceed 15 per cent. of basic compensation paid annually to all member employees, was insufficient to entitle member employee to disclosure of amount of employer's annual income and net profits in absence of allegation that amounts contributed were not equal to the 15 per cent limitation.

4. Master and servant ⚷70(3)

Where employees' profit-sharing trust agreement provided that contributions paid into trust by employer for each year should be apportioned at the end of each pay-roll year to the account of each member employee on a percentage ratio, a member employee who voluntarily terminated his employment before the end of the fiscal year was not entitled to participate to any extent in contributions to the trust for that year.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by A. H. Peterson against California Shipbuilding Corporation, etc., and others to enforce plaintiff's claim to benefits under an employees' profit sharing trust created by named defendant. From a judgment of dismissal, plaintiff appeals.

Judgment affirmed.

J. Paul Madsen, of Los Angeles, for appellant.

Thelen, Marrin, Johnson & Bridges, and Thomas R. Suttner, all of Los Angeles, for respondents.

WILSON, Justice.

This action involves the construction of the terms of an employees' profit sharing trust created by respondent California Shipbuilding Corporation, known as Calship Employees' Benefit Fund. Appellant seeks to enforce his claim to benefits which he asserted under the declaration of trust and which were denied by respondents, the corporation and the trustees of the fund. Their demurrer to the amended complaint was sustained with leave to amend. Appellant refused to amend further. A judgment of dismissal followed, from which this appeal was taken.

Respondent corporation established a trust under date of November 30, 1942, for the benefit of its executive, administrative or professional employees who were paid on a fixed salary basis and not an hourly rate with overtime and who were exempt from the coverage of the Federal Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201–219. The general provisions of the trust agreement material to this action are as follows:

1. Every employee not entitled to compensation for overtime would become a

qualified participant in the fund upon completion of six months' service.

2. An annual contribution to the fund would be made by the trustor on or before November 30th of each year. This would amount to either 5 per cent of the net profits realized for the fiscal year ending each such November 30th or 15 per cent of the basic compensation otherwise paid during such year to all members of the benefit fund, but not more than the latter. No contributions were made by the employees.

3. At the end of each payroll year the money paid into the trust would be apportioned to the account of each member employee on a percentage ratio established by dividing the base pay of the employee by the aggregate total base pay of all employees for the payroll year.

4. Payments from the fund to the members were to be made as follows: (a) Upon death while a member all amounts credited to the member's account would be paid to his personal representative. (b) Upon becoming incapacitated for six consecutive months the entire account could be withdrawn. (c) Upon induction into the armed services of the United States the entire account could be withdrawn. (d) If a member ceased to be an employee less than one year after becoming a member of the fund he received 25 per cent of all amounts credited to his account at the time of the termination of his employment. (e) If a member ceased to be an employee more than one but less than three years after becoming a member of the fund he received 50 per cent. (f) If a member ceased to be an employee more than three but less than five years after becoming a member of the fund he received 75 per cent. (g) An employee who quit after five years employment was entitled to receive his entire account. (h) Member employees whose employment was terminated because of cessation or substantial curtailment of shipbuilding operations would receive their entire accounts.

Appellant was a salaried employee of the corporation continuously from September 22, 1941, to January 31, 1945, in the capacity of Assistant Superintendent of machinery in the construction of ships for the United States Government. He voluntarily terminated his employment on the latter date after having been employed more than three years, but less than three years after he became a member of the fund by virtue of the trust agreement of November 30, 1942.

Appellant alleges that respondents credited benefits to the account of appellant for and during the payroll years ending on the 30th day of November in each of the years 1942, 1943 and 1944, in the total sum of $1,546.41, 50 per cent of which, amounting to $773.21, was paid to him. He contends that he is entitled to the remaining 50 per cent of the amount and respondents maintain that by reason of his employment for less than three years after having become a member of the fund he has been paid his full due.

Appellant has attempted to bring himself within the provisions of subsections 4(c) and 4(h), of the trust agreement above outlined by alleging that on January 31, 1945, he "quit his said employment" with respondent corporation "because of great and substantial curtailment in said defendant's shipbuilding operations and because of plaintiff's belief and expectation at the time of an early and sudden cessation of such shipbuilding operations," and that he immediately enlisted, entered and enrolled in the United States Maritime or Merchant Marine Service in which he remained until the commencement of this action.

He does not allege the extent of the curtailment of respondent corporation's operations nor does he allege any facts from which the court may determine whether such curtailment, if any, was substantial. He was not discharged by his employer because of the lessening of its ship construction but he seems, according to the allegations in the amended complaint, to have determined in his own mind that the curtailment was sufficient to warrant the voluntary termination of his employment. But for his action, taken at his own election unsupported by any suggestion from the corporation that the work was growing less and that there was a possibility of his discharge, he might yet be in the same employment, building up benefit credits to which he would be entitled by his years of service. His personal expectation of future conditions was insufficient to furnish a reason for his leaving his employment.

[1] The trust agreement provides that if because of substantial curtailment of shipbuilding operations member employees cease to be employees of the corporation, then as to member employees "whose employment *is terminated*" by reason of such curtailment such employees shall be entitled to receive all amounts credited to their respective accounts. This provision does not mean those employees who voluntarily leave, that is those who terminate their own employment, but it refers to those who are required by the employer to quit —those whose employment *is terminated* at the direction of others. His claim is therefore unsupported by subdivision 4(h).

[2] Subdivision 4(c) likewise fails to give sustenance to appellant's alleged cause of action. The Merchant Marine is not a part of the armed forces of the United States and appellant's entry therein was not an "induction into the armed services" which is designated as one of the circumstances under which he would be entitled to withdraw the entire amount credited to him. McCune v. Kilpatrick, D.C., 53 F. Supp. 80, 88. See also In re Berue, D.C., 54 F.Supp. 252, 255.

[3] Appellant alleged that respondent corporation agreed to contribute to the benefit fund for the fiscal year ending November 27, 1943, between 2 per cent and 5 per cent of its income before provision for federal taxes based on income, and for each of the fiscal years ending November 30, 1944, and November 30, 1945, respectively, a sum equaling 5 per cent of the net profits of the corporation for each such fiscal year before provision for income taxes, but said contributions in no event to exceed 15 per cent of the basic compensation paid during such year to all employee members of the benefit fund. He further alleged that the exact amount of the income or net profits of the corporation or of the basic compensation paid to employees during the existence of the trust or during the period of his employment were unknown to him and on information and belief alleged that the corporation did not contribute between 2 per cent and 5 per cent of its income for the fiscal year ending November 27, 1943, nor 5 per cent of its net profits for the years 1944 and 1945. On these allegations he asks that the corporation be required to disclose the amount of its income and net profits for the respective years mentioned. In his pleading appellant alleged that the contribution should not exceed 15 per cent of the basic compensation paid to employee members of the fund, this being the limitation provided in the trust agreement. While he alleged that the corporation failed to contribute between 2 per cent and 5 per cent of its income or 5 per cent of its net profits he did not allege that the amount contributed was not equal to the 15 per cent limitation and in this respect the amended complaint is deficient.

[4] Appellant was not entitled to any portion of the benefit fund in the fiscal year ending November 30, 1945, although he asserts a right to his proportion thereof that accumulated between November 30, 1944 and January 31, 1945, the date on which he terminated his employment. The trust agreement provided that contributions paid into the trust for each year "shall be distributed among the member employees *as of the end of such pay roll year pro rata* on the basis of the basic compensation paid to such employee during such pay roll year." Since appellant was not an employee of the corporation on November 30, 1945, the end of the fiscal year, he was not a member of the fund on that date and therefore has no right to participate in the fund.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

80 Cal.App.2d 801

PEOPLE v. SCHWARTZ.

Cr. 4099.

District Court of Appeal, Second District,
Division 3, California.
July 10, 1947.
Hearing Denied Aug. 7, 1947.

1. Criminal law ⚷982

The statutory provision that, where maximum possible sentence is less than two years, period of probation may continue for not more than three years, applies to both felony and misdemeanor cases, and hence one who pleaded guilty to charge of bookmaking could properly be placed on probation for three years, though maximum imprisonment for such offense was one year. Pen.Code, § 337a, subd. 2; § 1203.1.

2. Criminal law ⚷982

Order placing one who had pleaded guilty to charge of bookmaking on probation for three years was properly revoked when within probationary period she pleaded guilty to another offense. Pen.Code, §§ 337a, 1203, 1203.1.

3. Criminal law ⚷982

Where order granting probation was revoked within probationary period for violation of terms thereof, court must pronounce judgment sentencing probationer for offense for which she was placed on probation. Pen.Code, § 1203.

4. Criminal law ⚷982

Judgment pronounced during probationary period revoking probation for violation of terms thereof and sentencing probationer to imprisonment in county jail was pronounced in proper time, though period of time during which she could originally have been imprisoned for the offense had expired. Pen.Code, § 1203.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Blanche Schwartz pleaded guilty to a charge of bookmaking, and, from a judgment revoking a previous order of probation and sentencing her to imprisonment in county jail, defendant appeals.

Judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and W. E. Simpson, Dist. Atty., and Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

WOOD, Justice.

Defendant pleaded guilty to a charge of violation of Section 337a, subdivision 2, of the Penal Code, a felony, which offense is commonly known as bookmaking. On July 20, 1944, upon the hearing of her application for probation, the court suspended proceedings in the case and granted probation for a period of three years upon the conditions that she pay a fine of $100 and "must refrain from gambling or bookmaking and must report regularly to the Probation Department and obey all laws." On November 29, 1946, the court, in the presence of defendant and her counsel, revoked said order granting probation, and pronounced judgment that defendant be imprisoned in the county jail for six months. Defendant appeals from the judgment.

After probation had been granted the defendant pleaded guilty in another department of the superior court (the date is not shown by the record but it is asserted in appellant's brief that it was more than two years after probation had been granted) to another and different charge of violation of Section 337a of the Penal Code, and the judge in the other department, without referring the matter to the probation department for investigation, granted probation to her on condition that she pay a fine of $500 forthwith. The basis for revoking probation in the present case was the plea of guilty in the other department of the court.

Appellant contends that the judgment is void for the reason that it "was pronounced after the legal period during which the appellant could have been placed on probation upon the charge." Her argument is that at the time of making the original order the court, by suspending the proceedings, let the crime remain a felony, and that since the period of time for which the court could have granted probation in a *felony* case was the maximum possible term for which it could have sentenced a defendant in a *felony* case, and since the maximum possible term for which the court could have sentenced this defendant under Section 337a for such *felony* was imprisonment for one year, the portion of the order granting probation in excess of one year was a nullity, and the judgment pronounced after the expiration of one year was void.

The punishment for violation of Section 337a of the Penal Code is "imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

Section 1203.1 of the Penal Code provides in part: "The court * * * in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, *except as hereinafter set forth*, and upon such terms and conditions as it shall determine. The court * * * in the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; *provided, however, that where the maximum possible term of such sentence is less than two years, then such period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over three years;* may fine the defendant in such sum not to exceed the maximum fine provided by law in such case; or may in connection with granting probation, impose either imprisonment in county jail, or fine, or both, or neither; may provide for reparation in proper cases; and may require bonds for the faithful observance and performance of any or all of the conditions of probation." (Italics added.)

[1] Appellant contends that the proviso in said Section 1203.1, stating that where the maximum term of such sentence is less than two years then such period of suspension may continue for not over three years, relates to misdemeanors and not to felonies, and that since appellant stood convicted of a felony at the time sentence was suspended the court could not grant probation for three years. Such contention is based upon the fact that "county jail" imprisonment is referred to immediately preceding such proviso. She argues that under the doctrine of noscitur a sociis and ejusdem generis the meaning of the part of the Section after the word "provided," which part relates to the suspension for three years, must be considered as relating to the part of the Section preceding the word "provided," which part pertains to imprisonment in the county jail, and that when so considered it is plain that the legislature "intended that such misdemeanor sentences which extend as high as two years could be suspended in the discretion of the court for not over three years," and that such provision "was never meant to apply to felonies." She also argues that "It will thus be seen that the part pertaining to suspension of imposition or execution of sentence to continue for not over three years relates to cases where 'in the order granting probation and as a condition thereof may imprison the defendant in the county jail.'" The present case, although regarded as a felony, certainly is one in which the court "may" in the order granting probation and as a condition thereof "imprison the defendant in the county jail." In addition to the provision of the Section particularly referred to above, which states that imprisonment in the county jail may be made a condition of probation, it is stated in said Section, at a later place, that the court "may in connection with granting probation, impose either imprisonment in county jail, or fine, or both, or neither." The first provision in the Section relative to imprisonment in the county jail states the limit of time for imprisonment in the county jail, and the later provision states that imprisonment in the county jail may be imposed, with or without a fine, in granting probation. At the beginning of the Section it is provided that probation may be granted for a period of time not longer than the maximum term for which a defendant can be sentenced, except as thereinafter set forth. It is then provided therein, as a condition of probation, that the defendant may be imprisoned in the county jail for a period not longer than

the maximum time fixed by law in the instant case. It is not specified there or at all that such provision relates to misdemeanors only. Then an exception (apparently the one referred to at the beginning of the Section) is made to the provision that probation cannot continue beyond the time for which a defendant can be sentenced, and that exception is that where the maximum possible term of such sentence is less than two years, then such period of suspension may continue for not over three years. Appellant seems to contend that the exception refers only to a county jail sentence, since the words "such sentence" are used in the exception. It is to be noted, however, that the words "such sentence" are also used at the beginning of the Section before any reference is made to the county jail. The contention of appellant that said exception relates to misdemeanors only is not sustained. It is clear that the provision in said Section 1203.1, "that where the maximum possible term of such sentence is less than two years, then such period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over three years," applies to felony cases and misdemeanor cases.

[2-4] Appellant violated the terms of her probation by engaging in bookmaking. Section 1203.2 of the Penal Code provides in part that: "At any time during the probationary period of the person released on probation * * * the court may * * * revoke and terminate such probation * * * if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation * * *." The order granting her probation was properly revoked. If the judge in the other department of the court had known, at the time she pleaded guilty to the second offense, that she was then on probation for the prior offense, she could not have been placed on probation for the second offense. Section 1203 of the Penal Code provides: "* * * that probation shall not be granted * * * to any defendant unless the court shall be satisfied that he has never in any place been previously convicted of a felony * * *." Probation having been revoked within the probationary period, and for violation of the terms thereof, it was the duty of the court to pronounce judgment. People v. Hunter, 42 Cal.App.2d 87, 91, 108 P.2d 472; People v. Williams, 24 Cal.2d 848, 854, 151 P.2d 244. The judgment was pronounced within proper time.

The judgment is affirmed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.

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81 Cal.App.2d 61

MIRANDA v. MIRANDA et al.

MIRANDA et al. v. MIRANDA.

Civ. 15905.

District Court of Appeal, Second District,

Division 2, California.

July 28, 1947.

Hearing Denied Sept. 25, 1947.

1. Joint tenancy 🔑8
Partition 🔑22

A joint tenancy may be altered by written agreement of the tenants who may by contract modify the right of partition.

2. Husband and wife 🔑279(1)

"Remain", within property settlement agreement, meant that property should remain in the names of both parties until wife's remarriage or removal. Code Civ. Proc. § 752.

See Words and Phrases, Permanent Edition, for all other definitions of "Remain".

3. Husband and wife 🔑279(1)

A property settlement agreement prepared by wife and her own attorney was to be interpreted most strongly against her. Civ. Code, § 1654.

4. Husband and wife 🔑281

Where no equitable ground for annulling property settlement was alleged, whether it was a complete expression of the agreement of the parties was a question of law.

5. Contracts 🔑143

The purpose to be achieved by a contract is the principal factor in deriving its meaning.

6. Contracts 🔑154

A contract must be construed according to its plain, common-sense meaning as gathered from its four corners.

7. Contracts 🔑147(1, 2)

A contract must be construed to effectuate mutual intention of the parties as of the date of the writing, and such intention is to be ascertained solely from the language employed, where it is clear and explicit and involves no absurdity. Civ. Code, § 1636.

8. Partition 🔑62

Divorced wife, who brought action for partition of property occupied as a home and who alleged in her answer to husband's cross-complaint that husband had breached property settlement agreement under which wife was permitted to occupy the home until remarriage but who offered no proof in support thereof, impliedly acknowledged validity of property settlement and nonexistence of grounds for annulling it.

9. Perpetuities 🔑6(1)

Property settlement agreement giving wife the right with children to occupy family home after divorce until remarriage, when property should be sold, did not improperly restrain wife's right to sell the property at any time prior to her remarriage, in violation of statute pertaining to suspension of the absolute power of alienation. Civ. Code, § 715.

10. Trusts 🔑1

The essentials of a valid trust are a competent trustor, a property, an indicated intention, a definite disposition of the estate, a trustee, and a beneficiary. Civ.Code, § 2220.

11. Trusts 🔑11(1)

A property settlement agreement giving wife the exclusive right to occupy family home so long as she should not remarry, but providing that upon her remarriage the property should be sold and funds realized therefrom used for support and maintenance of minor children, created a valid trust.

12. Partition 🔑22

Property settlement agreement, that family home was to remain in names of husband and wife as long as wife did not remarry and so long as the property was occupied by her as a home for herself and children, constituted a restriction upon rights of the parties to partition the property so long as such conditions existed and waived right of either party to partition during prescribed period.

13. Husband and wife 🔑280

A disposition of joint property by honest agreement of spouses is final without regard to subsequent approval by court in divorce proceedings.

14. Husband and wife 🔑280

A property settlement agreement that title to family home should be in statu quo ante divorce decree until wife's remarriage was not superseded by subsequent, interlocutory, and final judgments of divorce, regardless of whether it was approved by the court in divorce proceedings.

15. Husband and wife 🔑278(2)

Agreements of spouses for performance of certain acts in event of a divorce do not contravene public policy.

16. Husband and wife 🔑278(2)

A property settlement agreement between spouses who were living apart, which itself provided that wife had already instituted action for divorce and that the parties intended thereby amicably to settle and adjust all differences as to property rights, was not void as contrary to public policy because allegedly made in contemplation of action for divorce.

17. Evidence 🔑450(5)

A property settlement agreement was plain and unambiguous, and parol testimony offered for purpose of clarifying the agreement and to discover the intention of the parties was properly rejected.

18. Evidence ⚷397(2), 429, 433(6)

A written contract is considered as containing all terms of agreement, and no evidence other than contents of the writing is admissible except where there is a mistake or imperfection in the writing or where validity of the agreement is the fact in dispute. Code Civ.Proc. § 1856.

19. Partition ⚷22

Under property settlement agreement that family home was to be held in the names of husband and wife so long as wife and minor children should occupy the premises as a home and that, if thereafter the wife should remarry, the property should be sold and funds realized therefrom used for support and maintenance of the minor children, wife who continued to occupy the home with minor children and who had not remarried was not entitled to partition.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Partition action by Mary Louise Miranda against Max A. Miranda and others, wherein Ruth A. Miranda and Max Joseph Miranda, by Max A. Miranda, their guardian ad litem, intervened. The named defendant filed a cross-complaint alleging the terms of a property settlement and the children intervened with the same declaration. From a judgment denying partition, plaintiff appeals.

Affirmed.

E. A. Oppenheim, of Los Angeles, for appellant.

Newton E. Anderson and M. M. Miller, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

By this action appellant sued her former husband for partition of lot 31, block B of Sherman subdivision, Los Angeles county. By his cross-complaint respondent, Max A. Miranda, alleged that pending the action for divorce, on September 7, 1943, and prior to entry of the interlocutory decree the parties executed a writing whereby they settled all differences with respect to their property and the custody of their children; that the lot "was to be held in the names of said parties so long as the cross-defendant and the minor children * * * should occupy the premises as a home, and that if thereafter the cross-defendant should enter into another marriage the said property should be sold * * * and that the funds realized therefrom shall be used for the support and maintenance of said minor children * * at the rate of $50 per month." The children intervened with the same declaration. Upon the issue thus raised the court decided in conformance with the agreement and respondent's contentions and denied partition.

The pertinent provisions of the property settlement are the following:

"(3) Second party covenants and agrees that First party have the right to the exclusive use and occupation of the family home located at 830 N. Clark St., West Hollywood, California, so long as she does not re-marry; said use and occupation to include the furniture, fixtures, linens, dishes and all articles now in use in said household. Second party agrees to make the monthly payments on said real property amounting to $25.00 per month and in addition to pay when due all taxes or assessments levied upon said property, furniture and fixtures. It is agreed that said property shall remain in the names of the parties hereto as 'joint tenants' so long as First party does not remarry and as long as said property is occupied by First party as a home for herself and the children of the parties hereto.

"(4) That this agreement is made and entered into in contemplation that the action of divorce heretofore instituted by First party against Second party shall ripen into a final decree, duly entered in the Office of the County Clerk of the County of Los Angeles, State of California, and if First party shall thereafter enter into another marriage then said property shall be sold, * * * the funds realized therefrom shall be used for the support and maintenance of said minor children of the parties hereto, said sum to be allowed and expanded at the rate of fifty ($50.00) dollars per month. That during the period of time said money is being expended, Second party shall be relieved from any further payments for the support of said minor children. That when the funds so realized from the sale of the above mentioned property is exhausted, then Second party shall resume the payments hereinafter provided for the support of said minor children."

"(9) The parties hereto agree that they will live separate and apart from and after the execution of this agreement and that in the event of a reconciliation between the parties hereto this agreement shall continue in full force and effect without abatement of any term or provision hereof unless by written agreement duly executed by each of said parties after the date of said reconciliation."

"(11) In consideration of the execution of this mutual agreement First party hereby waives from the Second party all demands for alimony either temporary or permanent it being understood that this settlement is a total and complete release of the Second party by First party of all matters and charges whatsoever, and that except as herein provided, the First party shall after this settlement require nothing whatsoever from the Second party as though the marriage relationship has never existed between them. * * *"

Among the findings appear the following: By the settlement the title of the lot was to remain in the names of the parties as joint tenants so long as the wife does not remarry, to be occupied by her as a home for herself and the children; if she should remarry it is to be sold and the proceeds used for the support of the children at the rate of $50 per month; when the funds so realized are exhausted defendant shall resume the payment provided in their agreement for the support of the children, plaintiff to have the right to the exclusive use of the home as long as she does not remarry; that the agreement contains no provision for any change in the ownership or title of the property in the event plaintiff should remarry, except that in such event the home shall be sold; that plaintiff has not remarried and at the time of filing her complaint she was occupying the home for herself and the minor children.

No mention of the complaint in intervention appears in the findings but the court concluded and adjudged that the home is held in trust pursuant to the provisions of the property settlement agreement between the parties in favor of the minor children of the parties, "Intervenors herein."

[1-4] Viewed from any angle the agreement of the parties is sufficient to support the judgment. In the absence of the agreement the right of appellant to a partition of the property could not be questioned. Code Civ.Proc., sec. 752. But a joint tenancy just as a tenancy in common may be altered by a written agreement of the tenants who may by contract modify the right of partition. Asels v. Asels, 43 Cal. App. 574, 578, 185 P. 419. The language of the agreement distinctly provides that the property "shall remain in the name of the parties hereto as joint tenants, so long as the first party does not remarry and so long as said property is kept by first party as a home for herself and the children of the parties hereto." The meaning of the word "remain" is "to continue unchanged in place, form or condition; to continue." Webster's International and Oxford English Dictionaries. Hence the provision for the property to remain in the names of the parties as joint tenants has no other reasonable meaning than that the title of the home should remain in the names of both parties until one of two conditions should occur, to wit; appellant's remarriage or her removal from the home. If she ceases to occupy the home the title in joint tenancy nevertheless continues until she remarries, but if she remarries a sale must be made. As further proof that the property is to be kept in trust the agreement provides that upon a sale thereof the funds realized shall be used for the support and maintenance of the minor children, and that when said funds are exhausted respondent "shall resume the payments hereinafter provided for the support of said minor children." No ambiguity or uncertainty in the language of the agreement appears. The writing was prepared by appellant and her own attorney; hence it must be interpreted most strongly

against her. Civil Code, sec. 1654. Since no equitable ground for annulling the contract is alleged the question of whether it is a complete expression of the agreement of the parties is one of law. Harrison v. McCormick, 89 Cal. 327, 331, 26 P. 830, 23 Am.St.Rep. 465. Appellant still occupies the home with her children and has not remarried. Considering such facts in connection with the language of the agreement it is clear that it was the intention of the parties that their home should serve as the primary factor in a trust fund for the benefit of their children. Such conclusion is accentuated by two provisions: (1) The proceeds from its sale shall be exhausted in maintaining the children in the event that they should cease to be sheltered thereby; (2) in the event of a reconciliation the agreement is to remain in full force unless modified by a writing.

[5-7] The purpose to be achieved by a contract is the principal factor in deriving its meaning. In re City and County of San Francisco, 191 Cal. 172, 177, 215 P. 549. It must be construed according to its plain common sense meaning as gathered from its four corners. Cook v. Columbian Oil, Asphalt and Refining Company, 144 Cal. 670, 674, 78 P. 287; Pacific Heating and Ventilating Company v. Williamsburg City Fire Ins. Co., 158 Cal. 367, 369, 111 P. 4. Such construction must be given to a contract as will effectuate the mutual intention of the parties as of the date of the writing, and such intention is to be ascertained solely from the language employed where it is clear and explicit and involves no absurdity. Civ.Code, sec. 1636; Betts v. Orton, 34 Cal.App. 397, 400, 167 P. 1147.

[8] Appellant contends that the judgment is not supported by the evidence in that respondent breached the property settlement agreement in the following particulars, to wit: (1) He refused to permit appellant the exclusive and peaceful occupation of the home; (2) he was constantly in arrears in the payments of the nominal support for the children; (3) he constantly molested appellant and the children and retained possession of a part of the premises. Such breaches were alleged by appellant in her answer to the cross-complaint. Notwithstanding their denial no proof was offered in support thereof. Having brought her action for partition she thereby impliedly acknowledged the validity of the property settlement and the nonexistence of grounds for annulling it.

[9-11] Appellant contends that if the agreement intended a restraint on her right to sell the property at any time prior to her remarriage such restraint would be void as in violation of section 715, Civil Code.* But a glance at the language of the agreement discloses that the restraint placed upon the parties is not to exist beyond the lives of any persons named in the agreement; in fact not beyond the minority of the two children. In contending that the property settlement did not effect a trust appellant argues that "no statement nor words are contained in the agreement to indicate an intention to create a trust." In making such contention appellant is forgetful of the essentials of a valid trust, to wit, a competent trustor, a property, an indicated intention, a definite disposition of the estate, a trustee and a beneficiary. 54 Am.Jur., p. 43, sec. 30; 65 C. J., p. 231 et seq; Lefrooth v. Prentice, 202 Cal. 215, 226, 259 P. 947. In addition to the terms of the traditional valid trust the legislature in 1929 provided that a trust in relation to real or personal property or both may be made for any lawful purpose. Civil Code, sec. 2220. The language of the agreement in the instant case provides (1) a legal purpose, to wit, maintaining the home for appellant and the minor children; (2) an estate, to wit, the home held by the parties as joint tenants; (3) beneficiaries, to wit, appellant and the minor children; (4) a legal term, to wit, the time during which the children would be entitled to support

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* "Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation can not be suspended, by any limitation or condition whatever, for a longer period than as follows:

"1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

"2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

and maintenance from their parents. With all the elements of a legal trust present, the finding that a valid trust was created by the property settlement was supported by the contract of the parties.

[12] Appellant contends that the findings indicate that no trust was created and could not be created at any time prior to appellant's remarriage. Also, she contends that the findings do not show that appellant waived a right to partition. Such contentions fly in the face of the very contract to which she subscribed as well as of the findings. The agreement that the home was to remain in the names of the parties as long as the wife does not remarry and so long as the property is occupied by her as a home for herself and the children constitutes a restriction upon the rights of the parties to partition the property so long as these conditions exist, and constitutes a waiver of the right of either party to a partition during the prescribed period. The findings also provide in conformance with the agreement that in the event appellant should remarry the home is to be sold and the proceeds used for the benefit of the children. Could language more clearly indicate a provision for a trust in favor of the children? While the property is left in the names of the parties as joint tenants until the happening of the contingencies specified, yet the rights of the children are hedged about with restrictions against the alienation of the property by any device whatsoever prior to their attaining majority.

[13, 14] Appellant contends that the interlocutory and final judgments of divorce are superior to the property settlement and therefore control the decision in the instant case, citing Abbott v. The Superior Court, 69 Cal.App. 660, 666, 232 P. 154. That decision holds that an interlocutory decree dealing with the property rights of the parties, but which does not adopt a contract theretofore made by them, becomes nevertheless conclusive as to property rights. But the cited decision is of no avail where the trial court has already made findings based upon substantial evidence, definitely holding that the contract of the parties, as in this case, was to the effect that the title to the home of the parties should be held in statu quo ante the divorce decree. Like Hamlet's play, the agreement settling their property rights is the thing. When spouses honestly agree to a disposition of their joint or community property such disposition is final without regard to whether it is approved by the court in divorce proceedings. Such approval is not essential to its efficacy. Green v. Green, 66 Cal.App.2d 50, 151 P.2d 679; Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265.

[15, 16] The contention that the agreement is void because it was made in contemplation of an action for divorce cannot be sustained. The instrument itself provides that appellant had already instituted her action for divorce and that the parties were living separate at the time. Under such circumstances a discussion of the impending divorce was rendered imperative by reason of the necessity of providing for their children through the years of their infancy. Agreements of spouses providing for the performance of certain acts in the event of a divorce do not contravene public policy. Where parties are living separate and apart and their agreement shows that they intended thereby amicably to settle and adjust all differences as to property rights it is not contrary to public policy to do so. Hill v. Hill, 23 Cal.2d 82, 89, 142 P.2d 417.

[17-19] Prejudicial error is assigned with reference to the court's rejecting the testimony of the witness Wenzell called on behalf of appellant for the purpose "of clarifying the agreement and to discover the intention of the parties." The ruling of the court was correct. The circumstances under which the contract was made are contained in the writing itself. By reason thereof no parol proof was necessary to make the contract intelligible. No doubt arises from the language of the agreement that needs to be dispelled by oral testimony. The language is plain and unambiguous and is sufficient support for the court's finding. When a contract is in writing the instrument itself shall be considered as containing all the terms of the agreement, and no evidence other than the contents of the writing is admissible ex-

cept (1) where there is a mistake or imperfection in the writing itself or (2) where the validity of the agreement is the fact in dispute. (Code Civ.Proc., sec. 1856; Harding v. Robinson, 175 Cal. 534, 166 P. 808.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

81 Cal.App.2d 110

PEOPLE v. COOPER.

Cr. 4074.

District Court of Appeal, Second District,
Division 3, California.
July 30, 1947.

1. Criminal law 🔑552(2)

A showing of mere opportunity to commit a crime is not sufficient to justify a verdict of guilty.

2. Criminal law 🔑347

An opportunity to commit a crime is material circumstance to be considered in conjunction with other circumstances in determining whether the accused is guilty of offense charged.

3. Criminal law 🔑351(3)

In prosecution for burglary and grand theft, the flight of defendant from jewelry store under conditions indicating consciousness of guilt was material circumstance to be considered.

4. Criminal law 🔑351(3)

Immediate flight, even in absence of any accusation, may afford persuasive evidence of consciousness of guilt.

5. Burglary 🔑36
Larceny 🔑50

In prosecution for burglary of jewelry store and grand theft, where defendant at first denied that he had been in jewelry store but later admitted he was there, the false and inconsistent statements indicated consciousness of guilt and the defendant's denial was a material circumstance to be considered in determining his guilt.

6. Burglary 🔑36
Larceny 🔑50

In prosecution for burglary of jewelry store and grand theft, the knowledge of defendant as to place where jewelry was concealed was a material circumstance to be considered in determining his guilt.

7. Criminal law 🔑407(1)

In prosecution for burglary of jewelry store and grand theft, implied admission of guilt by defendant, when he did not say anything at time codefendant stated in his presence that defendant and another were ones who committed the theft, was material evidence of defendant's guilt, in view of fact that the accusatory statement was made under circumstances where defendant was free to speak spontaneously and where, if accusation were false, it called for a reply by the defendant.

8. Criminal law 🔑407(1)

Where an accusatory statement is made under circumstances where accused is free to speak spontaneously and where if accusation were false, it calls for a reply by accused, but accused stands mute in face of accusation, both the statement and fact of accused's failure to deny are admissible as evidence of a consciousness of guilt.

9. Criminal law 🔑406(4)

Defendant's offer to plead guilty to petty theft was an implied admission of guilt of charges of burglary of jewelry store and grand theft which could be considered in determining defendant's guilt.

10. Burglary 🔑41(1)
Larceny 🔑65

Evidence was sufficient to sustain conviction for burglary and grand theft.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Robert S. Cooper was convicted of burglary and grand theft, and he appeals.

Affirmed.

Harry M. Umann, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant Robert S. Cooper, the appellant, and Guy Cooper and Warren Lodge were charged jointly in one count of an information with burglary and in a second count with grand theft. In a jury trial they were convicted on both counts, and the jury found that it was burglary of the second degree. Defendant Robert Cooper appeals from the judgment "whereby the defendant was convicted of robbery of the first degree." It will be assumed that the appeal is from the judgments which were entered herein, that is, judgments of conviction of burglary and grand theft.

The evidence shows that four boxes of diamond rings, of a value of more than $200, were stolen from a display window of a jewelry store in Norwalk on April 16, 1946. The store faces south, is about 20 feet in width and 40 feet in depth. The entrance door is in the center of the front of the store, is recessed from the front line of the building about 3½ feet, and on each side of the entrance there is a display window, about 7 feet in length and 3½ feet in width, extending from the entrance to the wall. The rear of the display windows, inside the store, is in line with the front door of the store. At the rear of the display windows there are sliding doors, the bottoms of which are about 4 feet from the floor of the store. When the sliding doors are closed the display windows are entirely closed and the only way merchandise can be removed from the windows is through those doors. Showcases, about 35 feet in length and 3 feet in height, extend along the west side of the store from the west display window to the rear of the store, and the first opening between the showcases, through which a person can go behind the counter, is about 9 feet from the door. There is no opening between the showcase and the display window, and the top of the showcase extends about to the bottom of the sliding doors of the west window. The sliding doors to that window can be opened either from the front or back of the showcase.

The owner of the store testified that on April 16, 1946, about 4:20 p. m., the three defendants entered his store, acting drunk and unruly and all talking at the same time, and at first they stood in a row in front of the showcase about 12 feet from the front door as he proceeded to wait on them; that appellant said he had been celebrating the birthday of Lodge's wife; that Lodge said he was looking for something for his wife—"almost anything"—and that he wanted earrings for her; that while he (witness) was showing them to him, Guy Cooper moved to the showcase in the front of the store next to the display window, and leaned over the showcase; that appellant moved back about 10 feet toward the east wall, opposite the witness and Lodge, and acted crazy, made faces, jigged around, and attracted the witness' attention; that suddenly Guy Cooper said he was going to the drug store to get a bromo seltzer, and then he left the store; that about 15 seconds after he left, the appellant said, "Where did he go?" and appellant then left the store; that Lodge, who had continued to look at merchandise the witness was showing him, then said suddenly, "I have got to have something nice," and "I will be back in a few minutes, and you see if you can find anything that is right"; that Lodge then left the store, and the witness then noticed that the sliding door of the display window (next to the front door and in front of the showcase) was open; that the sliding doors of the display windows are always kept closed; that he looked in the display window and it "didn't look right," because the jewelry display in the window is always so arranged that if any box of jewelry is removed it leaves a noticeable empty space; that when he returned to the store from lunch about 1:30 p. m. of that day he observed the window, and there were no empty spaces in it; that upon checking the merchandise after the defendants had left he found that four boxes of diamonds were missing.

Mr. Wire, a watchmaker in the store, testified that he saw the three defendants in the store about 4:30 p. m. on April 16, 1946; that he had seen appellant and Lodge in the store about two weeks previously and also about a month previously, and on those occasions he waited on them and they looked at earrings and other jewelry, but did not buy anything; that when the three defendants came in on April 16th he was sitting at his bench behind the counter in the rear part of the store with his back to them, and he glanced around, saw who they were, and then continued with his work, and watched them through a mirror on the wall; that the owner of the store proceeded to wait on Lodge, who said he wanted earrings; that at that time the defendants were together and they talked as if they had been drinking; that as the owner continued to wait on Lodge, appellant stepped back a little distance from Lodge, walking as if he were drunk, and trying to attract the owner's attention; that Guy Cooper moved to the showcase near the front door, leaned over the showcase and against the sliding door, and said there was nothing in the showcase which would interest them; that Guy Cooper then said he would go to the drug store and get a bromo seltzer, and he left the store; that about a minute thereafter appellant said, "Where did he go?" and then appellant left the store; that about two minutes thereafter Lodge said, "I will be back in a minute and see if we can find something," and then he left the store; that Guy Cooper was in the store about five minutes and the others about eight minutes; that it was a warm day and appellant was wearing a heavy overcoat; that about thirty seconds after they had left he noticed the sliding door next to the front door was open about 6 inches; that he inspected the window and found that 3 boxes of rings were missing; that about 15 minutes before the defendants came in he waited on some customers, showing them some rings which he took from the display window, and that he placed the rings back in the window and at that time nothing was missing from the window display.

Another employee of the store testified that he put the jewelry in the display window the morning of April 16, 1946, and that on one pedestal in the window he placed four ring boxes each of which contained a diamond engagement ring and a wedding ring, and he also placed in the center of that pedestal two boxes of diamond earrings; that as he returned to the store about 1:30 p. m. he noticed that the display window was in the same condition it was in when he decorated it in the morning.

Another employee testified that he saw the three defendants in the store on April 16, 1946; that he had seen appellant and Lodge in the store on two prior occasions (the occasions referred to by witness Wire); that on April 16th the three defendants, while in the store separated and "were all over the front of the store."

An employee of a market, which is about half a block from the jewelry store, testified that in the afternoon of April 16, 1946, he saw three men who were "similar" in appearance to the defendants going together across the street, near the market, toward the jewelry store; that one of them was wearing an overcoat; that about eight minutes later he saw two of those men run back across the street to a 1940 green Ford coupe, jump in it and drive away; that one of those two who ran back was wearing an overcoat.

Another employee of that market testified that in the afternoon of said April 16th he saw three men who resembled the defendants get out of an automobile in a parking lot, and then go up the street; that one of them was wearing an overcoat; that about 10 minutes later he saw two of them running back to the automobile, and at that time the other man was already in it, and they drove away; that one of the two who ran back was wearing an overcoat; that the automobile was a green Ford coupe with license number 15N370.

A brother of Lodge, called as a witness for plaintiff, testified that on April 16, 1946, he loaned his automobile, a 1940 green Ford coupe with license number 15N370, to defendant Lodge.

A deputy sheriff testified that he arrested the defendants on April 19, 1946, when they arrived in a 1940 green coupe at the place where the owner of the car, Lodge's brother, worked; that they also arrested a fourth man who was in the automobile with defendants, but he was not involved in the jewelry store affair; that in a conversation with all the defendants on that day, in the presence of deputy sheriff Freeman, he asked them if they had been in any of the stores at Norwalk recently, and they said they had not; that on the next day he and Officer Freeman had a conversation with each defendant out of the presence of the other defendants; that Guy Cooper said they had been to San Diego, but had not stopped in Norwalk, and that he might tell more if he were permitted to talk to his brother Robert; that appellant said they had gone to San Diego to visit a relative, that they had stopped somewhere, possibly Norwalk, and bought some food, but they had not gone into a jewelry store; that Lodge said they had gone to San Diego in his brother's car, but had not stopped in Norwalk. He testified further that in the separate conversations with Guy Cooper and appellant they had asked that the fourth man be released; that the officers told them, in reply thereto, that they could not release him until they were satisfied he was not involved in the Norwalk case; that the officers told Lodge that the Coopers had asked for the release of the fourth man and that they could not release him until the three defendants proved to the officers that he was not involved in the Norwalk matter; that the three defendants then had a conversation in the corner of the room and returned to the officers, and Guy Cooper again requested that the fourth man be released, and said "I was in the jewelry store in Norwalk but I didn't have anything to do with the theft," and "Let the other two defendants admit that they were the ones that took the property because I am on probation"; that the officer said, "You were in the store, weren't you?" and he said "Yes" and "the others were the ones that committed the theft"; that the other two defendants did not say anything at that time; that he asked the defendants where the jewelry was, and Lodge said it was where the officers could not find it; that each defendant said he could tell where the jewelry was; that he asked the defendants if they would plead guilty to theft, and Lodge and appellant said they would plead guilty to petty theft; that he told them petty theft was not involved and that the charges would be filed and it would be up to the court to decide the outcome of the case; that appellant and Lodge asked again if they could plead guilty to petty theft, and he told them they could not; that he asked them if they would take the officers to the jewelry, and they said they would not take them to it at that time; that two days later the defendants said they would not show them where the jewelry was, and that they were going to fight the case. It was stipulated that officer Freeman would testify substantially the same as the other officer had testified.

Appellant testified that on the day in question the three defendants went to San Diego and on the way back he drove the car into a parking lot in Norwalk, then they went into a grocery store and then into the jewelry store, and Guy Cooper talked to the owner about a navy bracelet for his nephew; that none of the defendants stole anything from the jewelry store; that he wore an overcoat on that day, but he did not believe he wore it in the store. Lodge testified that the three defendants were in the jewelry store on that day; that none of them stole anything from the jewelry store; that he never said anything to the owner of the store. Guy Cooper did not testify.

[1, 2] Appellant asserts that he merely accompanied his brother Guy Cooper and Lodge, who entered the store to inquire about a navy bracelet, and that the defendants may have had a mere opportunity to commit theft, in that they were in the store, but beyond that there was no evidence that appellant actually committed the offense. He argues that his contention is substantiated by the fact that the defendants were at all times in plain view of the prosecution's witnesses, the watchmaker and the owner, who testified that they did not see any of them take the jewelry. In other words he argues that the defendants might have had the opportunity to steal the jewelry, but if

these witnesses who testified that the defendants were in plain view, did not see any of them remove the jewelry, then a finding that they took advantage of their opportunity and stole the jewelry cannot be sustained. That argument assumes that those witnesses meant, by such testimony, that they observed the hands of the defendants so carefully at all times that, irrespective of how quick of hand the defendants might have been, no one of the defendants could have taken the jewelry without being observed doing so. Those witnesses did not say that the hands of the defendants were in view at all times. It is obvious that the left hand of Guy Cooper, as he leaned over the counter near the display window, could have been in such a position that it could not have been seen by the watchmaker or owner, who were to the right of him. An inference could reasonably have been drawn, under the circumstances here, that the left hand of Guy Cooper, as he leaned over the counter near the display window, was not within the view of those witnesses, and that at that time while his body obstructed the witnesses' view of his left hand he opened the sliding door with his left hand and took the jewelry. Of course a showing of mere opportunity to commit a crime is not sufficient to justify a verdict of guilty. An opportunity to commit a crime, however, is a material circumstance to be considered in conjunction with other circumstances in determining whether the accused is guilty of the offense charged. People v. Robbins, 171 Cal. 466, 470, 154 P. 317; People v. Flores, 58 Cal.App.2d 764, 770, 137 P.2d 767.

[3, 4] Another material circumstance was the flight of appellant from the jewelry store under conditions indicating consciousness of guilt. He wore an overcoat in the store, and the two employees of the nearby market saw two men who resembled appellant and Lodge, one of whom was wearing an overcoat, run from the jewelry store, approximately at the time the theft was committed, to an automobile in which Guy Cooper was sitting in the driver's seat, and saw the automobile leave immediately when they entered it. Immediate flight, even in the absence of any accusation, may afford persuasive evidence of consciousness of guilt. People v. Murguia, 6 Cal.2d 190, 192, 57 P.2d 115; People v. Waller, 14 Cal.2d 693, 702, 96 P.2d 344.

[5, 6] Another material circumstance was appellant's denial that he was in the jewelry store. At first he told the officers that he had not been in the store and later he admitted he was there. False and inconsistent statements indicate consciousness of guilt. People v. Cole, 141 Cal. 88, 90, 74 P. 547. Another material circumstance was the knowledge of appellant as to the place where the stolen jewelry was. He offered to disclose the whereabouts of the jewelry, but later refused to give the information.

[7, 8] Other material evidence was the implied admission of guilt by appellant when he did not say anything at the time Guy Cooper said in his presence that appellant and Lodge were the ones who committed the theft. That accusatory statement was made under circumstances where the appellant was free to speak spontaneously, and where, if the accusation were false, it called for a reply by appellant. Under such circumstances when an accused stands mute in the face of accusation, both the statement and the fact of the accused's failure to deny are admissible as indicative of a consciousness of guilt. See People v. Simmons, 28 Cal.2d 699, 712, 172 P.2d 18. All the defendants had requested the officers to release the fourth man who had been arrested with them, and the officers in reply thereto had told them it would be necessary for them to prove to the officers that he was not involved. After the officers had granted them permission to confer together concerning the request, and after they had conferred, Guy Cooper, who was then on probation, made the accusatory statement, and no reply was made.

[9] Other material evidence was the implied admission of guilt of the charges herein when he offered to plead guilty to petty theft. In People v. Carroll, 92 Cal. 568, 28 P. 600, an officer testified that the

defendants, who were arrested upon a charge of robbery, asked him if he would allow them to plead guilty to petty theft. On appeal therein it was contended that the conversation with the officer was not admissible, upon the ground that the defendants were not acting voluntarily. The court held therein that the conversation was voluntary and was properly admitted. In People v. Boyd, 67 Cal.App. 292, 227 P. 783, the defendant was charged with grand theft and obtaining money under false pretenses. When that case was called for trial, after several continuances had been had, defendant therein offered to plead guilty to obtaining money under false pretenses if the case would be continued to another date. That case was tried, and evidence therein as to the offer to so plead was received over the objection of the defendant, and defendant was convicted of obtaining money under false pretenses. On appeal therein the District Court of Appeal held that such objection should have been sustained, but the Supreme Court in denying a petition for a hearing disapproved that part of 'the opinion and held that the trial court was right in overruling the objection and receiving the evidence as to the offer to plead guilty to one of the offenses charged. The Supreme Court said therein at pages 302 and 303 of 67 Cal.App., at page 786 of 227 P.: "The action of the defendant in that regard was an admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury. * * * Such an admission was not, of course, conclusive evidence against the defendant. It was competent evidence merely; its weight and sufficiency being proper subjects for consideration by the jury. * * * The defendant's own admission, voluntarily made, was clearly competent evidence against him."

[10] The jury could reasonably infer from the evidence that the three defendants, in pursuance of a prearranged scheme among themselves to commit theft in the jewelry store, entered the store for the purpose of committing theft therein, and that the conduct of appellant and Lodge in the store was concerted action, in furtherance of the scheme, for the purpose of averting the attention of the owner and employees from Guy Cooper while he stole jewelry from the display window. The evidence was sufficient to support the findings of guilt on both counts, burglary and grand theft.

The judgments are affirmed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.

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80 Cal.App.2d 823

In re McCABE'S ESTATE.
BURWELL v. McCABE.

Civ. 3665.

District Court of Appeal, Fourth District, California.

July 14, 1947.

Hearing Denied Sept. 8, 1947.

1. Trusts 🔑297

The accounting contemplated by sections of the Probate Code respecting administration of trusts is similar to an accounting in equity, and similar rules are applicable, since for reasons of convenience and necessity the probate court is thus given certain powers which would ordinarily be exercised in equitable actions. Probate Code, §§ 1120, 1121.

2. Limitation of actions 🔑39(9)

Actions in equity, including proceedings for an accounting where a specific provision has not otherwise been made in the code, are governed by the provisions of the four-year statute of limitations in Code of Civil Procedure as being actions "for relief not hereinbefore provided for." Code Civ. Proc. § 343.

3. Limitation of actions 🔑39(9)

Where decree of distribution was entered pursuant to will establishing a testamentary trust providing that trust estate should be delivered to the beneficiary when she became 21, proceeding by beneficiary after reaching that age to require the trustee to account was governed by the four-year statute of limitations as being an action "for relief not hereinbefore provided for" and not by the statute establishing a three-year limitation period for certain actions. Probate Code, §§ 1120, 1121; Code Civ.Proc. §§ 338, 343.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding by Virginia Rose McCabe Burwell, beneficiary, against Violet M. McCabe, trustee, to require Violet M. McCabe, as trustee of a testamentary trust, to render an account. From a judgment dismissing the proceeding, petitioner appeals.

Judgment reversed.

Joseph E. Daly, of San Diego, for appellant.

Monroe & McInnis, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is a proceeding brought under section 1121 of the Probate Code to require the respondent, as trustee of a testamentary trust, to render an account.

The petitioner was the adopted daughter of the respondent and her husband. The husband died on February 6, 1928. By his will, among other things, he left $50,000 in trust to the respondent for the use and benefit of this petitioner. By the terms of the trust, the respondent was authorized to use so much of the income of the trust estate as might be necessary, and also such part of the principal as she might consider necessary, for the support and education of the petitioner until she attained the age of eighteen years. Thereafter, the income was to be paid to the petitioner until she became 21 years old at which time "all of said trust estate and property" was to be paid and delivered to her.

A decree of distribution was entered on April 25, 1929, distributing $50,000 in trust to this respondent pursuant to these provisions of the will. This petitioner arrived at the age of 21 years on July 23, 1942. This proceeding, for the purpose of requiring the trustee to render an account, was filed on May 6, 1946. The petition, among other things, alleged that the respondent had never rendered any account or report of her acts as trustee, and that she refused to give any information as to the condition of the trust estate. A citation was issued requiring the respondent to appear and show cause why she should not be compelled to account. The respondent filed an answer admitting that $50,000 from this estate had been distributed to her in trust for the use and benefit of the petitioner. As one of the defenses, it was alleged that the trust thus created by the will and decree of distribution was terminated at the time the petitioner arrived at the age of 21 years; that this occurred in July, 1942, more than three years prior to the commencement of this proceeding; and that any and all proceedings herein are barred by the statute of limitations and particularly by the provisions of subds. 1 and 3 of section 338 of the Code of Civ.Proc.

A hearing was had at which time the respondent was granted additional time within which to make an accounting. The matter came on for further hearing and further accounting on November 25, 1946. On that day the petitioner filed a purported objection to the respondent's answer, in which it was alleged that the respondent had never told the petitioner anything of this inheritance, and that she learned of it for the first time in April, 1946. On suggestion of counsel, the court ordered that the question of whether the proceeding was barred by the statute of limitations should be first considered. In that connection, the will and the decree of distribution were put in evidence, and a showing was made that the petitioner had reached the age of 21 years on July 23, 1942. Thereafter, the court held that the proceeding was barred by the statute of limitations. Findings of fact and conclusions of law were filed in which, among other things, the court found that by the express terms of the will and the decree of distribution this trust terminated when the petitioner arrived at the age of 21 years; that this occurred on July 23, 1942; that this proceeding was commenced on May 6, 1946; that more than three years had thus elapsed; that petitioner's cause of action accrued when she reached the age of majority; and that no facts or circumstances existed to toll the statute of limitations. As conclusions of law, it was found that this proceeding is subject to subd. 3 of section 338 of the Code of Civ.Proc., and that by the lapse of more than three years it became barred. A judgment was entered dismissing the proceeding, from which judgment the petitioner has appealed.

The sole question presented on this appeal is whether this proceeding was barred by the statute of limitations. The respondent argues that the trust terminated on the day the petitioner became 21 years of age and that the statute then began to run. It is assumed, without argument in support thereof, that subd. 3 of section 338 Code Civ.Proc. was applicable here, as the court found.

We would be reluctant to hold that any statute of limitations contained in the Code of Civil Procedure was applicable under these circumstances. Among other things, it might well be questioned whether the mere arrival of the date at which the trustee was obligated to turn over the trust estate to the beneficiary, was sufficient to constitute such a termination of the trust as would start the running of any statute in the absence of any attempt on the part of the trustee to comply with the order of the court as contained in the decree of distribution. See Hise v. Superior Court, 21 Cal.2d 614, 134 P.2d 748. This is especially true since section 1121 of the Probate Code gives to a beneficiary of such a trust the right to demand an accounting, without limiting the time within which such a demand must be made, and further affirmatively provides that such a demand shall not be denied if no account has been rendered to the court within six months. The effect of the only limitation thus provided is the exact reverse of that of the usual limitation provided for in the Code of Civil Procedure. It would seem that this special provision, for a particular purpose, must have been intended to exclude the operation of other and conflicting provisions of the other code. It hardly seems reasonable that it was intended that the general statute of limitations should be applicable in such a case, with the effect of divesting the court of the jurisdiction and duty thus given by this special statute, applying to and governing a particular relationship and situation. There are sound reasons for making this distinction, and it is in accord with the usual rules of equity, especially those relating to trusts, under which a trustee is not permitted to take advantage of his own wrong and is held to the highest standards of fair dealing in carrying out the confidential relationship he has assumed.

However, it is not necessary to hold that no statute of limitations was applicable here. Assuming, without holding, that some such statute was applicable under these circumstances the court's findings and conclusions, upon which this judgment of dismissal was based, that this proceeding is subject to subd. 3 of section 338 of the Code of Civ. Proc., and that petitioner's right to demand an accounting was barred by the lapse of three years after she became of age, must be held erroneous.

This proceeding was initiated more than three years but less than four years after the petitioner became 21 years of age. The respondent urges, and the court found, that subd. 3 of section 338 of the Code of Civ. Proc. applies. Originally, she alleged in her answer that subd. 1 of that section also applied but this contention seems to have been abandoned. It seems clear that this proceeding is based upon an obligation assumed by the respondent in accepting and agreeing to perform, under a decree of distribution, the duties of a trust, and not upon a liability created by a statute within the meaning of subd. 1 of section 338. It seems equally clear that this is not an action for the recovery of specific property or for wrongfully taking, detaining or injuring the same, within the meaning of subd. 3 of section 338. This proceeding is one to enforce a right based upon a testamentary trust, involving the right to have the court's distribution order complied with, and to secure the resulting benefits, the exact extent of which cannot be definitely known in advance. It is clearly a proceeding for an accounting under a specific right to such relief given by section 1121 of the Probate Code as a part of, and in furtherance of, the probate powers of the court.

[1] The accounting contemplated by sections 1120 and 1121 of the Probate Code is similar to an accounting in equity and similar rules are applicable since, for reasons of convenience and necessity, the probate court is thus given certain powers which would ordinarily be exercised in an equitable action. McAdoo v. Sayre, 145 Cal. 344, 78 P. 874. In effect, a probate court is thus given the right to exercise certain powers, ordinarily exercised in a court of equity, in order that it may complete a matter which was started under its probate jurisdiction.

[2] The general rule is well established that actions in equity, including proceedings for an accounting, where a specific and definite provision has not otherwise been made in the code, are governed by the provisions of section 343, Code Civ.Proc., a four-year statute, as being actions "for relief not hereinbefore provided for." Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; McArthur v. Blaisdell, 159 Cal. 604, 115 P. 52; Nougues v. Newlands, 118 Cal. 102, 50 P. 386; Freeman v. Donohoe, 65 Cal.App. 65, 223 P. 431; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723.

[3] If it be assumed that some statute of limitations applied under the facts here appearing the applicable statute would be section 343, and not section 338. The appellant became of age on July 23, 1942, and if it be considered that this trust then terminated and that the statue then began to run she would have four years in which to act. This proceeding was started on May 6, 1946, well within that time. It follows that the proceeding was not barred, and that the court erred in so finding and holding.

The judgment of dismissal appealed from is reversed.

MARKS, J., concurs.

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80 Cal.App.2d 902

CUNNINGHAM et al. v. HART et al.

No. 13472.

District Court of Appeal, First District,
Division 1, California.
July 21, 1947.

1. Municipal corporations ⚷79

Generally, civil service is a municipal affair, and as such the charter of the city and laws enacted and rules adopted pursuant thereto govern rights of the commission, the appointing power, and the employees.

2. Municipal corporations ⚷79

Where a matter is a state-wide or general public concern, a state law may be passed which will control provisions of municipal charters on same subject.

3. Municipal corporations ⚷217(5)

City civil service employees upon their return from military service were entitled to immediate opportunity to take examination to make them eligible for promotions they would have received had they not left public service and had they passed required examination. Military and Veterans Code, § 395.1; Const. art. 11, § 6; art. 20, § 3.5.

4. Municipal corporations ⚷79

The reinstatement in public employment of returning veterans is a matter of general public concern, and, being such, provision in statute directing that public employee upon his re-entry to employment on return from military service be given all the rights and privileges in, connected with, or arising out of employment which he would have enjoyed if he had not been absent therefrom, would be construed as controlling the "home rule" provisions of municipal charter. Military and Veterans Code, § 395.1; Const. art. 11. § 6, art. 20, § 3.5.

◆

Proceeding by Sarto J. Cunningham and another against Emmett H. Hart and others as members of Civil Service Board of the City of Oakland, Theodore G. Stahlberg as Secretary and Chief Examiner of the said Civil Service Board, and the Civil Service

Board, of the City of Oakland, to compel respondent Civil Service Board to re-establish a canceled Civil Service eligibility list.

Alternative writ discharged and application for peremptory writ is denied.

Buckley & Ehlers, of Oakland, for petitioners.

F. B. Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondents.

BRAY, Justice.

Petition for writ of mandate to compel respondent Civil Service Board of the city of Oakland to re-establish a cancelled civil service eligibility list.

Petitioners are two captains in the Oakland fire department who had successfully passed promotional civil service examinations for the position of battalion chief and whose names were the only ones remaining on the eligible list, which normally would not have expired until September 17, 1947. At the request of the city council, the city attorney rendered an opinion to the civil service board concerning the effect of section 395.1 of the Military and Veterans Code, which section was added by the Legislature in March, 1946. Upon receipt of this opinion the board on March 11, 1947, passed a resolution cancelling the eligible list and instructing the secretary of the board to prepare examinations to establish new eligible lists. This resolution reads:

"Whereas, twenty-seven members of the Fire Department having been granted military leaves to serve in the armed forces of the United States, and having returned from military leaves to their positions in the Fire Department, and by such service having forfeited their rights of participation in one or more of the promotional examinations No. 1360 for Engineer, No. 1361 for Lieutenant, and No. 1363 for Battalion Chief; therefore, in accordance with Paragraph (b), Sec. 395.1 California State Military and Veterans Code, be it

"Resolved, That prevailing Eligible List No. 1360 for Engineer, No. 1361 for Lieutenant, and No. 1363 for Battalion Chief are hereby cancelled effective March 11, 1947, and the Secretary is hereby instructed to prepare examinations to establish new eligible lists for these classifications as soon as possible."

The position of petitioners is that the board acted arbitrarily and unlawfully in cancelling the promotional eligible list in that section 395.1 has no application to the selection and appointment of civil service employees in the city of Oakland, because civil service matters are municipal affairs and therefore beyond the reach of the Legislature. Another way of stating the contention is that the state law cannot supersede the Oakland charter.

[1] There can be no question but that, generally speaking, "Civil service is a municipal affair, and as such the charter of the city and the laws enacted and the rules adopted pursuant thereto govern the rights of the commission, the appointing power and the employees." Higgins v. Lynch, 72 Cal.App.2d 526, 164 P.2d 943, 944. See also Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513. These cases were decided prior to the adoption of section 395.1 and, of course, without any consideration of the question involved here. As civil service generally is a municipal affair and governed by the charter, must the charter provisions yield to the state law in a matter of this kind?

Section 6, article XI, of the state Constitution provides: "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations *in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters,* and in respect to other matters they shall be subject to and controlled by general laws." (Emphasis added.)

Section 49(a) of the Oakland charter provides: "The City of Oakland shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter * * *."

Section 395.1, Military and Veterans Code, provides: "Notwithstanding any other provision of law to the contrary, any public officer, deputy, assistant, or employee of the State, or of any city, county, city and county, school district, water district, irrigation district, or any other district, political corporation, political subdivision, or governmental agency thereof who, in time of war or national emergency as proclaimed by the President or Congress, leaves or has left his office or position prior to the expiration of the Selective Training and Service Act of 1940 as amended, or any extension thereof, to join the armed forces of the United States and who does or did without unreasonable and unnecessary delay join the armed forces shall have a right, if released or discharged under conditions other than dishonorable, to return to and reenter upon the office or position within six months after the termination of his active service with the armed forces, if the term for which he was elected or appointed has not ended during his absence. He shall also have a right to return to and reenter upon the office or position during terminal leave from the armed forces and prior to discharge or release therefrom.

"(b) *Upon such return and reentry* to the office or employment *the officer or employee shall have all of the rights and privileges in, connected with, or arising out of the office or employment which he would have enjoyed if he had not been absent therefrom*; provided, however, such officer or employee shall not be entitled to sick leave, vacation or salary for the period during which he was on leave from such governmental service and in the service of the armed forces of the United States." (Emphasis added.)

[2] It has been held in a number of instances that where a matter is of state-wide or general public concern a state law may be passed which will control the provisions of municipal charters on the same subject. In City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745, the city manager refused to sign a contract for the construction of a wire fence around the municipal waterworks, admittedly a municipal affair, because, among other reasons, the contract did not contain a provision forbidding the employment of aliens upon the work as provided by the Publics Works Alien Employment Act of 1931. There, as here, the petitioner contended that the state law could not bind the city of Pasadena for the reason that the proposed improvement constituted a municipal affair as that phrase is used in section 6 of article XI of the Constitution, and was provided for in the city charter. The court held, at pages 398, 399–340 of 215 Cal., at page 750 of 10 P.2d:

"It remains to determine whether the Alien Labor Law of 1931 is effective and binding on freeholders' charter municipalities in this state. In other words, is the matter of the employment of aliens on public works one of local concern and a municipal affair, or is it such a matter of general public or state concern as that the statute is binding on such freeholder charter cities? We have concluded that this statute is such an act of sovereignty as to constitute the subject-matter thereof of general state concern as distinguished from a local or municipal affair. * * *

"This state has declared and enforced a policy of prohibiting the sale, etc., of agricultural lands in the state to ineligible aliens. That this policy, as a matter of general state concern, would be binding on a freeholders' charter city owning extensive areas of agricultural lands can, we think, admit of no serious doubt. Thus to interfere and prohibit the sale of its agricultural lands would be to control and limit to that extent the disposition of city property, but if the Alien Land Law be expressive of a state policy and in pursuance of a general state concern, the municipality must yield to the paramount authority of the state. * * * Reasons of public policy may well be invoked against the employment of aliens on public work, in addition to the mere preferment of citizens. Assuming that the municipality be in position to raise the constitutional question, it would be of no avail and it may not rightly object to the allocation of its funds to citizens for services rendered on public work if, as we hold, such purpose be a matter of general state policy, as distinguished from a municipal affair."

The following cases are examples of matters which have been determined to be of state-wide concern and in which general laws have prevailed over conflicting laws in municipalities adopting the "home rule" afforded by section 6, article XI of the Constitution: Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172, regulation of traffic on city streets. To the same effect, Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334; Mann v. Scott, 180 Cal. 550, 182 P. 281; In re Murphy, 190 Cal. 286, 212 P. 30; Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515. Regulation of the character and standards of taxicab service to be performed on city streets, In re Martinez, 56 Cal.App.2d 473, 132 P.2d 901. Appointment of a probation officer and the fixing of his salary payable out of the city and county treasury, pursuant to the Juvenile Court Law, Nicholl v. Koster, 157 Cal. 416, 108 P. 302. Sustaining the Metropolitan Water District Act which permits individual municipalities to initiate proceedings in the formation of a water district, City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630. Sustaining the City Boundary Line Act, Gadd v. McGuire, 69 Cal.App. 347, 231 P. 754. Adoption of a pension system by a municipality does not take the place of the Workmen's Compensation Law in its application to city employees, Sacramento v. Industrial Accident Commission, 74 Cal.App. 386, 240 P. 792. General laws prohibiting the licensing by a city of a house of prostitution, Farmer v. Behmer, 9 Cal.App. 773, 100 P. 901. General laws prohibiting the organization and control of a school district by a county, Scott v. County of San Mateo, 27 Cal.App. 708, 151 P. 33. A statute claiming a city street to be a secondary state highway prevails over right of municipality to improve that street, Southern California Roads Co. v. McGuire, 2 Cal.2d 115, 39 P.2d 412. Exclusive control in the state of liquor licensing, Los Angeles Brewing Co. v. Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71. Issuance and revocation of motor bus licenses within a city, People v. Willert, 37 Cal.App.Supp.2d 729, 93 P.2d 872. Drunken driving provision in Motor Vehicle Act prevails over city ordinance, Helmer v. Superior Court, 48 Cal.App. 140, 191 P. 1001. Liability of a municipality for tortious acts or omissions of its servants, Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353. Liability of a municipality for defective highways within its limits, Wilkes v. City and County of San Francisco, 44 Cal. App.2d 393, 112 P.2d 759.

It cannot be disputed that the matters contained in section 395.1 of the Military and Veterans Code are of general concern and state-wide interest, even of national concern. As stated in section 2 of the act passing section 395.1, "Nearly 1,000,000 California veterans have been discharged or will be discharged from the armed services of the United States within the next few months. Many of these veterans left positions of public office and employment without a clear understanding of their rights of reinstatement. There is a lack of clarity and uniformity in the various laws governing the rights of such veterans. In order that all such veterans may have a uniform right to reinstatement and may resume their proper places in the civil life of the community at the earliest opportunity, it is necessary that this act take immediate effect."

The people of California have declared that this is a matter of public policy. Section 3.5 of article XX of the Constitution added at the election held in November, 1944, reads in part as follows:

> "Notwithstanding any other provision of this Constitution, the Legislature by general law may provide for * * * the reinstatement in public employment, * * * of public officers and employees who have resigned or who resign their offices or employments to serve or to continue to serve in the armed forces of the United States or in the armed forces of this State. The Legislature may determine the extent to which such provisions shall be given retroactive effect.
>
> "As used in this section, 'public officers and employees' includes all of the following: * * *
>
> "(d) All officers and employees of any county, city and county, city, township, district, political subdivision, authority, commission, board, or other public agency within this State."

Thus, the people of the state have declared this to be a matter of state-wide concern by an amendment to the Constitution, and in so doing, have granted the Legislature the power to enact general laws controlling the subject, *"Notwithstanding any other provision of this Constitution."* (Emphasis added.) This alone would appear to compel a holding that section 395.1 prevails over the "home rule" afforded in municipal affairs by section 6, article XI.

Even disregarding the fact that the people and the Legislature have already declared this to be a matter of state-wide concern, it would seem that the mere fact that so great a number of veterans were returning within so short a period of time, necessitating their assimilation in civil life in an orderly, uniform manner, without undue dispute or conflict, differing in each locality, makes it a matter affected with a public interest and one affecting the general welfare of the state.

In deciding that a grant of leave of absence to a civil officer of the county of Los Angeles for the duration of his active service in the armed forces of the government during the war did not create a vacancy in his office, the court in McCoy v. Board of Supervisors, 18 Cal.2d 193, 114 P.2d 569, said, after referring to certain acts of the Legislature providing for the granting of leaves of absence for war service to state and county officers and employees, at page 196 of 18 Cal.2d, at page 571 of 114 P.2d: "These emergency measures show clearly that it was and is the policy of the legislature to expedite and encourage the enlistment of public employees in the armed forces of the United States, and to insure the restoration of their positions to them upon return to civil life. A study of similar enactments in other jurisdictions, of various soldiers' and sailors' relief acts, and of the trend of judicial decision, reveals a growing recognition of the necessity of protecting those in military or naval service against the loss of civil rights, and of the potency of a national emergency to justify broad and appropriate relief. Not only have state and national legislative bodies been alert to meet the need for special protective measures, but state and federal courts have kept pace and have evinced a firm intention to take a liberal view of these emergency enactments in order that their protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction. 88 A.L.R., note, page 1519."

People ex rel. Happell v. Sischo, 23 Cal. 2d 478, 144 P.2d 785, 150 A.L.R. 1431, held that the absence of a judge of the superior court from his judicial duties due to his accepting a commission as an officer in the United States Army during the war did not create a vacancy in his office. There the court reviewed many cases showing that the policy expressed in the McCoy case is a general nationwide policy with the exception of but three states. The court says, at page 490 of 23 Cal.2d, at page 791 of 144 P.2d, 150 A.L.R. 1431: "The national policy is designed and intended to promote recruiting—the so-called voluntary enlistment and acceptance of commissions—as well as to expedite administation of the Selective Service Act [50 U.S.C.A.Appendix, § 301 et seq.]. To hold section 395 of the Military and Veterans Code unconstitutional in its application to any public employees or officers would be contrary to the national policy." (Section 395.1 had not been enacted at that time.) At page 492 of 23 Cal.2d, at page 792 of 144 P.2d, 150 A.L.R. 1431, the court further states: "Section 395 of the Military and Veterans Code obviously is designed to, and reasonably should, aid and expedite the recruiting service of the United States. To hold it inapplicable and void as to judges would reasonably tend to discourage them from enlisting or accepting commissions. Upon the conclusion we have reached in holding that section 9 of article VI applies to judicial officers as such but does not operate to curtail the powers vested in the Legislature to grant military leaves of absence to public employees in the armed forces during time of war, even though the latter also hold judicial office, we avoid giving section 9 such effect as might tend to obstruct the recruiting service of the United States, and we sustain the People of this State, acting through the Legislature, in their translation of the national policy into section 395 of the Military and Veterans Code."

Indicative of the national policy on the rights of returning veterans, it is to be noted that in connection with veterans who were, before their entrance into the armed forces, in the employ of a state or political subdivision thereof, 50 U.S.C.A.Appendix, § 308(b) (c), declares that it is the sense of the Congress that such persons should be restored to the positions which they previously held or to positions of like seniority, and pay.

In a case involving the provisions of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A.Appendix, § 501 et seq., this court in Johnson v. Johnson, 59 Cal.App.2d 375, at page 389, 139 P.2d 33, adopted the language use in Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587 [59 Cal. App.2d 375, 139 P.2d 40]: "The Soldiers' and Sailors' Civil Relief Act [of 1940] is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."

[3, 4] Petitioners claim that the proper interpretation of section 3.5 of article XX of the Constitution limits the words "reinstatement in public employment" merely to a veteran's right to have his old position back, without any right to "have all the rights and privileges in, connected with, or arising out of the office or employment which he would have enjoyed if he had not been absent therefrom" as provided in section 395.1 of the Military and Veterans Code. In view of the general attitude of the people towards men and women who performed the great patriotic duty of entering the armed services in time of war, and the decisions of the courts liberally interpreting laws concerning the rights and privileges to be granted them because of such service, such an interpretation would be too narrow and constricted. Just to give a returned veteran the same position he had when he left for war, and refuse to place him as nearly as reasonably and feasibly possible in the position he would now be in had he not gone into the armed forces, would be a poor recognition of and reward for the sacrifice he had made for his country. When the public servant returns from service in the armed forces to his former position, under the spirit of the Constitution, the act of the Legislature, the decisions of the courts, and above all, the desires of a grateful citizenry, he is entitled to an immediate opportunity to take an examination to make him eligible for the promotion he would have received had he not left the public service and had he passed the required examination.

As hereinbefore shown, the reinstatement in public employment of returning veterans is a matter of general public concern, and being such, the general laws control the "home rule" provisions of municipal charters. Therefore, it becomes unnecessary to consider the effect of section 76 of the Oakland charter which, in effect, gives the board the right to cancel the eligibility lists at any time. Nor it is necessary to consider another point raised by respondents, namely, that mandamus will not lie here, because the board had the discretion of choosing one of two methods in meeting the situation. One was to cancel the existing elegibility list and call for a new examination of all eligible persons, including the returned veterans. This was the procedure followed in this instance. The other method would be to give an examination to returning veterans, and combine the resulting eligibility list with the existing list.

The alternative writ is discharged and the application for a peremptory writ is denied.

PETERS, P. J., and WARD, J. concur.

80 Cal.App.2d 832

COOPERATIVE BUILDING MATERIALS, Inc. v. ROBBINS & LARKEY et al.

Civ. 15834.

District Court of Appeal, Second District,
Division 2, California.
July 15, 1947.

1. War ⚿4

A contract whereby plaintiff agreed with defendant, who was subcontractor on building being constructed for federal government, to deliver equipment for mixing concrete, and to furnish operators and provide laborers for operation of the machines, was not a "lease" of equipment on a fully operated basis, but rather it rendered plaintiff an "independent contractor" for performance of construction work, and, hence, maximum price was not required to be established under Price Control regulations before plaintiff could recover on the contract. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor" and "Lease".

2. Landlord and tenant ⚿20

A provision for payment of rent and of transfer of use and possession of property to hirer are essential elements of a "lease".

3. Landlord and tenant ⚿20

If provisions of an instrument show an intention on part of one party to dispossess himself of the property and of the other to enter and hold in subordination to title of the first party, it is a "lease".

4. Landlord and tenant ⚿20

A "lease" usually implies an instrument by which exclusive possession of property is given for a limited period.

5. Evidence ⚿450(5)

Evidence that at time contract was entered into, plaintiff discussed renting of his concrete mixing equipment to tenant, who was subcontractor on building being constructed for federal government, on bare rental basis but that defendant rejected proposal and stated that they would prefer to enter into a contract whereby plaintiff was to do all work necessary to produce the concrete and that thereupon the contract was executed, though not permissible for purpose of altering terms of written contract as executed, was admissible for purpose of explaining a purported ambiguity therein.

6. Contracts ⚿169

Although a departmental ruling is entitled to consideration it is without force when it is contrary to express language of contract concerning which the ruling is made and when the instrument needs no interpretation other than that appearing on its face, or, if contract is susceptible of more than one interpretation, its meaning and intention of contracting parties is made clear by the evidence.

7. War ⚿4

Interpretation of contract whereby plaintiff agreed with defendant, who was a subcontractor on building being constructed under contract with federal government, to deliver necessary equipment for mixing concrete and to furnish operators and provide laborers for maintenance and operation of the machines as a lease of equipment on a fully operated basis within Price Control regulations by District Price Attorney of Office of Price Administration, written after completion of the work and while plaintiff was endeavoring to collect its compensation, was without force, where it was contrary to express language of the contract. Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 901 et seq.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Cooperative Building Materials, Inc., against Robbins & Larkey, a copartnership, etc., and another, to recover amount allegedly due under contract. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Ben M. Kochman and Crider, Runkle & Tilson, all of Los Angeles, for appellants.

Hanna & Morton and Joseph W. Pierce, all of Los Angeles, for respondent.

WILSON, Justice.

L. F. Dow Company, Inc., not a party to this action, was the general contractor for the construction of concrete floors and foundation walls of warehouse buildings at Herlong, California, under a contract with the United States Engineers Division of the War Department of the United States Government. On September 8, 1944, the Dow Company entered into a subcontract in writing with appellants Robbins & Larkey, a copartnership, whereby the latter agreed to furnish, erect, pour and construct certain concrete work in connection with the floors and foundation walls covered by the Dow contract. Appellant Massachusetts Bonding and Insurance Company executed its bond in writing whereby it agreed to pay the claims of all persons furnishing labor, materials, equipment and supplies and all things necessary to perform and complete the work covered by the subcontract with Robbins & Larkey. Thereafter Robbins & Larkey entered into a written agreement with respondent reading as follows:

"Co-Operative Building Materials, Inc.
"6009 Santa Monica Boulevard
"Los Angeles, 38, California
"September 9, 1944
"Walter Larkey and William Robbins
"Los Angeles, California

"In connection with your contract with L. F. Dow Company for placing concrete floors and foundation walls in warehouse buildings at the Army Depot in H*u*rlong, California, we propose to furnish the following work and service: 1. Deliver to the job site two standard mixermobiles * and one 65-ton, 4-compartment batching plant,* and remove same at conclusion of the contract. 2. Furnish operators and fully maintain said mixermobiles and batching plant. 3. Provide laborers for emptying cement sacks into our mixermobile skips.

"It is understood that cement will be furnished to us, piled beside our mixermobile skips. You are to receive the concrete in our tower hopper.

"Our charge for the above outlined work and services shall be $15,120.00 (Fifteen thousand One Hundred-twenty Dollars), and the use and control of two dump trucks, completely operated and maintained for hauling rock and sand from batch plant into mixermobile skips for mixing the concrete to be placed in floor slabs which we understand to be ten thousand cubic yards, more or less, for six (6) warehouses. In addition we shall receive the sum of $1.512 per cubic yard of concrete to be mixed for wall forms and all other concrete required but not included in floor slabs. We are to receive payments weekly to cover all items of labor or wages for men employed by us at the job and shall receive all balances due in addition to labor and wages, twice monthly as work progresses.

"It is anticipated and understood that the complete pouring of the concrete covered by your contract shall be completed within approximately thirty days; however, we agree to furnish and maintain the above equipment for a period not to exceed fifty days. Thereafter, we shall receive a standby charge of $150.00 per day for each day the equipment is retained by you, said period of time to commence on September 9, 1944.

"Dated at Los Angeles, California,
this 11th day of September, 1944
Co-operative Building
Materials, Inc.
By W. Ball, Pres.

"The above proposal, conditions and terms are hereby accepted:
"Walter F. Larkey
"Wm. M. Robbins"

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* A mixermobile is described as a complete truck-mounted-concrete-mixing-and-elevating equipment. It loads itself, mixes its concrete and has the ability to lift it to higher elevations in a tower which is constructed on the machine.

A batching plant is a plant consisting of overhead compartments for the assembling of rock and sand. Directly below is a gathering hopper in which the material is weighed according to a specification, and the hopper in turn will again empty at street level into a truck for transporting it. It is a device for measuring specific aggregates in the specification of concrete.

Respondent completed its contract, and extra work in addition, about November 15, 1944. Robbins & Larkey refused to pay respondent anything whatsoever for its work, hence this action to recover. Judgment for $16,854.45 was rendered in favor of respondent against the copartnership, Robbins & Larkey, the individuals composing the partnership, and Massachusetts Bonding and Insurance Company, from which they have appealed.

Robbins & Larkey resist payment on the contention, as alleged in their answer, that their contract with respondent is invalid and unenforceable for the reason that the equipment was "leased" to them by the contract and that respondent failed to file with the Office of Price Administration for this district its application to establish the reasonable price therefor in compliance with the Maximum Price Regulations, Sections 1399.1 to 1399.15, of the Office of Price Administration, and that unless and until the reasonable price and ceiling price is fixed by the Office of Price Administration for this district on the equipment respondent is barred and estopped from setting up, asserting or recovering any amount on said "leased" equipment.

Appellants maintain that the contract between respondent and Robbins & Larkey is within the terms of the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq., and of the regulations adopted pursuant to that act. Respondent contends, as found by the court, that it is an independent contractor for the performance of construction work, having agreed to furnish "work and service" with equipment and labor for the completion of the work that it agreed to perform, and therefore the contract is not within the terms of the Price Control Act.

The regulations of the Office of Price Administration applicable to this action are as follows:

Section 1399.1(c) provides that no person shall lease or furnish for use and no person in the course of trade or business shall rent or receive for use any construction equipment on a fully or partially operated basis at a price in excess of the maximum rental price established by this regulation.

Section 1399.5(a) requires that no person shall make or receive payment for any operating and maintenance service unless the maximum charge therefor has been established as therein provided.

Section 1399.6 provides: "If any construction or road maintenance equipment is leased on a 'fully operated' or similar basis, whereby the consideration to be paid represents payment both for the rental of such equipment and any operating and maintenance service, or services, the consideration paid shall not exceed the aggregate of the maximum rental price provided by this regulation for such equipment and the maximum charge established with, or by, the Office of Price Administration, Washington, D. C., for such service, or services, and the lessor shall separately itemize on his invoices his charges for rental and his charges for services."

Section 1399.12(a)(5)(i) defines "operating and maintenance service" to be "the supplying, by a lessor of construction or road maintenance equipment, in connection with the rental thereof, of any or all of the following services or supplies, required in the operation of such equipment: Operator, mechanic, oiler, fuel, oil, lubrication, repairs (other than repairs due to normal wear and tear), parts and any other services incidental thereto."

Section 1399.12(a)(9) reads as follows: "(i) 'Bare' basis refers to any lease, contract, or understanding (except such as is described in (iii) below), regardless of whether the same is denominated a rental agreement, or forms a part of another agreement, whereby one party undertakes to furnish another party with any construction or road maintenance equipment, without supplying any operating and maintenance services required in connection therewith, for any use and for any consideration, regardless of how such consideration is determined.

"(ii) 'Fully operated' basis refers to any lease, contract, or understanding (except such as is described in (iii) below), regardless of whether the same is denominated a rental agreement, or forms a part of another agreement, whereby one party undertakes to furnish for the use of, or use for, another party any construction or road maintenance equipment and to supply all operating and maintenance services required in connection therewith, for any purpose and for any consideration, regardless of how such consideration is determined. 'Partially operated' basis refers to the same sort of lease, contract or understanding as aforesaid, except that the party furnishing the equipment does not supply all, but only some, of the operating and maintenance services required in connection therewith.

"(iii) Neither of the foregoing definitions embrace, nor does this regulation apply to, a situation wherein the party furnishing to or using for another party any construction or road maintenance equipment is, pursuant to the terms of a written contract and according to the laws of the State where the work is to be performed, an independent contractor, liable to the other contracting party only for a particular result in respect to such work and is not subject to the control of such other party as to the means or methods by which such result is to be accomplished."

[1] Appellants contend that because the contract provides that respondent shall furnish (1) the equipment, (2) the operators for its full maintenance, and (3) the laborers for emptying cement into the mixermobile skips the contract is within the provision of section 1399.6 of the regulations, which refers to construction equipment that is "leased" on a "fully operated" basis as the latter term is defined in section 1399.12(a) (9) (ii). This argument ignores the provision of section 1399.12.(a) (9) (iii) which provides that neither the definitions in subdivisions (i) and (ii) nor the regulations apply where the party furnishing construction equipment is, "pursuant to the terms of a written contract and according to the laws of the State where the work is to be performed, an independent contractor, liable to the other contracting party only for a particular result in respect to such work and is not subject to the control of such other party as to the means or methods by which such result is to be accomplished."

The contract in question is not covered by any of the foregoing regulations. It did not provide for either the leasing or the furnishing of construction equipment (sec. 1399.1(c)), nor for operating and maintenance service (sec. 1399.5(a)), nor for leasing on a "fully operated" or other basis and did not provide for payment for rental of equipment or for operating or maintenance service (sec. 1399.6). Respondent did not supply operating or maintenance service in connection with rental or otherwise (sec. 1399.12(a) (5) (i)) and its contract was not a "bare" basis or on a "fully operated" basis (sec. 1399.12(a) (9) (i) and (ii)).

Respondent was an independent contractor, liable to Robbins & Larkey "only for a particular result" (sec. 1399.12(a) (9) (iii)), to wit, the mixing of the concrete according to the specifications in the contract between Robbins & Larkey and L. F. Dow Company, Inc., which in turn was governed by the contract between the last named company and the War Department. Respondent was not subject to the control of Robbins & Larkey as to the means or methods by which the result was to be accomplished. (Id.) The contract therefore was not embraced within the definitions contained in the regulations and respondent was subject neither to the provisions of the Emergency Price Control Act nor to any of the regulations adopted pursuant thereto.

The judicial definition of an independent contractor, as well as that contained in the regulations above quoted, includes respondent. "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work. * * * A contractor, obviously, is one party to a contract or one who has contracted to do or perform certain work." Chapman v. Edwards, 133 Cal.App. 72, 76, 24 P.2d 211, 213.

Respondent was required by its contract not only to furnish equipment, laborers and operators but to mix the concrete to be placed in floor slabs, which was understood to be 10,000 cubic yards, for the agreed price of $15,120, and in addition was to receive a stated sum per cubic yard of concrete to be mixed for wall forms and all other concrete required which was not included in the floor slabs.

As prescribed by its contract, respondent delivered the necessary equipment on the premises, furnished operators and provided laborers for the maintenance and operation of the machines and for the mixing of concrete for the floor slabs and for the extra work consisting of wall forms and other required construction.

The court made a finding that the machinery and equipment used by respondent in the mixing of the concrete was not subject to the control or direction of any of the appellants and that respondent at all times had sole, complete and exclusive control of the means or methods by which the concrete was prepared and mixed and of the result to be accomplished. The evidence sustaining this finding was not contradicted in any particular.

[2-4] The contract in question bears no resemblance to a lease. It contains no reservation of rent; the owner of the equipment, respondent, did not agree to and did not divest itself of possession; Robbins & Larkey never had possession of the equipment; no rental was specified; no term was fixed. A provision for the payment of rent (Mann v. Mann, 141 Cal. 326, 330, 74 P. 995) and of a transfer of use and possession of property to the hirer (Entremont v. Whitsell, 13 Cal.2d 290, 297, 89 P.2d 392) are essential elements of a lease. If the provisions of an instrument show an intention on the part of one party to dispossess himself of the property and of the other to enter and hold in subordination to the title of the first party it is a lease. Morris v. Iden, 23 Cal.App. 388, 393, 138 P. 120; Williams v. Miller, 68 Cal. 290, 293, 9 P. 166. A lease usually implies an instrument by which the exclusive possession of property is given for a limited period. Coney Island Co. v. McIntyre-Paxton Co., 6 Cir., 200 F. 901, 908; Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. 583, 1 A. 394, 395, 58 Am.Rep. 743.

Appellants contend that the language contained in the last paragraph of the contract requires us to construe the instrument as a lease. That paragraph recites that it was anticipated and understood that the pouring of concrete would be completed within approximately 30 days. Nevertheless respondent agreed to furnish and maintain the equipment for a period of not to exceed 50 days and thereafter it was to receive a "standby charge of $150.00 per day for each day the equipment" should be retained by Robbins & Larkey. Neither this clause nor the use of the term "retained" means that the latter were at any time to have possession or control of the machinery. To determine the character of the instrument its entire contents, not just one paragraph or provision, must be considered and given full effect. The only rational construction of this provision, giving consideration to the entire contract and to the conversation preceding its execution, to which we shall refer later, is that although the parties considered 30 days to be sufficient for the completion of the work, respondent would, if delays rendered it necessary, maintain the equipment on the job without charge for 20 additional days, but if for any reason there should be a further delay respondent would not be required to retain the machinery on the job for more than 50 days without being compensated therefor in addition to the contract price. There is nothing in the provision referred to that indicates that the equipment was to pass out of respondent's possession or into the control of Robbins & Larkey, and there is nothing that transforms the instrument into a lease. It contains none of the elements to which we have referred that are necessary to constitute a lease. The provision for a daily charge while the equipment was "retained" by Robbins & Larkey does not signify that respondent was to part with possession of the machinery. The language simply defines the termination of the period estimated to be necessary for the completion of the work and the date after which extra payment was to be made if the equipment should be detained, required to remain, on the job for a longer time.

[5] Such ambiguity as appellants have attempted to inject into the contract by their argument, though none is present, has been dispelled by the uncontradicted evidence that when Robbins & Larkey and a representative of respondent discussed the renting of the equipment a proposal was made to rent it to them on a bare rental basis whereby respondent would have had no responsibility other than for the time the machines were out of the latter's possession. Robbins & Larkey rejected the proposal and stated that they would prefer to enter into a contract whereby respondent was to do all the necessary work to produce the concrete, including the operation of the batching plant. Thereupon the contract was executed. Such evidence would not have been admissible for the purpose of altering the terms of the written contract and was not offered for that purpose. It was presented and received with the sole object of explaining a purported ambiguity that seems to have arisen at the time of the trial in the minds of counsel and the court. For that purpose it was admissible. Kenney v. Los Feliz Inv. Co., Ltd., 121 Cal.App. 378, 386, 9 P.2d 225; Walsh v. Walsh, 18 Cal.2d 439, 444, 116 P.2d 62.

The finding of fact that the contract is not a lease is sustained both by the language of the instrument itself and by the explanatory evidence.

[6, 7] Appellants contend that the interpretation of the contract by the District Price Attorney of the Office of Price Administration, written long after the completion of the work and while respondent was endeavoring to collect its compensation, to the effect that the agreement was a "fully operated" lease as defined in the regulations should be accepted by the court as controlling. Although a departmental ruling is entitled to consideration it is without force when it is contrary to the express language of the contract concerning which the ruling is made and when the instrument needs no interpretation other than that appearing on its face, or, if the contract be susceptible of more than one interpretation, its meaning and the intention of the contracting parties is made clear by the evidence.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

80 Cal.App.2d 868

AKINS et al. v. RIVERBANK CANNING CO.

Civ. 7345.

District Court of Appeal, Third District, California.

July 16, 1947.

Rehearing Denied Aug. 8, 1947.

Hearing Denied Sept. 8, 1947.

1. Contracts 🔑309(1)

Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment to the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged. Civ.Code, § 1514.

2. Contracts 🔑309(1)

Where defendant contracted with plaintiffs to buy all tomatoes grown by plaintiffs on certain land and entered into identical contracts with other tomato growers, and buyer was required under the contracts to exercise reasonable care to furnish supply boxes to plaintiffs and other growers, buyer had duty, in the exercise of reasonable care, to apportion available boxes when alleged labor shortage precluded supplying all growers with enough boxes and could not discriminate against plaintiffs by furnishing all available boxes to other growers to the exclusion of plaintiffs. Civ.Code, § 1514.

3. Appeal and error ⚷1056(1)

Refusal to admit evidence of a labor shortage in defendant's cannery was not prejudicial error where under contract to buy tomatoes from plaintiffs and other tomato growers and to furnish supply boxes defendant had duty to apportion boxes among all growers including plaintiffs if labor shortage rendered impossible the furnishing to growers of all necessary boxes, but defendant discriminated against plaintiffs and furnished all available boxes to growers other than plaintiffs.

On Petition for Rehearing

4. Appeal and error ⚷221

Question with respect to damages not raised in trial court could not be urged for first time on appeal.

Appeal from Superior Court, Yolo County; C. C. McDonald, Judge.

Action by V. Akins and F. Akins, both individually and as copartners, doing business under the firm name and style of Akins Bros., against Riverbank Canning Company (a corporation), for breach of contract. From an adverse judgment, defendant appeals.

Judgment affirmed.

F. M. Brack, of Modesto, for appellant.

A. G. Bailey, of Woodland, for respondents.

PEEK, Justice.

The present controversy arises out of the alleged failure of defendant to supply boxes to plaintiffs for the purpose of picking and shipping tomatoes to defendant's cannery, as provided in the contracts between the parties. The court, sitting without a jury, found in favor of plaintiffs, and from the judgment entered accordingly defendant has appealed.

Plaintiffs by their complaint allege that on March 25, 1944, two contracts were entered into with defendant, whereby plaintiffs agreed to sell and defendant agreed to buy all tomatoes grown on certain described lands in Yolo county; that when the tomatoes were ready for harvest plaintiffs so notified defendant and requested boxes as provided in said agreements; that although repeatedly requested so to do defendant furnished only a small portion of the boxes necessary, and that as a proximate result thereof plaintiff suffered loss and damage.

Defendant's answer, to which were attached copies of the contracts, admitted the execution thereof and affirmatively alleged that by reason of circumstances and conditions beyond its control which were specifically set forth in said contracts as excuses for nonperformance, defendant was unable to furnish boxes to plaintiffs.

From the testimony of F. Akins it appears that at the outset of the picking of the crop some boxes were obtained by plaintiffs from other growers and personally hauled to their lands; that in response to their continual requests, defendant's representative at Woodland, Mr. Moddison, told plaintiffs he would have boxes for them in a few days but he kept stalling them and finally stated they were too small as growers and were too far away to get boxes to them. After it appeared they would get no boxes from defendant, plaintiffs, in an endeavor to dispose of the tomatoes and with the knowledge of the defendant, contacted another cannery which agreed to take the crop if a release could be obtained from defendant. Originally defendant refused plaintiffs' request for a release, and although defendant finally acquiesced it was not until after the tomatoes had become overripe, rotted, and were of no value.

The plaintiff, V. Akins, testified that plaintiffs at no time received any boxes in accordance with their contracts with defendant, which called for roadside delivery; that the only boxes obtained were those personally taken by plaintiffs from three different ranches and hauled to plaintiffs' property, but that many of the boxes so obtained were broken and useless. In reply to his questions Moddison told him also that he could not get boxes for plaintiffs because they were "too small a grower and too far away", and when he pointed to boxes then at the defendant's loading platform the agent told him such boxes were for other persons. The witness further testified he went to various ranches, including Moddison's landlord and personally observed that they were getting boxes. At the beginning of the picking season he was told by said agent to hold up the picking for a couple of days and it would be easier to get boxes but at no time was he told that the cannery could not take the tomatoes. In accordance with the agent's suggestion plaintiffs did wait a couple of days and thereafter were at the loading platform every day but were unable to obtain any boxes although on various occasions he saw many boxes there and likewise saw many trucks come in and load up with boxes.

Defendant then called as a witness Mr. Sam P. Cava, its production superintendent, and by him offered to prove that because of a labor shortage at its cannery defendant was able to accept only a small amount of the tomatoes normally handled. An objection by counsel for the plaintiffs, on the ground that defendant's offered excuse for nonperformance had not been alleged in the answer, that there was no proper foundation therefor, and that no notice of the shortage had been given to plaintiffs, was sustained by the court.

Defendant then called its Woodland agent, Mr. Moddison, who testified that at the start of the picking season there were 44,000 boxes in the Woodland district and 17,000 in the "growers'" district (we assume this to mean the plaintiffs' district) but that plaintiffs were so late in responding to his notification to them that boxes were available, that when they did arrive at the loading platform in Woodland the supply was exhausted. He further testified he told plaintiffs he would be able to supply them with boxes; that boxes were coming in to the platform but they were going out to growers on the large trucks; that ninety-five per cent of the boxes were being delivered direct to the growers. Trucks would come in at night, unload and by morning there would be no boxes. He also stated he told plaintiffs he was not getting boxes because they were all tied up at the cannery. He denied having told plaintiffs they were too small as growers but admitted that he did say they were too far away. His further testimony was that he could not get trucks to deliver the boxes to them because such deliveries were outside the contract the defendant cannery had with the trucking company; that he had a verbal agreement with plaintiffs to do their own hauling of the boxes; that sometimes plaintiffs would come in to the platform in the morning and wait all day for boxes but with no success; that the cannery entered into contracts with other growers after the execution of plaintiffs' contracts and boxes were delivered to them and the tomatoes were accepted at the cannery.

At the conclusion of Moddison's testimony defendant again offered to prove by Cava that the labor shortage at the plant in Modesto was the reason for the failure to get boxes to Woodland. However, the court again sustained plaintiffs' objections to such testimony, which ruling the appellant assigns as error and sole ground for reversal.

The defendant's offer of proof with respect to the proposed testimony of the witness Cava included no evidence as to apportionment or attempted apportionment of the available boxes but related solely to the potential production of defendant's cannery under normal conditions and the reduced production at the time in question by reason of the alleged labor shortage. There is no showing that he could have testified as to any other matter, nor was there any attempt at the trial to show that he would have been able to testify on the question of proration, if any, of the boxes. From the record it appears that the only person who could have testified to such facts was the defendant's Woodland agent, Moddison, who was in charge of the platform from which the boxes were distributed. However, when Moddison was called as a witness for defendant, counsel made no attempt to introduce any such evidence then or at any stage of the proceeding. On the contrary the testimony of Moddison indicates that in fact there was discrimination rather than proration.

While it is true, as defendant contends, that Section 13 of its contract with plaintiffs provides that "in case * * * shortage of labor or supplies * * * affecting in any way the conduct of Buyer's business or canning operations, including any obligation * * * to furnish boxes * * *

Buyer will be excused from performance * * * and Buyer may * * * accept such portion of such tomatoes as Buyer, in its judgment, can economically handle", it also must be noted that by Section 11 defendant agreed, for the convenience of plaintiffs, to "furnish boxes * * * for the delivery of tomatoes * * * but shall not be liable for failure to do so beyond the exercise of reasonable effort and care."

It is the statutory law of this state that a contract must be read as a whole so as to give effect to each part if reasonably practical, with each clause helping to interpret the other. Civil Code, sec. 1641. Therefore Section 13 of the contract before us cannot be read to the exclusion of Section 11. In other words, in the event of the happening of any of the contingencies contained in Section 13 defendant would be excused from performance or if in "its judgment" it could "economically" handle only a portion of the tomatoes it could do so. Obviously under the facts herein defendant did exercise its judgment and determined that it could "economically handle" only a limited amount of tomatoes. However by Section 11 it also had agreed to furnish boxes to plaintiffs and could be held liable for failure to do so if it did not exercise "reasonable effort and care". From this it would seem to follow that a "shortage of labor" could be an excuse for nonperformance only if such contingency were the proximate cause of plaintiffs' damages.

Plaintiffs, however, allege and contend that their damage was the result of the failure of defendant to supply boxes as it agreed, thereby placing in issue the quoted portion of Section 11.

Defendant's agent Moddison himself testified that growers other than plaintiffs had boxes delivered directly to their farms pursuant to contracts identical with those here in issue. Even assuming that the portion of the contract by which defendant agreed to furnish boxes "at roadside" had either been waived by plaintiffs or that an oral agreement had been made modifying the same, as defendant's agent testified, whereby plaintiffs agreed to haul boxes to their property, nevertheless it is uncontradicted by the evidence that plaintiffs received no boxes and it is likewise uncontradicted that boxes were available and were supplied to other growers. Under such circumstances it cannot be said that defendant exercised "reasonable effort and care" to supply boxes to plaintiffs in accordance with the specific terms of said contracts.

Therefore, the contingency or circumstance which caused the nonperformance by defendant was not defendant's difficulty in obtaining adequate labor at its cannery, but rather its own voluntary act in the admitted discriminatory distribution of boxes at its Woodland loading platform.

[1] The question thus presented falls squarely within the rule stated in Section 464, subsection 1, Restatement of the Law of Contracts: "Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment to the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged * * *."

This same rule is likewise set forth in Williston on Contracts, Rev.Ed., Vol. 6, section 1962, p. 5506, where it is said: "Because of excusable impossibility a contractor may be unable to fulfill all of a number of similar obligations and yet could fulfill any one of those obligations if he totally disregarded the others. In such case the contractor is under a duty to apportion the possible performance prorate among the several contracts, if he is to be excused from further liability."

No case has been cited by counsel, nor has our research revealed any, wherein the specific question here in issue has been determined by the courts of this state. However, section 1514 of the Civil Code, though not directly in point, does, at least in theory, approve the rule of apportionment as mentioned and supports the conclusion we have reached herein.

Here the parties by virtue of the peculiar nature of the contracts and the type of activity involved, obviously contemplated that similar contracts would be made with other growers. Each of such contracts constituted part of an over-all plan known to all the growers, none of whom could reasonably believe that if future circumstances should prevent the complete performance of all the contracts he would be entitled to preferential treatment under his agreement or that the cannery at its own choosing might discriminate against him in favor of others. Considered from this view the parties clearly must have intended that in the event of the happening of one or more of the contingencies enumerated in section 13 of the contract which would result in only a partial impossibility, all of the growers with identical contracts would be affected equally, and there would be an apportionment of the supply of boxes consistent with the exercise of reasonable effort and care as stated in section 11.

Under the circumstances herein it would be as manifestly unfair to compel defendant to carry out in full its contract with plaintiffs to the exclusion of all others as it would be to allow defendant to carry out its contracts with some of the other growers and to escape its obligation to plaintiffs by proof of only a partial impossibility of performance.

The labor shortage relied upon by defendant was not such as to wholly stop defendant's activities. Its proffered testimony would have shown nothing more than reduced canning activities, which in no way could excuse its discrimination against plaintiffs—a fact admitted by its own agent. If defendant failed to equitably distribute the boxes, or failed to properly guard them to enable it to do so, then defendant alone was at fault. It was within its power, at least to a degree, to carry out its contracts with plaintiffs. Defendant knew it could not supply all of the boxes necessary, yet it chose to discriminate against plaintiffs to the benefit of other growers. Such acts were neither fair, reasonable nor proper under the circumstances.

Finally, it may be said that by reason of the testimony of its agent Moddison, even if defendant had been allowed to introduce the proffered testimony concerning a labor shortage, such testimony in no way could have changed the effect of its discrimination in the distribution of the boxes. Admittedly the cannery was not shut down completely, admittedly some boxes were available, admittedly some growers received them, and admittedly plaintiffs did not.

[2, 3] In the light of such uncontradicted facts how, then, can it be said that defendant's voluntary refusal to supply plaintiffs with boxes as it contracted to do, and its delivery of the same to other persons, rendered the contracts impossible of performance or excused its performance. As shown by defendant's own testimony it had precluded itself from performing its obligation to plaintiffs under this contract, either in whole or in part, by its discriminatory acts. There was no prejudicial error in the trial court's refusal to admit the evidence of a labor shortage.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

On Petition for Rehearing

PER CURIAM.

Appellant's petition for rehearing raises the point that the affirmance of the judgment of the trial court is erroneous in that on the basis of our holding the proper measure of damages should have been the difference between the amount actually received for the crop and what the plaintiff would have received had there been proration.

In our opinion filed herein we held that the plaintiffs' damage was shown to have been due to defendant's discrimination and failure to prorate. However, at the trial, the defendants offered no evidence to show that the extent of the plaintiffs' damage would have been other than the amount awarded in the event there had been proration.

[4] The question with respect to the question of damages not having been raised in the trial court cannot be urged for the

first time here on appeal, and the issue on this point does not affect the basis of our holding.

The petition for rehearing is denied.

Hearing denied; SCHAUER, J., dissenting.

80 Cal.App.2d 857

COUCH et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 7339.

District Court of Appeal, Third District, California.

July 16, 1947.

Rehearing Denied Aug. 13, 1947.

Hearing Denied Sept. 8, 1947.

1. Landlord and tenant 🔑169(11)

Where tenants' child was killed when it came in contact with energized wires protruding through floor of house owned by power company, whether defect was "latent", or whether electric company as landlord was without knowledge of its existence, so as to exonerate company of liability, was for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Latent Defect".

2. Appeal and error 🔑1010(1)

Where tenants' child was killed when coming in contact with electrically charged wires which were visible and bare, and at time tenants moved into the house an employee of the power company, which owned the house, had closed the switch energizing all the wires, a finding that power company had knowledge that the bare wires were charged was not erroneous.

3. Electricity 🔑13
Landlord and tenant 🔑164(1)

An electric power company, in the dual capacity of owner of house which it leased to tenant and of vendor of the electricity used therein, was charged with a greater responsibility, as respects its liability for injury due to contact with electrically charged wires, than it would have been as the mere landlord.

4. Electricity 🔑16(2, 5)

Wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom, and the proper care in respect thereto requires reasonably prompt and frequent inspection.

5. Death 🔑103(3)

Where tenants' child was killed when coming in contact with electrically charged wires protruding through floor of house owned by electric power company, whether tenants were guilty of contributory negligence which would bar recovery against power company was question for jury.

6. Negligence 🔑136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other

7. Appeal and error 🔑1004(1)

The remedy for excessive verdicts is practically committed to the trial judge who is authorized to weigh the evidence and who, it is presumed, will not allow a verdict for the full amount to stand if he believes it gives more than the pecuniary loss that plaintiffs may be reasonably supposed to suffer.

8. Death 🔑99(3)

$15,000 for the death of a child aged 10 months, which amount was fixed by the court in reducing verdict of $27,500, was not excessive.

9. Appeal and error 🔑1004(1)

The fact that the value of the dollar has materially decreased in recent years is recognized by appellate courts in refusing to reduce verdicts which formerly might have been considered excessive.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by John R. Couch and Gertrude Couch against Pacific Gas & Electric Company to recover damages for the death of plaintiffs' child allegedly caused by the negligence of defendant in the maintenance of uninsulated wires in a dwelling house belonging to defendant but rented to and occupied by plaintiffs. Verdict and judgment for plaintiffs and defendant appeals.

Affirmed.

Robert H. Gerdes, F. H. Pearson, W. R. Dunn, and Thomas J. Straub, all of San Francisco, and Laurence J. Kennedy, of Redding, for defendant-appellant.

Carlton & Shadwell, of Redding, for respondents.

PER CURIAM.

Plaintiffs brought this action to recover damages for the death of their child, aged 10 months, alleging that by reason of the negligence of defendant in its maintenance of uninsulated wires charged with electricity in the dwelling house belonging to defendant but rented to and occupied by plaintiffs, the said child was electrocuted by coming into contact with such wires. The action was tried before a jury and resulted in a verdict for plaintiffs in the sum of $27,500. On motion for a new trial the court reduced the damages to $188.31 allowed for funeral expenses, and $15,000 general damages. From the judgment entered accordingly defendant has prosecuted this appeal, contending that as landlord it was not liable, that plaintiffs were guilty of negligence contributing to the death of the child, that the verdict was so excessive as to indicate passion and prejudice, and that defendant's motion for a new trial should have been granted. No objection to any instructions given or refused is urged, or other errors asserted.

The evidence shows that defendant owned and operated Pit One power house in Shasta County, and also owned certain cottages at the plant which it rented to its employees, to whom it also sold electric current. In July, 1944, Mr. Couch, who had previously been employed as an electric welder, called upon H. W. Bertholas, defendant's district superintendent in charge of the plant, seeking a position, and was employed as an apprentice operator and mechanic. Arrangements were made with Bertholas for the Couch family to rent a designated cottage, and they arrived at the plant on the morning of July 16th. On the door of the designated cottage they found a note from Bertholas advising them to occupy temporarily another cottage which was indicated. Bertholas had already turned on the power in this cottage by throwing a switch on the back porch. In so doing he had energized three wires, the ends of which protruded from the floor in a small recess in the kitchen of the house, which wires had formerly been connected with a water heater which had been removed by the previous tenant. Mr. Bertholas, immediately after plaintiffs' arrival, went over the premises with Mr. Couch, showed him the electric switch, and told him how to hook up his electric stove. Couch went under the house and connected his stove, and at that time observed some loose wires which Bertholas told him were discarded hot water heater wires which were of no use as Couch did not have a water heater. Couch cut those loose wires, which were several feet from the location of the heater wires, and thought that he had cut those formerly attached to the heater. At no time did he know that the wires protruding from the floor in the kitchen were energized, and he was not told by any one that they were. On September 3rd, the child victim fell or stumbled onto the charged wires and was instantly electrocuted.

Appellant contends that as plaintiffs' landlord it was not liable for the death of the child because of defects in the rented premises; that as such landlord it was not its duty to inspect the premises with the object of locating latent defects which were unknown to it, or to repair patent defects; that the wires were obvious and their existence known to plaintiffs, and that it was their duty to ascertain whether they were charged, and in the meantime to assume that they were. Respondents reply by urging that defendant had knowledge that the wires carried electricity, that this was a latent defect, that defendant failed to warn plaintiffs, and was therefore liable as a landlord. Also that as a vendor of electricity, for which plaintiffs paid an extra charge, it was liable in such capacity as well, since it was its duty, as dispenser of such power, to insulate all wires which were exposed to the public; that it had failed to insulate the ends of the wires which protruded from the floor in the cottage and that it had energized them when Mr. Bertholas turned on the power in the house before plaintiffs entered it.

Appellant asserts that there was no hidden defect for the reason that the wires were obviously present and obviously bare; that the only unknown factor was whether they were charged, a factor as to which it had no knowledge. It relies upon Shotwell v. Bloom, 60 Cal.App.2d 303, 309, 140 P.2d 728, as stating the applicable law. In that case defendants were the owners of a house which was rented to plaintiffs. The latter, in order to warm the premises, lighted a fire in a fireplace, and subsequently the house burned, consuming plaintiffs' furniture. It was contended by plaintiffs that the destruction of the premises was proximately caused by a crack and loose bricks in the back of the fireplace, that these defects were latent, that their existence was known to defendants and unknown to plaintiffs, and that defendants had failed to warn them. Defendants contended that the evidence did not show that they had actual knowledge of the defects, if any, and that they were patent and not latent. The court stated that the general rule is that the landlord is not liable for injuries to the person or property of the tenant caused by defects in the leased premises; that, in general, the lessee takes the premises as they are, and that there is no duty on the part of the landlord to inspect with the object of locating latent defects nor to repair patent ones. However, the court also went on to say that there is a well settled exception to this rule; that if there is a hidden defect in the premises, or danger thereon, which is known to the lessor at the time of making the lease, but which is not apparent to the lessee, the lessor is bound to inform the lessee thereof, and failing to do so, he is liable for injuries to the tenant arising therefrom.

Appellant in the case before us asserts that under the general rule thus enunciated, it was not liable. Respondents contend that the evidence brings the case within the exception above stated, and is sufficient to show that the defect was latent and defendant had knowledge thereof.

Apparently, since plaintiffs and defendant rely upon the same authority, the difference between them, aside from the questions of contributory negligence and excessive verdict, resolves itself into this—was the defect latent, and was it known to defendant?

The trial court gave the following instructions to which no exception is taken:

"You are instructed that if you find the proximate cause of the death of Sandra Couch was a hidden defect on the rented premises, known to the defendant, and unknown to and not subject to discovery by the plaintiffs by the exercise of reasonable care and caution, and if you find that the plaintiffs were not guilty of any negligence proximately contributing to such death, I instruct you to return a verdict for the plaintiffs."

"You are instructed that the defendant, as a landlord, owed the following duty to the plaintiffs and the members of their family: if there were a hidden defect on the premises which was known to the defendant at the time of the letting of the premises to the plaintiffs, but which was not apparent to and would not be discovered by the plaintiffs in the exercise of reasonable care and caution, the defendant was bound to inform the plaintiffs of the hidden defect." (Given on the authority of Shotwell v. Bloom.)

"You are instructed the defendant in renting the premises was under the duty to advise or warn the plaintiffs of hidden defects in the premises, known to the defendant, and which were not apparent to and would not be discovered by the plaintiffs in the exercise of reasonable care and caution. In this case, therefore, if you find that at the time of the letting a hidden defect existed in the water heater wires, and that such condition was known to the defendant, and that the same was not apparent to and would not be discovered by the plaintiffs in the exercise of reasonable care and caution, I instruct you that the defendant under such circumstances would have the duty to inform the plaintiffs of the hidden defect and if it failed to do so it was guilty of negligence."

[1] Presumably the jury followed these instructions. It may therefore be assumed that it found that the defect was latent, that defendant knew of its existence and failed to warn plaintiffs, and that plaintiffs were not negligent. There is no contention by defendant before this court that the evidence is insufficient to sustain the verdict, and we cannot say as matter of law that the defect was not latent or that defendant was without knowledge of its existence.

In Tackett v. Henderson Brothers Co., 12 Cal.App. 658, 662, 668, 108 P. 151, 154, where a child was killed by contact with a loose wire which was charged with electricity, this court said that "the danger was hidden and concealed"; and it quoted from Mitchell v. Raleigh Elec. Co., 129 N.C. 166, 39 S.E. 801, 55 L.R.A. 398, 85 Am.St.Rep. 735, to the effect that electricity is "the most dangerous and deadly power recognized as a necessary agency in developing our civilization. * * * Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and, being odorless, the only means of its discovery lie in the sense of feeling, communicated through the touch, which, as soon as done, becomes its victim." Also see Stevens v. United Gas & Elec. Co., 73 N.H. 159, 60 A. 848, 851, 70 L.R.A. 119. While in the following cases the courts did not say in so many words that the presence of energy in a wire is a hidden danger, that it so considered it is implicit in the decisions themselves. See Reeve v. Colusa Gas & Elec. Co., 152 Cal. 99, 92 P. 89; Monroe v. San Joaquin Light & Power Co., 42 Cal.App.2d 641, 109 P.2d 720; Foley v. Northern Cal. Power Co., 14 Cal. App. 401, 112 P. 467; Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353.

Appellant says in its brief "There was no 'hidden defect' for the wires were obviously present and obviously bare. The only unknown factor was whether they were charged, a factor as to which appellant had no knowledge and therefore is not liable." This is in effect an admission that the presence of electricity in the wires was a hidden defect. In this connection appellant cites and relies upon Kearns v. Smith, 55 Cal.App.2d 532, 131 P.2d 36, as presenting a comparable situation. There the evidence showed that plaintiff rented an apartment from defendant, in the kitchen of which there was, in the ceiling, a single socket for an electric light. At one time this socket had been fitted with a pull chain, but during a previous tenancy the chain had been broken, and the tenant had screwed into the ceiling a removable double socket also fitted with a chain; but only one socket was fitted with an electric globe, the other being empty. At times the double socket would become loose and the current would be shut off, whereupon it became necessary to screw the double socket more tightly into the ceiling. To make this repair plaintiff mounted a stool and was engaged in screwing the double socket into the ceiling when she inadvertently inserted her finger into the empty socket protruding from its side and suffered a slight electric shock which caused her to fall from the stool. She sustained injuries from the fall, and sued the landlord for the resulting damages, contending that the defect was latent and known to the landlord. The court held, however, that the defect was not latent, but patent and open; that a landlord is not liable for injuries to a tenant from open and obvious defects in the premises—if the open socket could be considered a defect at all.

We do not consider that case as comparable, however. It must be conceded in the case before us that the existence of the wires protruding from the floor was obvious to both landlord and tenant alike. But the death of the child was caused, not by the wires, but by the current with which they were charged; and that they were energized was not apparent. In the Kearns case, that both sockets of the double socket carried the current was known and obvious from the double socket itself, and from the fact that the globe in the one part of it was in use.

[2] As to whether defendant in the instant case had knowledge that the wires were charged, the verdict of the jury implies a finding that it did. There is evidence that Bertholas knew, when plaintiffs moved into the house, that the previous tenant had owned a water heater which he had removed, and which had stood in the recess in the kitchen where the wires protruded; and that Couch had no water heater. The evidence also shows that when Bertholas closed the switch on the back porch of the house, which he did before plaintiffs became tenants of the premises, he energized all of the wires, including those which had been connected with the water heater; that there was a distribution panel on the back porch by the use of which the current to the water heater wires could have been shut off separately, but that Bertholas did not make use of it; and when he closed the main switch he energized the whole house. He admitted that when he went through the building after the arrival of the Couch family he saw the protruding wires and considered them a hazard, but did nothing about them. He also testified that it was company practice for the workman who energized the circuits in the company's houses to "inspect and clear them up," but that when he turned on the power in the house assigned to Couch he did not do this. He also testified that he called Couch's attention to the wires and told him "That *we* would have to take care of them." (Italics ours). In this state of the record we cannot say that defendant was without knowledge that the wires in question were energized. Certainly defendant was in possession of sufficient knowledge to put it upon inquiry, and as was said in Tackett v. Henderson Brothers Co., supra, 12 Cal.App. at page 662, 108 P. at page 152, "in view of the character of the agency with which they were dealing, and the solicitude of the law for human life, the failure to exercise diligent and proper care to obtain information is equivalent to actual knowledge of the situation, as far as their civil liability is concerned."

Also see Stanley v. Lander, 3 Cal.App.2d 284, 289, 39 P.2d 225, quoting from Tiffany on Landlord and Tenant, page 568, where it is said: "The view that the lessor's liability as for negligence exists when he has reason to suspect the existence of the dangerous conditions as well as when he actually knows of them is asserted or indicated in other cases, and accords with the rule, ordinarily applied, in determining questions of negligence, when this is dependent on knowledge of physical conditions, that one has knowledge of that which he ought to know. It may be doubted, indeed, whether the statements occasionally made that the lessor is not liable unless he has actual knowledge of the dangerous conditions are to be regarded as excluding his liability when he has reason to suspect their existence though without actual knowledge thereof. Were the lessor to be regarded as liable only on proof of his actual knowledge of the defects or dangers, he might, by purposely refraining from inquiry into the presence of dangerous conditions, though having reason to believe that such exist, entirely escape liability."

[3, 4] It might be added that, while under the landlord and tenant rule the evidence is sufficient to sustain the verdict, defendant was, in this case, not only the landlord but the vendor of electricity. It owned the house which it assigned to plaintiffs, and it also owned and controlled the electric system therein; it failed to insulate the heater wires, and it energized them and thus created the hazard which caused the accident, before plaintiffs became the occupants. In its dual capacity it was charged with a greater responsibility than it would have had as the mere landlord. While still in the sole possession of the property it could have averted the catastrophe by insulating the ends of the protruding wires, by excluding the current from them by use of the switch in its distribution box, or by cutting the wires. As we pointed out in Lozano v. Pacific Gas & Electric Co., 70 Cal.App.2d 415, 161 P.2d 74, the duty of a power company regarding electric wires and equipment requires reasonably prompt and frequent inspection, and failure to comply with this rule charges it

with notice of a defective or dangerous condition. In Polk v. City of Los Angeles, 26 Cal. 2d 519, at page 525, 159 P.2d 931, it was said, that wires carrying electricity must be carefully and properly insulated by those maintaining them, at all places where there is a reasonable probability of injury to persons or property therefrom. And in City of Marlow v. Parker, 177 Okl. 537, 60 P.2d 1044, 1046, the court said that care includes circumspection and foresight with regard to reasonably probable contingencies. Also see McCormick v. Great Western Power Co., 214 Cal. 658, 662, 663, 8 P.2d 145, 81 A.L.R. 678; Anderson v. Southern California Edison Co., 77 Cal. App. 328, 336, 337, 246 P. 559.

That a high degree of care is required by one who is operating a dangerous instrumentality such as transmission wires for electricity was held in Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 638, 265 P. 487, and cases there cited. In other cases it has been said that such person must exercise "very great care." (Anderson v. Southern California Edison Co., supra [77 Cal.App. 328, 246 P. 562]; Giraudi v. Electric Imp. Co., 107 Cal. 120, 124, 40 P. 108, 28 L.R.A. 598, 48 Am.St.Rep. 114.) In Fairbairn v. American River Electric Co., 170 Cal. 115, 118, 148 P. 788, the court said that where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it.

[5] Appellant argues briefly that plaintiffs were guilty of contributory negligence; but we cannot say as matter of law that such was the case. That question was one for the jury to determine under the instructions of the court. It is not contended that the instructions were either erroneous or insufficient, and we must assume that they were followed and that the jury found that plaintiffs were not guilty of contributory negligence. The burden of proving contributory negligence was on the defendant, and the question of the sufficiency of the evidence for that purpose is ordinarily one of fact for the jury.

Plaintiffs were not bound to look for latent defects—in this case that the wires were energized. Couch was not told that they were; they appeared to be out of use. Furthermore, Couch testified that while under the house connecting up his electric stove he saw some loose wires hanging under the floor, which he cut off; that he asked Bertholas what they were and was told that they "were discarded heater wires or hot water heater wires," that they "were discarded and of no use"; that he thought when he cut them off that he had cut the ones which had been connected with the water heater. He was not an electrician and was able to connect his stove only under instructions from Bertholas. He was not shown the distribution panel on the back porch, and did not know what it was, or that the power to the heater wires could be cut off there. While there was some conflict between the testimony given by Couch and that of Bertholas, such conflict was for the jury.

[6] It is said in Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829: "The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697–699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

Here it cannot be said that the evidence is without conflict on the facts, or that inferences therefrom point unerringly to negligence on the part of plaintiffs.

Also see Polk v. City of Los Angeles, supra; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Campbell v. Fong Wan, 60 Cal.App.2d 553, 141 P.2d

43; Anderson v. Southern California Edison Co., supra; Lozano v. Pacific Gas & Electric Co., supra; Reuter v. Hill, 136 Cal.App. 67, 74, 28 P.2d 390; Reeve v. Colusa Gas & Electric Co., supra, 152 Cal. at page 110, 92 P. at page 89; Howell v. San Joaquin Light & Power Corp., 87 Cal.App. 44, 56, 261 P. 1107; Foley v. Northern California Power Co., supra; Roberts v. Pacific Gas & Electric Co., supra, 102 Cal.App. at page 434, 283 P. at page 353; City of Thomaston v. Atkinson, 25 Ga.App. 615, 103 S.E. 876; Southern Bell Telephone & Telegraph Co. v. Davis, 12 Ga.App. 28, 76 S.E. 786, 790, 791; Lewis' Administrator v. Bowling Green Gaslight Co., 135 Ky. 611, 117 S.W. 278, 279, 22 L.R.A.,N.S., 1169. In the Roberts case, supra [102 Cal.App. 422, 283 P. 357], the court said, regarding the conduct of plaintiff: "As a reasonable man, he may have assumed that wires which were pulled down to the ground and lay beneath the fallen tree were either broken or carried no load of electricity. Under the circumstances of this case, the existence of contributory negligence was a question for the jury to determine."

[7-9] Appellant's final contention is that a new trial should have been granted because the verdict was so excessive as to indicate that it was the result of passion and prejudice. We cannot say that the sum allowed by the court is excessive. In the recent case of Brown v. Boehm, 78 Cal.App.2d 595, 178 P.2d 49 (hearing in Supreme Court denied) we had occasion to consider the question of excessive verdicts, and there held that the remedy for such verdicts is practically committed to the judge who presides in the court below, who is authorized to weigh the evidence and who, it is presumed, will not allow a verdict for the full amount to stand if he believes it gives more than the pecuniary loss that plaintiffs may be reasonably supposed to suffer. Here the trial court performed that duty and reduced the amount of the verdict. Under the decisions cited in the Brown case, we cannot say that the amount fixed by the court is excessive. As there pointed out, the value of the dollar has materially decreased in recent years, and that fact has been recognized by appellate courts in refusing to reduce verdicts which formerly might have been considered excessive.

The judgment is affirmed.

Hearing denied; TRAYNOR, J., dissenting.

80 Cal.App.2d 756

In re THRAMM'S ESTATE.

CLARK, U. S. Atty. Gen., v. TILSNER et al.

Civ. 15714.

District Court of Appeal, Second District, Division 1, California.

July 8, 1947.

1. Wills ⚷439

A testamentary instrument should be examined with a view to discovering the decedent's testamentary scheme or general intention to which particular words, phrases and provisions must be subordinated. Probate Code, §§ 101, 105.

2. Wills ⚷441

The intention of the testatrix must be determined from the words used in the light of the circumstances at the time they were so used. Probate Code, §§ 101, 105.

3. Wills ⚷658

Where holographic will made when United States and Germany were at war made bequests in favor of German nationals and residents and directed that estate should be settled a year after testatrix' death and that "If it is impossible to do so, with Germany, then everything should go" to designated American citizens and residents, testatrix intended that if because of the war her estate could not be settled within a year then bequests to German nationals should go to American nationals. Trading with the Enemy Act, § 7(d), 50 U.S.C.A. Appendix, § 7(d).

4. Wills ⚷658

Where holographic will made when United States and Germany were at war made bequests in favor of German nationals and residents and directed that estate should be settled a year after testatrix' death and that "If it is impossible to do so, with Germany, then everything should go" to designated American citizens and residents, the word "settled" should be considered in connection with the clause "If it is impossible to do so, with Germany" and since the will was written by a layman not possessed of technical legal knowledge the word must be interpreted not in a technical sense but by a consideration of the circumstances under which it was used and with the further view of not defeating the general intention of the testatrix. Trading with the Enemy Act, § 7(d), 50 U.S.C.A.Appendix, § 7(d).

5. Wills 🔑658

Where holographic will made when United States and Germany were at war made bequests in favor of German nationals and residents and directed that estate should be settled a year after testatrix' death and that "If it is impossible to do so with Germany then everything should go" to designated American citizens and residents, the court properly determined that by the word "settled" the testatrix meant that if the war with Germany prevented actual payment, distribution and delivery of the bequests.

See Words and Phrases, Permanent Edition, for all other definitions of "Settled".

6. Aliens 🔑16

Amendment to probate code relating to burden of proving existence of reciprocal rights of American nationals to take by succession or testamentary disposition estates of persons dying within other countries was not applicable to a case where the entire controversy had been tried, submitted to the court, and a memorandum opinion rendered by the court prior to the effective date of such amendment. Probate Code, §§ 259 to 259.2.

7. Aliens 🔑16

The amendment to Probate Code relating to burden of proving existence of reciprocal rights of American nationals to take by succession or testamentary disposition the estates of persons dying in other countries operates only prospectively. Probate Code, §§ 259 to 259.2.

8. Statutes 🔑263

In the absence of a clearly expressed legislative intent to the contrary, every statute will be construed to operate prospectively and will not be construed to affect pending proceedings unless such intention is expressly declared or necessarily implied from its language.

9. Constitutional law 🔑189

The legislature is without power to impair or destroy the obligations of contractual or vested rights and any statute which affects a vested right cannot be given retrospective operation.

10. Constitutional law 🔑190
Wills 🔑733(1)

Rights under will vested immediately upon death of testatrix and such rights could not be affected by a statute which was passed some two years later.

11. Appeal and error 🔑877(2)

Where right of Attorney General of the United States as successor to the Alien Property Custodian was entirely dependent upon the rights of German nationals under will, the Attorney General could not complain of inconsistent findings of trial court where under either finding he could not participate in distribution of testatrix' estate.

12. Appeal and error 🔑877(2)

An appellant cannot complain of errors affecting other parties who did not appeal.

13. Aliens 🔑7, 14

The validity of bequest by American citizen to German nationals was governed by the laws of the state of testatrix' domicile. Probate Code, § 259; U.S.C.A.Const. art. 1, § 8, cl. 11, § 10, cl. 1.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Maria Thramm, wherein Tom C. Clark, Attorney General of the United States, as successor to the Alien Property Custodian, claimed certain property which had been bequeathed to German nationals and residents, which claim was opposed by Otto Tilsner and others. From an adverse judgment, the Attorney General appeals.

Judgment affirmed.

John F. Sonnett, Asst. Atty. Gen., James M. Carter, U. S. Atty., and Ronald Walker and Clyde C. Downing, Asst. U. S. Attys., all of Los Angeles, Harry LeRoy Jones and M. S. Isenbergh, Sp. Assts. to Atty. Gen., and David Schwartz and David E. Feller, both of Washington, D. C., for appellant.

Benj. S. Parks and Robert M. Porter, both of Los Angeles, for respondents.

WHITE, Justice.

Tom C. Clark, Attorney General of the United States, as successor to James E. Markham, Alien Property Custodian, appeals from a decree of distribution denying the rights of the Alien Property Custodian to payment of bequests made to Ernst and Walter Thramp in the will of Maria Thramm, deceased.

The testatrix died in Los Angeles County, California on June 7, 1943, and her holographic will was admitted to probate in said county on July 6, 1943, and letters testamentary issued thereon to the Bank of America.

In so far as pertinent to the issues involved on this appeal, the provisions of the will are as follows: "To Mr. Ernest & Walter Thramp now living in Berlin, Germany, 37 Steinmetz Str. $2,000 each and if they be deceased to their heirs. Also my husband's watch, his Mother's diamot ring, cuff buttons and old ring should go to Ernest & Walter Thramp."

Following some eleven additional bequests to American nationals and after listing her assets, the decedent then provided: "A year after my death my estate should be settled. If it is impossible to do so, with Germany, then everything should go to my brothers Otto & Fred Tilsner and their children."

Finally, the will provided: "If my estate at the time of my death exceed the amount bequeathed then the balance is to be equally dividet between my brothers children Otto & Fred Tilsner".

On May 10, 1945, the executor filed its Second and Final Account, Report and Petition for Distribution which was set for hearing on May 31, 1945, after due notice of hearing had been given to the Alien Property Custodian, appellant herein, and to the attorneys for Ernest and Walter Thramp. Because Ernest and Walter Thramp are German nationals residing in Germany, the Alien Property Custodian on May 24, 1945 filed in this estate "Vesting Order number 4956" (10 Fed.Reg. 6471), vesting in himself all their right, title and interest in the estate of Maria Thramp, and after said last-mentioned date the Alien Property Custodian appeared herein as the successor in interest of the aforesaid two German nationals. On October 14, 1946 the Attorney General of the United States, by virtue of Executive Order No. 9788, 50 U.S.C.A.Appendix, § 6 note (11 Fed.Reg. 11981) succeeded to all the duties and powers of the Alien Property Custodian.

Following approval and settlement of the Executor's Account, the petition for distribution came on for hearing, at which time evidence was introduced, the matter was argued and submitted to the court.

On August 3, 1945, the court filed a memorandum opinion holding that sections 259, 259.1 and 259.2 of the Probate Code were constitutional, and that because of these code sections, Ernest and Walter Thramp, being residents and nationals of Germany, could not inherit; that because the estate could not be settled within one year, the conditional bequest became effective. Distribution of the respective bequests to the two German nationals was ordered made to Otto and Fred Tilsner and their children.

On September 15, 1945, an amendment to section 259 of the Probate Code became effective, and thereafter and prior to the settlement of the formal findings of fact and judgment pursuant to such memorandum opinion, the court without notice to the parties made an order under date of October 24, 1945, restoring the cause to the calendar for further hearing on the basis that the amendment to section 259 of the Probate Code operated retrospectively on a matter wherein the trial had already been completed. Respondents made a motion to set aside this ex parte order of October 24, 1945, which motion after due notice of hearing was heard and the matter argued on the 30th day of November, 1945, and the court thereafter made its order vacating the said ex parte order of October 24, 1945, and ordered preparation of findings of fact and judgment in accordance with the original memorandum opinion. Findings of fact and judgment in accordance with such order and such original memorandum opinion were signed by the court and filed herein on April 1, 1946.

It is first contended by appellant Attorney General of the United States that the court erred in its interpretation of the clause in decedent's will reading: "A year after my death my estate should be settled; if it is impossible to do so, with Germany, then everything should go to my brothers Otto & Fred Tilsner and their children".

In this regard the probate court by its findings interpreted this clause to mean: "That if relations existed between the United States and Germany one year after the date of the decedent's death, which occurred on June 7, 1943, preventing actual payment, distribution and delivery to Ernst and Walter Thramp, or their heirs, at that time in person, of the bequests made to them, that then and in that event the property should be distributed to her brothers Otto and Fred Tilsner, and their children, share and share alike. The Court further finds that the United States and Germany were at war on June 7, 1943, and continuously for more than one year thereafter, so that it was impossible to make actual payment, distribution and delivery to Ernst and Walter Thramp, or their heirs, in person, of the properties and monies bequeathed to them pursuant to the last will and testament of the decedent, and that by reason thereof and in accordance with the terms and conditions of the last will and testament of the decedent the bequest therein made to Ernst and Walter Thramp failed and the same and the whole thereof, in accordance with the terms and condition of said will, became and was payable to and distributable to Otto and Fred Tilsner, and their children, Marie Lee Johnson, Walter C. Tilsner, Howard J. Tilsner, Arthur F. Tilsner, Herbert L. Tilsner and Arthur E. Tilsner, share and share alike."

Appellant earnestly urges that this construction goes far beyond the meaning of the words actually used by the testatrix in that it construes the foregoing clause to mean that the bequests to Ernst and Walter Thramp, *and those bequests only,* were to be revoked if conditions "with Germany" were such that bequests were not actually distributed to them *personally* within one year. With this claim of appellant we cannot agree. A will is to be construed according to the intention of the maker (Probate Code, section 101), "and when an uncertainty arises upon the fact of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, *taking into view the circumstances under which it was made* * * *". Probate Code, section 105. (Emphasis added.)

[1] A testamentary instrument should be examined with a view to discovering the decedent's testamentary scheme or general intention. And the apparent meaning of particular words, phrases and provisions is to be subordinated to this scheme, plan or dominant purpose. Estate of Somerville, 38 Cal.App.2d 463, 468, 101 P.2d 533.

[2, 3] With the aforesaid particular clause of the will now engaging our attention before us, we must attempt to determine the intention of the testatrix from the words she used, in the light of the circumstances under which the document was made. It was a holographic will. It was made on February 3, 1942, at a time when the United States of America was at war with Germany. The testatrix made only one bequest to persons who were not citizens and residents of the United States, and that bequest was the aforesaid bequest to Ernst and Walter Thramp and their heirs, all of whom were nationals and residents of Germany. Under these circumstances surrounding the making of her will, we do not have to "delve into the secret workings of the mind of the testatrix" as urged by appellant, to ascertain from the wording of the will, in the light of the foregoing circumstances, that it was her intention that if, because of the war with Germany, her estate could not be settled within one

year then the bequest and the only bequest she made to nationals and residents of Germany was to go to her brothers Otto and Fred Tilsner and their children, all of whom were citizens and residents of the United States, whose rights not only to inherit but to receive such bequests were not affected or impaired by the war with Germany.

[4] It is next argued by appellant that the provision in the will "a year after my death my estate should be settled" is so uncertain as to be of no effect for the reason, asserts appellant, that "there were several ways by which the estate could have been settled, viz.: by payment of the bequests to the German nationals to the Alien Property Custodian as provided for in section 7(d) of the Trading with the Enemy Act [50 U.S.C.A.Appendix, § 7(d)], or by depositing the said bequests in a blocked account, pursuant to Executive Order number 8389 [12 U.S.C.A. § 95a note] 6 Fed. Reg. 2897." The estate was not settled within a year. In determining what the testatrix meant by her use of the word "settled" in the last-mentioned phrase of her will, consideration should be given to the words which follow, reading: "If it is impossible to do so, with Germany". Being a holographic will, manifestly written by a person not possessed of technical legal knowledge, the word must be interpreted not in a technical sense, but by a consideration of the circumstances under which it was used in the making of the testamentary document (Estate of Mayne, 28 Cal.App.2d 340, 342, 82 P.2d 504; Probate Code, sections 105, 106), and with a further view of not defeating the general intention of the testatrix.

[5] In its determination that what the testatrix meant by the word "settled" was that if the war with Germany prevented "actual payment, distribution and delivery" of the bequests, the trial court was justified. In view of the circumstances surrounding the making of the will, the trial court was warranted in concluding from the words used that the express intention of the testatrix was that if her relatives could not receive their respective bequests, then her relatives in the United States should receive them. Manifestly, the language of the testatrix, viewed in the light of circumstances surrounding the making of the will and her general testamentary scheme and plan, negatives any logical inference or conclusion that it was her intention that under any circumstances the bequests to her relatives in Germany should go to some governmental agency such as the Alien Property Custodian. To us it clearly appears from the language of the will that the intention of the testatrix and her general testamentary plan and scheme was that her property was, in any event, to go to her relatives. And if the war with Germany prevented delivery of the bequests to her relatives residing in Germany then such bequests should go to her relatives in the United States. The interpretation by the probate court of the aforesaid questioned language in the will finds ample support in law, reason and logic.

The court further found that on June 7, 1943 (date of death of the testatrix) residents and citizens of the United States did not possess the right, by treaty or otherwise, "to take upon the same terms and conditions as residents of Germany, by succession or by testamentary disposition, estates of real or personal property or the proceeds thereof of persons dying within the country of Germany; nor have they had the right to receive payment or delivery to them within the United States and its territories of monies or personal property or the proceeds of real property originating from such estates; that no reciprocal rights as defined by or set forth in sections 259 and 259.1 of the Probate Code of the State of California, existed either at the time of the death of the decedent or at any time thereafter between citizens and residents of the United States and residents and citizens of Germany, and that by reason of such fact any bequests, devises or legacies made by the decedent herein under and by virtue of her last will and testament on file herein to aliens, nationals, residents and citizens of Germany were and are entirely void and of no force or effect for any purpose whatever, and that the portion of decedent's estate so devised to such aliens, nationals, residents and citizens of Germany by said last will and testament upon the death of the decedent, in accordance with the terms and conditions of the last will and testament of the decedent, became payable to and distributable to Otto and Fred Tilsner, and to their children, Marie Lee Johnson, Walter C. Tilsner, Howard J. Tilsner, Arthur F. Tilsner, Herbert L. Tilsner and Arthur E.Tilsner, share and share alike."

It is conceded that the testatrix at the time of her death was a citizen and resident of the United States, and the court found that the above-named Otto and Fred Tilsner and their children are and each of them is a citizen and resident of the United States. That the aforementioned Ernst and Walter Thramp and each of them, as well as their heirs are and each of them is an alien German national and resident of Germany.

The California statutes under consideration with reference to the just-mentioned findings (Probate Code, Secs. 259, 259.1 and 259.2) provided in section 259.1 that the burden of proving the existence of the reciprocal rights dealt with in section 259 was upon the "non-resident alien". This section was amended in 1945 (Stats.1945, ch. 1160, sec. 1) to provide that "It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. * * *"

The amendment became effective on September 15, 1945, which date was subsequent to the filing of the final account and petition for distribution, and approval and settlement of the account. The effective date of the amendment was also subsequent to the introduction of evidence and submission to the court of the petition for distribution. The effective date of the amendment was also subsequent to August 3, 1945, when the court filed a memorandum opinion holding not only that because the estate could not be settled within one year the conditional bequest hereinbefore referred to became effective, but that sections 259, 259.1 and 259.2 of the Probate Code were constitutional, and that because of these sections the aforesaid German nationals could not inherit. The effective date of the amendment was, however, prior to the signing and filing of the findings of fact and decree herein on April 1, 1946.

Appellant contends that the last-mentioned findings are erroneous under the law in effect when they were signed and filed. That since no evidence had been introduced on the question of reciprocity the court's findings depended solely upon the statutory provisions as to the location of the burden of proof. That the statute having been amended prior to the signing and filing of the findings, it was the duty of the court to apply the amendment and the presumptions therein provided in making its decision.

[6, 7] Assuming the correctness of appellant's argument that the amendments to sections 259, 259.1 and 259.2 of the Probate Code were purely procedural in so far as that portion thereof pertaining to the burden of proof is concerned, nevertheless they could not be made applicable to this case since the entire controversy had been tried, submitted to the court and a memorandum opinion rendered by the court prior to the effective date of the amendments. The amendment which changed the location of the burden of proof on the question of reciprocity relates wholly to what must be done upon the trial or hearing of any petition for distribution. Manifestly, it applies only to trials or hearings which take place after its enactment and can have no effect whatsoever upon trials previously had. It operates only prospectively. Since this cause was tried under the presumptions in force at the time of trial, and before the effective date of the amendment, such amendment would not govern nor invalidate procedural steps taken before its effective date. Estate of Patterson, 155 Cal. 626, 638, 102 P. 941, 26 L.R.A.,N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625;

Dunlap v. United States, D.C., 43 F.2d 999; East Pratt Coal Co. v. Jones, 16 Ala.App. 130, 75 So. 722, 724; People v. Chalmers, 5 Utah 201, 14 P. 131.

[8] In the absence of a clearly expressed legislative intent to the contrary, every statute will be construed to operate prospectively, and will not be construed to affect pending proceedings unless such intention is expressly declared or necessarily implied from its language. Gates v. Salmon, 28 Cal. 320; Vanderbilt v. All Persons, 163 Cal. 507, 126 P. 158; East Bay Municipal Utility Dist. v. Garrison, 191 Cal. 680, 218 P. 43; Montecito County Water Dist. v. Doulton, 193 Cal. 398, 224 P. 747; People v. Allied Architects' Ass'n, 201 Cal. 428, 257 P. 511; Blade v. Superior Court, 102 Cal.App. 375, 283 P. 81. Here there is no such declaration, nor is the intention necessarily implied from the language of the amendment. The construction contended for by appellant would work an injustice to parties to the pending litigation, a result which cannot be presumed the legislature intended. In view of the authorities it is our conclusion that the amendment should not be given a retroactive operation.

[9] Furthermore, the legislature is without power to impair or destroy the obligations of contractual or vested rights, and any statute which affects a vested right cannot be given retrospective operation. Estate of Wellings, 197 Cal. 189, 195, 240 P. 21; Estate of Arms, 186 Cal. 554, 563, 199 P. 1053.

[10] The amendment here in question was not in force until September 15, 1945. The testatrix died June 7, 1943, and the rights herein involved became vested immediately upon her death. Hence, the amendment does not affect any of those vested rights in any manner. The new statute has changed the burden of proof and imposed a presumption against the resident heirs' rights of inheritance, which prior to that time had been a presumption in their favor, thereby affecting their right, which was vested, to receive the property without the necessity of such proof. Reciprocal rights, as defined by the new statute, eliminate many conditions which were essential to inheritance under the old statute, thereby broadening the possibility of the alien inheriting, all in derogation of the vested rights of the resident heir.

Were the statute, as amended, to be applied to the case at bar, it would completely deprive the resident heirs of vested rights, in that it provides that a petition for the determination of reciprocal rights *must be filed prior to the hearing on any petition for distribution,* which requirement was not in the former statute, and the new statute made no provision for protecting the rights of heirs who had not filed their petition prior to the filing of a petition for distribution. In the instant case the petition for distribution had been filed May 10, 1945, the hearing on the petition had been had, the cause submitted July 12, 1945, and the court had ordered judgment on August 3, 1945. The amendment to the statute did not become effective until September 15, 1945. Obviously it was too late to file a petition for determination of existence of reciprocal rights in this case *prior* to the hearing of the petition for distribution.

[11, 12] Appellant's claim that the court's findings are inconsistent in that a different distribution must be ordered in the event it be found that the German nationals are deprived of their legacies by virtue of section 259 of the Probate Code than if such deprivation was occasioned by the court's interpretation of the will, is unavailing. Since appellant's interest is entirely dependent upon the German nationals having some interest in the estate, he is not injuriously affected, because both or either findings prevent distribution to him. He cannot be heard to complain of errors affecting only other parties to the proceedings who do not appeal. De Arman v. Connelly, 134 Cal.App. 173, 181, 25 P.2d 24; 2 Cal.Jur. 840-842.

Finally, appellant earnestly insists that section 259 of the Probate Code dealing with reciprocal rights of nonresident aliens to land and personal property by inheritance or succession is void and unconstitutional because the California statute invades the domain of foreign affairs which is the exclusive prerogative of the federal government, and fully occupied by it. The federal power invoked by appellant is based upon the provisions of the Federal Constitution investing the treaty-making power in the federal government (Const.U.S., art. I, sec. 8, clause 11); and the provisions of the Constitution which prohibit states from entering into treaties with other powers (Const.U.S., art. I, sec. 10, clause 1).

These claims of appellant in so far as the instant case is concerned, were decided adversely to him by the Supreme Court of the United States in Clark v. Allen, 67 S.Ct. 1431, 1438, wherein the court said:

"We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals. We do not know from the present record the nationality of Alvina Wagner. But since the issue arises on the Government's motion for judgment on the pleadings, we proceed on the assumption less favorable to it, viz., that she was an American citizen.

"Fourth. It is argued, however, that even though the provision of the treaty is inapplicable, the personalty may not be disposed of pursuant to the California statute because that statute is unconstitutional. Issues under the Fourteenth Amendment are not raised as in Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255. The challenge to the statute is that it is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government. That argument is based on the fact that under the statute the right of non-resident aliens to take by succession or testamentary disposition is dependent upon the existence of a reciprocal right on the part of citizens of the United States to take personalty on the same terms and conditions as residents and citizens of the other nation. The argument is that by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an offer of reciprocal arrangements is said to be a matter for settlement by the Federal Government on a nation-wide basis.

"In Blythe v. Hinckley, 180 U.S. 333, 21 S.Ct. 390, 45 L.Ed. 557, California had granted aliens an unqualified right to inherit property within its borders. The alien claimant was a citizen of Great Britain with whom the United States had no treaty providing for inheritance by aliens in this country. The argument was that a grant of rights to aliens by a State was, in absence of a treaty, a forbidden entry into foreign affairs. The court rejected the argument as being an extraordinary one. The objection to the present statute is equally far fetched.

"Rights of succession to property are determined by local law. See Lyeth v. Hoey, 305 U.S. 188, 193, 59 S.Ct. 155, 158, 83 L.Ed.119, 119 A.L.R. 410; Irving Trust Co. v. Day, 314 U.S. 556, 562, 62 S.Ct. 398, 401, 86 L.Ed. 1734, 137 A.L.R. 1093. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. Hauenstein v. Lynham, supra [100 U.S. 483, 25 L.Ed. 628]. Then the state policy must give way. Cf. Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581. But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country, United States v. Curtiss-Wright Corp., 299 U.S. 304, 316, 317, 57 S.Ct. 216, 219, 81 L.Ed. 255, or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution. What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

[13] In the case now engaging our attention, the testatrix was an American citizen and the testamentary disposition to the German nationals was of personal property. Under the decision just cited, such testamentary disposition is governed by the laws of the state of California.

For the foregoing reasons, the decree appealed from is affirmed.

YORK, P. J., and DORAN, J., concurs.

KIRCHER v. ATCHISON, T. & S. F. R. CO. *

Civ. 15343.

District Court of Appeal, Second District,
Division 3, California.
July 29, 1947.

Hearing Granted Sept. 25, 1947.

1. Railroads 🔑274(2)

Those who go to railway stations to meet passengers or bid them farewell are "business visitors" since it is part of business of railway to afford guests and passengers such conveniences.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Visitors".

2. Railroads 🔑274(2)

In determining railroad's liability for loss of plaintiff's hand under a train at station, plaintiff who was on station for purpose of meeting friends arriving on train was "invitee" notwithstanding he did not have an appointment or agreement with his friends to meet them and notwithstanding that they did not arrive as he expected.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

3. Railroads 282(8)

In action against railroad for injuries to invitee on station, sufficiency of evidence that condition of pavement on night of accident was substantially as described by plaintiff's witnesses and whether pavement was not reasonably safe for use under conditions obtaining on night of accident were for jury.

4. Appeal and error 🔑1003

Unless under undisputed physical facts accident could not possibly have been due to defendant's negligence as alleged, judgment in favor of plaintiff must be affirmed and it is not sufficient that story told by plaintiff and his witnesses may be improbable since it is for jury or trial judge to weigh probabilities.

5. Appeal and error 🔑1003

The appellate court cannot reverse on ground that finding of negligence is contrary to the evidence unless appellate court can see that fact as found contravenes recognized physical laws so that it is impossible that accident could have been due to negligence alleged in complaint.

6. Appeal and error 🔑987(1)

The jurisdiction of appellate court on appeal is limited to questions of law.

7. Trial 🔑139(1), 140(2)

The weight of plaintiff's testimony and his credibility were for jury.

8. Evidence 🔑589

Where plaintiff's testimony was not incredible in light of entire evidence jurors were not precluded from giving greater weight to it than was accorded opposing evidence whether direct or circumstantial.

9. Railroads 🔑282(8)

In action against railroad for loss of plaintiff's hand under defendant's train, wherein plaintiff testified that he came to meet friends, that he started to jog on station platform toward rear of train looking through windows, that his left foot went into a hole in pavement and that he stumbled and hit his head against a blunt object being rendered unconscious, whether accident happened as plaintiff testified was for jury as against contention that accident could not physically have happened as testified to by plaintiff.

10. Appeal and error 🔑933(1)

Where motion for new trial has been denied, attack upon sufficiency of evidence to support verdict is not upon decisions of jury alone but upon those of trial judge as well and it is to be presumed that trial judge seriously performed his duty.

11. Appeal and error 🔑1005(4)

In case involving difficult questions of fact, reviewing court will accord considerable weight to decision of trial judge in denying motion for new trial since denial implies that trial judge has given thorough consideration to the evidence by which the facts have been developed and has determined that verdict was not contrary to preponderance of the evidence.

12. Appeal and error 🔑1001(2)

Even if appellate court were of opinion that jury reached an erroneous conclusion appellate court would not be justified in reversing judgment unless it could say that determinative question of fact was one upon which reasonable minds could not differ.

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* Subsequent opinion 195 P.2d 427.

13. Railroads ⚷278(1)

In determining railroad's liability for injuries to person who came to station to meet arriving friends and stumbled in hole being rendered unconscious and fell under train, where there was no evidence that holes were not plainly visible on night involved, manner in which station was lighted was only a fact to be considered in connection with claim that plaintiff was contributorily negligent as matter of law in failing to observe condition of platform upon which he was running.

14. Railroads ⚷278(1)

In determining whether plaintiff who stumbled in hole on railroad station platform where he was running to meet arriving friends was contributorily negligent, plaintiff was required to exercise ordinary care, but he could assume that station area was maintained by railroad in reasonably safe condition and he could not be held to have had knowledge of unsafe conditions unless they were discoverable in exercise of ordinary care.

15. Railroads ⚷282(8)

In action for loss of plaintiff's hand under defendant's train at its station when plaintiff was running on platform and stumbled in hole and fell unconscious, plaintiff's contributory negligence was for jury.

16. Appeal and error ⚷1015(1)

Appellate court must accord weight to decision of trial judge upon issue of plaintiff's contributory negligence as matter of law in deciding defendant's motion for new trial.

17. Damages ⚷98

Permanent impairment of earning capacity of person suffering loss of hand is the most important factor in assessing general damages.

18. Damages ⚷132(12)

$60,000 for loss of hand to 23 year old aviation cadet who had studied to become a physical education instructor who had no established vocation, whose pay as cadet was $75 per month, subsistence and clothing plus a dependency allowance of $20 for his wife and an allowance for child in unstated amount and $1 per meal when he was away from base, who had not progressed to primary training and who after injury was earning some $35 per week was so excessive as to require reversal of judgment on ground that verdict resulted from passion and prejudice.

19. New trial ⚷104(3)

In action against railroad for loss of hand of aviation cadet by falling under defendant's train, denial of motion for new trial on ground of newly discovered evidence consisting of military record and affidavit which plaintiff had made of facts of his accident was not abuse of discretion where much of such evidence was cumulative.

◆

Appeal from Superior Court, Los Angeles County; Benjamin G. Jones, Judge pro tem.

Action by Kenneth Kircher against the Atchison, Topeka & Santa Fe Railway Company to recover for loss of plaintiff's left hand under defendant's train at its station. From a judgment for plaintiff, defendant appeals.

Reversed with directions.

Robert W. Walker, William F. Brooks and Wallace L. Ware, all of Los Angeles, for appellant.

Max Fink and Jerome D. Rolston, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by the Atchison, Topeka and Santa Fe Railway Company from a judgment after verdict, in the amount of $60,000, awarded plaintiff as damages for the loss of his left hand under defendant's train at its station in Santa Ana. The complaint charged negligence, in that defendant maintained and conducted its said station and operated a passenger train over and upon the depot passenger platform in a negligent manner. The answer consisted of denials and a plea of contributory negligence.

The grounds of appeal are (1) that plaintiff was a mere licensee and that there was no evidence of active negligence on the part of defendant; (2) that there was no evidence of negligence upon the part of defendant in maintaining the premises; (3) that it was demonstrated by the evidence that it would have been physically impossible for plaintiff's injuries to have resulted from the negligence with which defendant was charged; (4) that plaintiff's injuries were conclusively shown to have been the result of his own negligence; (5) that a new trial should have been granted upon the ground of newly discovered evidence, and (6) that the award of damages was excessive.

At the time of the accident, November 14, 1943, plaintiff was 23 years of age. He had been in training as an aviation cadet since December 12, 1942, he had married in that month, and was stationed at the Santa Ana Army Air Base at the time of the accident. He had gone to Los Angeles November 13 with a fellow cadet, one Harper, and they had met another cadet named Hannan, with whom they did some shopping and had dinner at about 9 p. m. They then separated and plaintiff left Los Angeles for Santa Ana on a Pacific Electric train at about 10:23 p. m., arriving at Santa Ana at about 12:15 a. m., November 14. Expecting Harper and Hannan to return to Santa Ana on the Santa Fe train (No. 70) which left Los Angeles about midnight and arrived at Santa Ana about 2 a. m., plaintiff went from the Pacific Electric depot to the Santa Fe depot a few blocks away to await their arrival. Plaintiff's testimony was that the train arrived from the north, that he looked for his friends toward the front end of the train, and started to jog north toward the rear of the train, looking through the windows on the west side of the train; that his left foot went into a hole or depression in the pavement some three feet wide and several inches deep, he stumbled and hit his head against a blunt object, being rendered unconscious thereby, and that he remembered nothing of what happened thereafter until he came to and discovered that the wheels of the train had run over his left hand.

The first question in order is whether plaintiff was an invitee of defendant, or a mere licensee upon its premises. Shortly after he arrived at the station he went to defendant's check room and left with the attendant a suit box containing some of his clothing, and a small handbag. He was asked by the attendant if he was leaving on a train, replied that he was waiting for friends, and was told by the attendant that it would not be necessary to check the articles, but they would be placed behind the counter for him, and this was done. Plaintiff then wandered about the premises, passed to the east across all the tracks and spent some time in a station park before the arrival of train No. 70. The several tracks are approximately 15 feet apart, and will be referred to by numbers, west to east. From the station building asphalt pavement, flush with the rails, extended across tracks 1 and 2 and for some three or four feet east of track 2. East of the asphalt pavement was nine feet of brick pavement, extending to within two feet of the westerly rail of track No. 3, the main line track, and east of that were two other tracks and then the park premises. The area east of track 3 was not paved, the tracks extended above the ties, and passengers were not allowed to enter or leave trains on that side. Train 70 came in on track 3. It was composed of an engine and 11 coaches. Plaintiff testified that when the train came to a stop, he and several other persons walked easterly across the paved platform toward the head coach, and that it was while he was jogging north from this point that he suffered his accident. He was undoubtedly in an area which was maintained for the use of passengers and the public, including those who might come to the station to meet incoming passengers or to attend the departure of others.

[1,2] It is defendant's contention that a railway company extends no invitation to those who come to the station premises for the sole purpose of attending upon the arrival or departure of passengers and for purely social reasons; they are merely li-

censees, to whom the railway owes no duty to maintain the premises in a safe condition and has no liability except for active negligence. It has been held that one who visits railway premises for such purposes is not an invitee, but the great weight of authority supports the rule declared in Restatement, Torts, Comment d, section 332: "Thus those, who go to a hotel to pay social calls upon the guests or to a railway station to meet passengers or bid them farewell, are business visitors, since it is part of the business of the hotelkeeper and railway to afford the guest and passengers such conveniences." Many supporting cases are listed in 13 C.J.S., Carriers, § 722, page 1351, and in 10 Am.Jur. 80. Further discussion of the point is unnecessary. Plaintiff stood in the relation of an invitee. It is immaterial that he did not have an appointment or agreement with his friends to meet them, and also immaterial that they did not arrive as he expected.

In view of these conclusions, it is unnecessary to consider plaintiff's further argument that the maintenance of a service for checking parcels was an invitation to the public to use the station premises. It is also unnecessary to consider plaintiff's contention that defendant could have been found guilty of active negligence in the movement of its train.

[3] The next question is whether the implied finding that the station premises were not maintained in a reasonably safe condition has support in the evidence. Some six weeks after the accident pictures of the station were taken by a photographer, a resident of Santa Ana, who testified that he had frequently used the station and was familiar with the surroundings. The photographs were received in evidence and the witness testified that they correctly reflected the general condition of the railroad station platform as of November 14, 1943. Eight of these pictures showed a hole in the pavement and the witness testified to seeing a number of others, having a depth of from two to seven or eight inches. He was questioned particularly about one hole, which we shall call the large hole, and testified that it was irregular in depth of from four to seven inches and about two feet square, and he indicated the location of a number of the holes with reference to the railway tracks. He indicated a point where there was a series of small, shallow holes from two to four inches deep close together within about a three-foot area. There were, altogether, nine places identified by the witness where the pavement was in a broken condition. The photographs also showed patches where the pavement had been repaired. Numerous witnesses, employees of defendant and others, testified to their familiarity with the condition of the platform and that they had not seen any holes in the pavement. Although the pictures were taken six weeks after the accident, the photographer testified that he had observed the holes in the pavement before that date, that the conditions were generally the same, and it was clearly within the province of the jury to determine the sufficiency of the evidence to prove that the condition of the pavement on the night of the accident was substantially as described by plaintiff's witnesses. It was also within the province of the jury to determine whether the condition of the pavement was such that it was not reasonably safe for the use of passengers and others under the conditions which obtained on the night of plaintiff's accident. Oles v. Kahn Bros., 81 Cal.App. 76, 81, 253 P. 158; DeGraf v. Angelo California Nat. Bank, 14 Cal.2d 87, 97, 92 P.2d 899.

It is vigorously contended by defendant that plaintiff's accident could not have been caused by any defective or dangerous condition of the premises. The argument is that it was conclusively shown that plaintiff fell on the east side of the train, where there was no platform, where passengers or visitors were not supposed to be, and that he was therefore a trespasser. Specifically, it is claimed that plaintiff's injury was suffered on the east rail of track 3; this fact being established, it is argued that it would have been physically impossible for plaintiff to have fallen on the west side of the train so that his left wrist would have rested on the east rail and, further, that even if he could have fallen in that position if he had been close to the coach when he fell, he could not possibly have reached the position where he was injured if he had stepped into the hole described by the witnesses, which was some 13 feet west of the coach.

[4, 5] The argument in support of the claim of physical impossibility must be considered under the rule stated in Austin v. Newton, 46 Cal.App. 493, 498, 189 P. 471, 473: "Unless, therefore, we can say that, under the undisputed physical facts, the accident could not possibly have been due to defendant's negligence as alleged in the complaint, we must affirm the judgment. It is not sufficient that the story told by plaintiff and his witnesses may be improbable. It is for the jury or the trial judge to weigh and balance probabilities. We cannot reverse upon the ground that the finding of negligence is contrary to the evidence unless we can see that the fact as found contra-venes recognized physical laws, and that therefore it is impossible that the accident could have been due to the negligence alleged in the complaint."

First, as to the point where the injury occurred, four witnesses for defendant testified to finding blood and particles of flesh on the easterly rail of track 3 and two of them, one a police officer, testified to finding a so-called "scuff mark" on the unpaved ground near the blood on the rail, described as being one inch deep and about three feet long and which, it is argued, could have been made by the toe of a shoe of a person who had stumbled. The blood on the rail was located several feet to the north of the described hole in the pavement. One of the witnesses in question was a Santa Fe telegraph operator who had worked at the station for 21 years; another was a local station agent who had worked there for 12 years; another was a Santa Fe baggage and mail carrier, and the fourth a police officer. There was no evidence, circumstantial or otherwise, and plaintiff does not contend, that the injury occurred on the west rail.

[6] We judge from the briefs that plaintiff's case was presented upon the theory that plaintiff probably stepped in the large hole which we have described, stumbled and fell against the coach and rolled under the train. We have found no evidence of an allegedly defective condition of the pavement nearer the third tracks. The precise question is whether plaintiff could possibly have fallen into this position if he stumbled in a hole that was some 13 feet away from the coach. He testified he was trotting some distance away from the cars in order to see into the windows and that he could and did see persons in the cars. In his testimony he had estimated his distance from the train at seven to nine feet, with the explanation that it was no more than an estimate, and also that it was his left foot which encountered the hole. Unquestionably a fall under such a circumstance would be most unusual and extraordinary, but our present question is whether it would have been a physical impossibility, or such a remote possibility as to be unacceptable to reasonable minds. Was it unreasonable for the jury to believe plaintiff's version of the occurrence? Defendant argues, plausibly, that if plaintiff's left foot went into the hole, he would have fallen away from the coach and not toward it. And it is also pointed out that even if plaintiff stumbled toward the train and across the brick platform, there was yet a two-foot space between the platform and the west rail, that this space was six inches below the platform and that the rail itself was 7¼ inches high. If we should hold that it would have been impossible for plaintiff to have fallen while running at a point 13 feet west of the train and to have stumbled underneath it, we would be required to reverse the judgment and it would be unnecessary to consider other aspects of the case. But we do not take this view of the facts. People can and do stumble, endeavor to maintain balance, and fall some distance away. The fact that it appears strange that plaintiff should have fallen as he described does not warrant our holding that he fell in some other manner. Many accidents occur in a strange and unusual way. Plaintiff's theory was not less plausible than that of the plaintiff in the recent case of Lavender v. Kurn, 1946, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916, in which the contention was rejected that the verdict in plaintiff's favor was unsupported except upon the basis of speculation. Although we say, without hesitation, that it would be extremely diffi-

cult for us to believe that plaintiff fell in the manner he described, this is not a sufficient answer, in view of the fact that our jurisdiction on appeal is limited to questions of law.

Considering alone the physical facts, we think we may not hold, as a matter of judicial knowledge of physical laws, that it would be impossible for a man running alongside a stationary railroad train to stumble and fall under the train between the rails, strike his head against an object with such force as to render him unconscious, and come to rest with his body between the rails.

As a ground of attack, distinct from that of impossibility, defendant argues that plaintiff's testimony was impeached by the physical facts, by self-contradictory statements and the testimony of other witnesses, and that it does not furnish substantial evidence in support of the verdict. Defendant sought to prove that it would have been impossible for the train to have passed over plaintiff's body without crushing it. Beneath the coaches are articles of equipment with clearance above the ground, as testified to by defendant's supervisor as follows: battery box, 22 inches; generator, 18 inches; air hose and steam connections, 18½ inches; axles, 18 inches; brake shoe beams from one side of the coach to the other, clearance 5½ inches above rails, the latter extending 7¼ inches above the ties. The distance between tracks is 4 feet 8½ inches. Defendant's transit man located on a diagram certain of the mentioned equipment, so scaled as to indicate the height above the ground of the attached parts, and he testified that there was sufficient space underneath them, excepting for the air hose connection, to allow a coach to pass over a box 18 inches high and 4 feet 7 inches long lying between the rails. Another of defendant's witnesses testified that the lowest part of the air hose connection was approximately 14 inches above the ground, and another hose, the signal hose, was 21 inches from the ground. Plaintiff was a man of small stature. The evidence did not prove that it would have been impossible for the train to have passed over him if he had been lying flat upon the ground. Neither would it have been impossible for articles of the equipment underneath the car to have come into contact with his body and to have altered its position. We think it would not have been impossible for plaintiff's body to have been moved in this manner so that his left hand extended over the east rail.

Defendant further argues from the fact that plaintiff's hand was not entirely severed but was merely "dangling", that it could not have been run over by the wheels of all three coaches and that therefore the train must have been in motion when plaintiff fell and he must have fallen under the wheels of the last coach, as otherwise the hand would have been completely severed. However, the jury may have believed that plaintiff's body was caught and moved by the equipment under the coaches so that his left hand was extended over the east rail, or that he may have moved his arm even though he was not fully conscious.

[7-9] Defendant argues earnestly that plaintiff was otherwise successfully impeached, and that this court should hold for that reason that his testimony was unworthy of belief. Plaintiff did make statements to the effect that he had stumbled on a rock, but these statements were qualified by the further one that he did not know what caused him to fall. In his deposition and at the trial he testified that his left foot went into a hole. It was for the jury to weigh the uncertainties and contradictions in his testimony in judging of his credibility. It is also pointed out, as indicating the unreasonableness of plaintiff's contentions, that he now claims that he made a long, stumbling fall, but that he did not testify that he fell in that manner. Although plaintiff did not describe the exact manner in which he fell, the circumstance that he was rendered unconscious by a blow on the head, as he claimed, might reasonably have been believed to have caused some loss of memory as to the manner in which he fell. Further attacks upon his credibility consisted of the testimony of defendant's witnesses that plaintiff was not seen in the vicinity of the accident before it occurred, that all the curtains of the train were fully drawn, and conflicts between plaintiff's testimony and that of the defendant's witnesses in kindred matters.

We must assume that the jury gave full credit to the testimony of plaintiff. Since it was not incredible, in the light of the entire evidence, the jury were not precluded from giving greater weight to it than was accorded the opposing evidence, whether direct or circumstantial. Taking all of these matters into consideration, we believe we are bound by the jury's appraisal of plaintiff's credibility and the implied finding that the accident happened as he testified.

[10-12] It will appear from what we have said that we believe the jury could reasonably have accepted the theories of defendant as to the manner in which the accident occurred, but this concession is of no benefit to appellant. The decisions of fact of a jury are not the only ones accorded the litigants. The law gives the losing party the right to have the facts reexamined by the court on motion for new trial and it is to be presumed that the trial judge has seriously performed this important duty. Where such motion has been made and denied, an attack upon the sufficiency of the evidence to support the verdict is not upon the decisions of the jury alone, but upon those of the trial judge as well. In a case involving difficult questions of fact, as the present one does, it is proper for a reviewing court to accord considerable weight to the decision of the trial judge in denying the motion, since it implies that he has given thorough consideration to the evidence by which the facts have been developed and has determined that the verdict was not contrary to the preponderance of evidence. Even if we were of the opinion that the jury reached an erroneous conclusion, we would not be justified in reversing the judgment unless we could go so far as to say that the determinative question of fact was one upon which reasonable minds could not differ. After full consideration of the evidence, we have not reached that conclusion.

[13-16] Plaintiff urges, as an independent ground of support for the finding of negligence, evidence which he claims would have justified a finding that the station area was so dimly lighted as to render it unsafe for pedestrians. Plaintiff introduced testimony of a witness who measured the light at different points with a photographic light meter. If we should grant that such tests had some evidentiary value outside the field of photography, we would be unable to see any relation of light meter measurements to visibility, in a practical sense. It is unnecessary to discuss the other evidence on the subject from the standpoint of plaintiff's claim that the station was inadequately lighted. There was nothing obscure about the holes in the pavement and we find nothing in the evidence to indicate that they were not plainly visible on the night in question. The manner in which the station was lighted is only a fact to be considered in connection with defendant's further claim that plaintiff was guilty of contributory negligence as a matter of law in failing to observe the condition of the platform upon which he was running. The facts already stated define the question to be answered: was plaintiff guilty of contributory negligence as a matter of law in jogging along the platform looking through the windows of the coaches and failing to pay enough attention to his footing to discover the hole in the pavement. The rules of law by which his conduct is to be judged are familiar. He was required to exercise ordinary care, and in determining whether he did so he was to be accorded the right to assume that the station area was maintained by defendant in a reasonably safe condition. He was not bound to anticipate unsafe conditions and is not to be held to have had knowledge of them unless they were discoverable in the exercise of ordinary care. He was not running between tracks nor outside of an area which was maintained for the use of patrons of the railway and other pedestrians. We think it is not unusual for persons under such circumstances to hurry, or even to run slowly along railway platforms with their attention directed toward the cars of the train and to the points of entrance and exit. It is not to be expected that in the hurry that is often observed in railway stations, pedestrians will pay as close attention to what is under foot as they would in calmer moments and under other circumstances. We deem it unneces-

sary, in view of the facts already stated, to say more than that we believe the question of plaintiff's contributory negligence was one of fact for the jury, and not one of law. We must also accord weight to the decision of the trial judge upon this point in deciding defendant's motion for a new trial. Martin v. Angel City Baseball Ass'n, 3 Cal.App.2d 586, 40 P.2d 287.

The concluding and most serious attack upon the judgment is that the verdict was in an excessive amount. Our conclusion is that the award of $60,000 is so manifestly unreasonable as to compel the conclusion that it was given under the influence of passion and prejudice. Plaintiff, before he entered the Army Air Force, had graduated from high school and attended Jefferson College and Missouri University, studying to become a physical education instructor. He had worked as a recreation leader in the parks of St. Louis during summer vacations, instructing in ball playing and swimming. He had no established vocation. He was married and had become the father of a child a month preceding his accident. The fact that he was in the Army was sufficient evidence of his good physical health and condition. He hoped to remain in the Army if he succeeded in obtaining a sufficiently high rank. His pay as an air cadet was $75 per month, subsistence and clothing, plus a dependency allowance of $28 for his wife and an allowance for his child in an unstated amount, and $1 per meal when he was away from the base. He had been in the Army about 11 months, was in preflight training and had not progressed to primary training. After his injury he worked a few weeks for an engineering firm, where he was required to do drawing, and received $45 a week, but found that he was unable to do the work and later took a position of attendant at public tennis courts at $35 a week. He naturally suffered severe pain throughout extended hospitalization and treatment for his injuries and also embarrassment, humiliation, and anxiety over his condition and his prospects for the future.

Counsel for both parties have cited many cases on excessive damages from California and other jurisdictions. Among those cited by defendant are several in which smaller judgments for more serious injuries were reduced on appeal. Plaintiff has cited a number of cases in which larger judgments have been affirmed. We have derived little benefit from a study of the cases cited and others which we have considered. All cases in which injuries have resulted in amputation of the left hand cannot be classed together. There is no standard of general application by which damages for such an injury may be measured. Special damages usually enter into the computation. Plaintiff suffered no such loss, except through loss of wages until he was re-employed; his injuries were cared for at Government expense. He had no established vocation and his prospect of remaining in the Air Corps permanently was far too intangible to be used as a basis for computation of future earnings as an army officer. He was young enough to fit himself for an occupation in which he would be competent and reasonably efficient without the use of a natural left hand, although of course his choice of occupation would have been greatly restricted.

[17, 18] Permanent impairment of earning capacity in such case is by far the most important factor in assessing general damages. It is particularly difficult in plaintiff's case because of the absence of a definite factual basis, but we think there is no basis for saying that it appears with reasonable certainty that plaintiff will suffer a loss of earnings in the amount of $1,000 a year, or anything approximating that sum, for a period of between 50 and 60 years, or a proportionately greater amount over a lesser period. Considering the value of the use of the money the award in question would return much more than the suggested yearly amount. Fortunately, plaintiff's health has not been impaired. He has the choice of many occupations in which he would have substantial earning power and has not by any means lost the opportunity of working out for himself a successful business career. While fully conscious of our duty to give serious consideration to the decisions of the jurors and the trial judge with respect to the amount of the damages, we are satisfied that the award was unreasonable and we do not hesitate to characterize it as shocking to our sense of justice

and one which was rendered under the influence of passion and prejudice.

We do not regard the case as one in which we should order a reduction of the damages. Under the facts which we have related, the assessment of damages is peculiarly a matter for decision by another jury (or by a judge). This issue, in our opinion, should be retried, and the judgment should be reversed solely for that purpose.

[19] One of the grounds of defendant's motion for new trial was newly discovered evidence. It was shown by affidavit that on June 28, 1945, a court order was made that the Secretary of War direct that there be forwarded to the court plaintiff's complete military record and an affidavit he had made of the facts of his accident; that diligent efforts had been made by counsel to obtain the records for use at the trial but that they did not arrive until the evidence was closed and the case was being argued. It was defendant's claim that the medical records did not show any injury to plaintiff's head, that the affidavit would show plaintiff's statement that he fell when he stepped on a rock, and that other records would show that plaintiff concealed from the Army the fact that he had been convicted of a felony. We believe there was no abuse of discretion in the denial of the motion. Captain Adams and Lieutenant Murray of the Army Air Base testified as witnesses for defendant that plaintiff had stated and made affidavit that his fall was caused by stumbling on a rock or brick. In a counter affidavit of an attorney for plaintiff it was stated that the medical reports were only partial, and that they were negative as to whether plaintiff had a noticeable head injury, although they did show that plaintiff claimed to have been rendered unconscious by the fall. The fact that plaintiff concealed from the Army a previous conviction of a felony, which he admitted at the trial, would not, in our opinion, have been of material aid to defendant upon a retrial. Much of the evidence, claimed to have been newly discovered, was cumulative. The order denying the motion implies that the trial judge was of the opinion that the evidence furnished by the Army records would not have led to a different verdict. The ruling is subject to attack only upon the ground of manifest abuse of discretion, and no abuse of discretion has been shown.

The judgment is reversed for a retrial of the sole issue of damages.

KINCAID, J., pro tem., **concurs.**

WOOD, Justice.

I concur in the judgment. In my opinion remarks by the trial judge in the presence of the jury, to the effect that questions asked by defendant's counsel were not fair, might well have tended to influence the jury prejudicially against defendant in arriving at the amount of damages. When the attorney asked plaintiff how long it took him to travel from "near the front coach" to where he fell, the judge said: "I don't think your question was *quite fair* in that respect, Mr. Brooks, assuming that he was at the front end of the first coach, and *he has repeatedly* stated that he was not sure. *The question should have been objected to.*" The attorney then said: "I beg pardon, what I am trying to find out—." The judge said: "I know what you are trying to find out, but you made an assumption that *tied the witness up tighter than he had been before. It is hardly fair.*" When the attorney asked plaintiff where he crossed from the station platform to the park, he said he did not know exactly, but he indicated a place which appeared to be where two coaches were coupled. The attorney asked him if he was referring to the couplers between the cars. The plaintiff said he could not pick it out that exactly. The attorney said: "Well, in that vicinity." The judge said: "Well, I cannot see any necessity of *crowding the witness down to the last inch* as to where a path begins. *It is not reasonable.*" The attorney said: "I do not intend to do that." The judge said: "You are *holding him down* to a coupling between two cars, which is about the same thing." When the attorney asked plaintiff how far he was over the asphalt pavement from the brick platform when he fell the plaintiff said he did not know, but he would say about seven feet from the train. The attorney said: "If I were to tell you that the brick platform was nine feet wide would that be any assistance in approximating the distance you were west of the brick platform?" The plaintiff said: "No, I mean, when I am walking * * * I cannot balance up seven or nine, I mean it is not that much difference to me." The attorney said: "Well, perhaps we don't understand each other." The judge then said that the plaintiff was only approximating and that: *"He did not measure, he did not have a tape line or ruler."* The plaintiff said: "That is right." The judge said: "*Nor did you step it off,* is that correct?" The plaintiff said: "No, sir." The attorney said: "My question is, if the witness knows how far off of the brick platform —." The judge said: *"He has told you repeatedly* all he knows he was about that far from the car."

The attorney asked the plaintiff if he *gave* a statement to a representative of defendant as to his version of the accident, and the plaintiff replied that he had talked to some one *shortly* after the accident when an army officer was there also. The attorney asked him if he *signed* a statement giving his version of the accident, and he replied that he did not think so—that *several* weeks after the accident some one did ask him questions about it and that he gave answers. The attorney then said: "In any event, you did *talk with someone in the presence of one of your officers,* isn't that correct?" The plaintiff replied that he did have an interview with some one. The attorney asked him: "Didn't you make this statement in the presence of representatives of the defendant, Mr. Anderson and Lieutenant Adams of the Military Justice Department: 'That while waiting for the train to arrive you saw a man and woman talking together on the depot platform; that they went into the park on the east side of the tracks opposite the station, and being curious you went over to the park to see what was doing' and you referred to yourself as a 'Peeping Tom,' do you recall having made that statement at that time and place?" The attorney for plaintiff objected to the question, and said: "If you have a statement hand it to the witness." The attorney for defendant said: "I will hand it to him." The judge said: "If it is in writing it must be shown to the witness." The attorney for plaintiff said: "He claims it is in writing. The only way they ever take statements is in writing so far as I know." The judge said: "That is not called for. We are trying this case as nearly to the law as we can, and as *fairly* as possible, and if you have a writing the law requires it to be exhibited to the witness." The attorney for defendant said: "I have a writing, but *I did not say I have a writing covering that statement."* The judge said: *"If you have not, this becomes highly prejudicial."* The attorney for plaintiff said: "I want at this time to make my objection, take exception to the prejudicial conduct of counsel. If he has a statement in writing —". The judge said: "I have already made my statement. *Just give counsel time, he may produce it.* There is a reference made in your question to the witness, if he did not sign a statement —". The attorney for defendant said: "That is true, your Honor." The judge said: "I think *if that is what you are interrogating him about* you should produce it. The law requires it, *in all fairness."* The attorney for defendant said: "I intend to produce it, but the question has reference to the foundation for impeachment. *It was made in the presence of these gentlemen."* The judge said: "I do not see the materiality of this matter, however."

It does not appear that similar statements were made concerning counsel for plaintiff.

80 Cal.App.2d 976

CULLINAN et al. v. McCOLGAN, Franchise Tax Com'r.

Civ. 7341; Sac. 5812.

District Court of Appeal, Third District, California.

July 25, 1947.

Hearing Denied Sept. 22, 1947.

1. Statutes 🔑219

Although interpretation of statute by an administrative agency will be accorded great respect by courts and will be followed if not clearly erroneous, it will be overthrown by courts, if erroneous, where such question of law is properly presented.

2. Statutes 🔑190

In order to justify construction of a statute by either an administrative agency or a court, it must first appear that construction is necessary.

3. Constitutional law 🔑70(3)
Statutes 🔑190

Where a statute is not ambiguous, there is no room for construction and inconvenience or hardship which results from following the statute as written must be relieved by legislation rather than by construction.

4. Constitutional law 🔑77

A ministerial officer may not, under the guise of a rule, vary or enlarge the terms or conditions of a legislative enactment.

5. Constitutional law 🔑77

The section of Personal Income Tax Act respecting computation of net income upon the basis of taxpayer's annual accounting period is not ambiguous and is not open to construction, and regulation of Tax Commissioner was invalid insofar as it exempted, from taxation, income accrued prior to January 1, 1935, even though the income was receipted on or after that date, and even though the taxpayer reported the cash receipts on disbursement basis. Gen. Laws, Act 8494, § 16(a).

6. Statutes 🔑190, 220, 225¾

Fact, if established, that Personal Income Tax Act was amended in 1937, 1939, 1941, and 1943 without any indication by Legislature that regulation adopted by Tax Commissioner was not in accord with legislative will, could not give force of law to the regulation, where the regulation was in effect a supplement to the act and the act itself was unambiguous. Gen.Laws, Act 8494.

7. Constitutional law 🔑70(1)

The fact that the Franchise Tax Commissioner had followed the procedure set forth in regulation which was not warranted by Personal Income Tax Act was not ground for court approval of the procedure, since approval would be an invasion of the province of the Legislature. Gen.Laws, Act 8494, § 16(a).

8. Statutes 🔑266

The presumption is against the retroactive operation of income tax statutes, and such statutes should not be interpreted so as to have retroactive effect.

9. Taxation 🔑363½

Under Personal Income Tax Act enacted in June, 1935, applicable to net income accrued after January 1, 1935, taxpayers, who voluntarily chose to report income on a cash receipts basis rather than on an accrual basis, could not complain that the tax was retroactive because income earned prior to January 1, 1935, but received subsequent to January 1, 1935, was taxable. Gen.Laws, Act 8494, § 16(a).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Eustace Cullinan and Theo. J. Roche, executors of the last will and testament of Matthew I. Sullivan, also known as Matt I. Sullivan, deceased, against Charles J. McColgan, Franchise Tax Commissioner of the State of California. From an adverse judgment plaintiffs appeal.

Judgment affirmed.

Sullivan, Roche, Johnson & Farraher, and Eustace Cullinan, all of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal from a judgment in favor of respondent, Franchise Tax Commissioner of the State of California, upon his demurrer to plaintiffs' complaint, the demurrer having been sustained without leave to amend.

Each of the five counts of the complaint alleges generally that plaintiffs kept their records and reported their income on a cash receipts and disbursements basis. Additionally each of the counts alleges that for the calendar years 1936–37–39–40 and 41 respectively, the plaintiffs as executors of the estate of Matthew I. Sullivan filed a return with the respondent commissioner in accordance with the Personal Income Tax Act of 1935, Gen.Laws, Act 8494, and the regulations of the commissioner as set forth in Article 36–1 thereof, which article provides:

"Art. 36–1. Cash Receipts and Disbursements Basis-Accruals Before 1935. Ordinarily, a taxpayer reporting on the cash receipts and disbursements basis must report all income received during his taxable year even though accrued in a prior year and may deduct all amounts paid during such year, even though incurred in a prior year. However, income accrued prior to January 1, 1935 is not taxable and need not be reported, even though the income is received on or after that date and even though the taxpayer reports on the cash receipts and disbursements basis. Thus, salaries and other compensation for personal services earned in 1934 or prior years, for example, is not taxable even though received in 1935 or subsequently. Furthermore, obligations incurred prior to January 1, 1935 may not be deducted, even though paid on or after that date by a taxpayer reporting on the cash receipts and disbursements basis. Thus, delinquent taxes for years prior to 1935, rentals, salaries or other business expenses incurred in 1934 or prior years are not deductible, even though paid in 1935 or subsequently."

Recently this court had before it a strikingly similar contention in the case of Dillman v. McColgan, 63 Cal.App.2d 405, 146 P.2d 978, which did not relate to income earned prior to January 1, 1935 and not received until after that date as in the present case, but rather involved a deduction claimed by a taxpayer by virtue of a stock assessment levied prior to said date and paid thereafter. The assessment was levied in 1933 by the Comptroller of the Currency against bank stock owned by Dillman but was not paid by him until August 1935 and claimed as a deduction in his tax return for that year. At all times there, as here, the books of the taxpayer were carried on a cash receipts and disbursements basis. In that case we were primarily interested in section 16(e) of the act, which section provides that deductions shall be taken for the taxable year in which paid or incurred dependent upon the method of accounting by which the net income is computed. In the present case we are primarily interested in the application of Article 36–1 with respect to section 16(a) of the tax act which provides that:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the commissioner does clearly reflect the income."

In the Dillman case this court found that said rule of the respondent commissioner was invalid to the extent that it provided that, in the case of a taxpayer on a cash receipts and disbursements basis, expenses incurred prior to January 1, 1935, were not deductible even though paid after that date. We also stated by way of dictum that the regulation was invalid in its ruling that compensation earned prior to January 1, 1935, need not be reported even though received after that date, and it is that question which is directly presented herein.

We can find no reasonable basis for a conclusion that the legislature intended a different rule to apply with respect to items of income from that which applies with respect to items of deductions.

[1] Because of the direct applicability of what was said in the Dillman case to the questions herein presented, anything we might say in this opinion would be but to

paraphrase what this court, speaking through Presiding Justice Adams, has already stated. We therefore quote from the Dillman case, as follows [63 Cal.App.2d 405, 146 P.2d 980]:

"It was said in the recent case of Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935, that while the interpretation of a statute by an administrative agency will be accorded great respect by the courts and will be followed if not clearly erroneous, it will be overthrown by the courts, if erroneous, where such a question of law is properly presented.

[2, 3] "The first point to be determined is whether the statute which the commissioner purports to have interpreted by art. 36-1, supra, required interpretation; for in order to justify construction by either an administrative agency or a court, it must first appear that construction is necessary. In United States v. Missouri Pac. R. Co., 278 U.S. 269, 277, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322, 376, the court said: 'It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. * * * Construction may not be substituted for legislation.' Also see note, 73 L.Ed. pp. 322–375. The same principle is enunciated in California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 661, 147 A.L.R. 1028, where it is said: 'But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute. Los Angeles County v. Superior Court, supra, [17 Cal.2d 707, 112 P.2d 10]; 23 Cal.Jur. 776.' Also see Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86; Commissioner of Internal Revenue v. Van Vorst, 9 Cir., 59 F.2d 677, 679; Morrill v. Jones, 106 U.S. 466, 467, 1 S.Ct. 423, 27 L.Ed. 267.

[4] "It is equally well established that a ministerial officer may not, under the guise of a rule or regulation, vary or enlarge the terms or conditions of a legislative enactment. Boone v. Kingsbury, 206 Cal. 148, 161-163, 273 P. 797; Bank of Italy v. Johnson, 200 Cal. 1, 21, 251 P. 784; Montgomery v. Board of Administration, etc., 34 Cal.App.2d 514, 521, 522, 93 P.2d 1046, 94 P.2d 610; 25 R.C.L. 1043, § 273; and cases cited in 73 L.Ed. 349, 350.

[5] "We find nothing in the applicable portions of the statute before us that calls for the construction placed upon it by Art. 36-1. Section 16, supra, states definitely that net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed by him in keeping his books; that the amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, and that the deductions and credits provided for shall be taken for the year in which 'paid or accrued,' or paid or incurred, dependent upon the method of accounting upon the basis of which net income is computed. This is admitted by the rule itself which recites that 'ordinarily' a taxpayer reporting on the cash receipts and disbursements basis must report all income received during his taxable year even though accrued in a prior year, and may deduct all amounts paid during such year, even though incurred in a prior year. Our attention is not directed to any language in the statute that authorized the commissioner to make the exception set forth in Art. 36-1, that income accrued prior to January 1, 1935, was not taxable and need not be reported though received after that date and even though the taxpayer reported on the cash receipts and disbursements basis, and that such taxpayer could not deduct amounts paid after January 1, 1935, for obligations previously incurred. As a rule of convenience this provision may have had its advantages in the administration of the act; but it is plain that in promulgating it the commissioner was not construing any language of the statute, for it makes no distinction between the years prior to and those subsequent to its enactment, but was supplementing it. And if the commissioner could modify the provisions of the act as to income accrued or liability incurred prior to 1935, he could as well be said to have

been given authority to so provide for subsequent years, and thus to nullify the provisions of the act that a taxpayer who keeps his books on a cash basis must report his income for a given year all cash income received during said year, and credit himself with disbursements for the year when disbursed.

"Appellant presents the further argument that the Personal Income Tax Act was amended in 1937, 1939, 1941 and 1943, 'without any indication on the part of the Legislature that the administrative practice of the commissioner was not in accord with the legislative will.' But such fact, if it be a fact, cannot give the force of law to a rule which is in effect a supplement to a statute, and where the act itself is unambiguous. Iselin v. United States, 270 U.S. 245, 46 S. Ct. 248, 70 L.Ed. 566. It was said in United States v. Misouri Pac. R. Co., supra, that the rule that re-enactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction, applies only when the construction is not plainly erroneous, and to cases presenting the precise conditions passed on prior to the re-enactment."

The further contention of appellants that rule 36–1 is both equitable and fair is predicated upon an article appearing in 13 So. Cal.Law.Rev. p. 431, wherein the author writing upon the subject of "taxation of accrued items on death" refers to said article as a recognition by California authorities of the "inequity of retroactively applying" the provisions of the California Income Tax Act.

We have no argument with the very able and comprehensive discussion to which appellants have referred, but however academically correct it may be with respect to its desirability as a sound policy in alleviating inequity or oppressive taxes in the special instances therein mentioned, it can in no way change that which the legislature of this state has enacted or that which the courts of this state have determined to be the law applicable to the particular rule of the respondent here in question. Such matters of policy in the field of taxation are neither for the executive nor the judicial departments but for the legislature.

[6] The fact that for several years respondent has followed the procedure set forth in Article 36–1 is insufficient justification for the adoption of and adherence to a rule which in effect amounts to legislative action by the commissioner. It necessarily must follow that for this court now to approve said rule likewise would be to invade the province of the legislature, something neither the respondent commissioner nor a court may do.

[7, 8] We are in accord with appellants' final contention that the presumption is against the retroactive operation of income tax statutes and that such statutes should not be interpreted so as to have retroactive effect, but we fail to understand the applicability of the enunciated rule to the instant case nor do we believe counsel has shown wherein such rule applies. The admitted fact that the income was earned prior to 1935 is immaterial inasmuch as the taxpayer's books at all times were kept on a cash basis. So far as he was concerned it was not income to him until paid. The option given to a taxpayer to report his income on a cash receipts or an accrual basis is founded upon the theory that cash received in the reported year will be balanced by income accrued in the same year but which will not have to be reported until subsequently. Having voluntarily chosen the method used he cannot complain that the tax is "retroactive."

Furthermore there would appear to be a direct analogy between this case and Holmes v. McColgan, 17 Cal.2d 426, 110 P. 2d 428. There it was argued unsuccessfully that since the increase in value of certain real property occurred prior to January 1, 1935 but was not realized until after that date, it could not be taxed as income. Here appellants' contention likewise relates to a similar realization, fees earned prior to January 1, 1935, but not paid until thereafter.

[9] The fact that one case involves appreciation in the value of real property which was subsequently sold, and the other an accrual of attorney fees subsequently collected, does not make the two distinguishable on legal principle.

Reiterating the thought previously expressed in regard to the question of deductions as raised in the Dillman case, there is no more reason to assume that the legislature intended to exclude amounts earned before the effective date of the act but received by the taxpayer on a cash basis after the effective date of the statute, than that the legislature intended to exclude increases in the value of property accruing prior to the effective date of the act but realized subsequently through a sale of the property.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

80 Cal.App.2d 983

Theo. J. ROCHE, Plaintiff and Appellant, v. Charles J. McCOLGAN, Franchise Tax Commissioner of the State of California, Defendant and Respondent.

Civ. 7342; Sac. 5813.

District Court of Appeal, Third District, California.

July 25, 1947.

Hearing Denied Sept. 22, 1947.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Sullivan, Roche, Johnson & Farraher and Eustice Cullinan, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for respondent.

PER CURIAM.

It appears from the stipulation of the parties that the same legal questions are presented in this proceeding as those in Cullinan v. McColgan, Cal.App., 183 P.2d 115.

For the reasons stated in our opinion in that case the judgment herein is affirmed.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

In re PARKER'S ADOPTION.

In re WEST.

ANDERSON v. PAIGE et al.*

No. 13429.

District Court of Appeal, First District, Division 1, California.

July 22, 1947.

Hearing Granted Sept. 18, 1947.

1. Appeal and error 🔑110, 113(1), 782

Orders denying motions to vacate judgment and for a new trial are not appealable, and attempted appeals therefrom would be dismissed.

2. Adoption 🔑9, 11

No pleadings similar to complaint and answer are necessary in adoption proceedings, and no issues are joined and no findings of fact or conclusions of law are necessary.

3. Adoption 🔑7

Where State Department of Social Welfare had made its investigation and determined that the best interests of child would be promoted by proposed adoption and that proposed home was suitable for the child as well as other essential facts, and then permitted the mother to sign consent to the adoption and mother's signature evidencing consent to adoption was acknowledged and witnessed by an agent of the department, there was an acceptance by the department of the mother's consent to the adoption. Civ.Code, § 226.

4. Adoption 🔑7

Where State Department of Social Welfare had accepted mother's consent to adoption of child, the department was thereafter without power to mark the consent void. Civ.Code, § 226.

5. Adoption 🔑7

The mere fact that the other parent does not consent to adoption of child does not void the consent previously given by a parent. Civ.Code, § 226.

6. Adoption 🔑7

Where a child was illegitimate, no consent other than that of its mother was required for adoption. Civ.Code, § 226.

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* Subsequent opinion 191 P.2d 420.

7. Adoption ⚷7

A departmental rule that the consent of a parent to adoption could be withdrawn at any time before adoption order was entered was of no importance, where rule was not called to mother's attention and there was no evidence that mother consented to adoption knowing of such rule. Civ.Code, § 226.

8. Adoption ⚷5

"Proper subject for adoption", as used in the Civil Code, refers to the adoptability of the child from a physical or mental standpoint or perhaps even a racial standpoint, but does not mean that all the legal prerequisites must be met, since a child may be a proper subject for adoption and yet cannot be adopted until the legal requirements have been satisfied. Civ.Code, § 226.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Subject for Adoption".

9. Adoption ⚷7

The right of natural parents to the custody of their children is accompanied by a corresponding duty, and, where mother of illegitimate child had so completely disregarded duty to child that after three years of neglect child was placed for adoption with foster parents who spent money, love, and services on its care, the parent who had consented to adoption and whose consent had been accepted by the State Department of Social Welfare had lost paramount right to custody of child and decree of adoption by foster parents was proper. Civ.Code, § 226.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the adoption of Robert James Parker, a minor, and proceeding in the matter of Robert James West for a writ of habeas corpus, which were consolidated and wherein Virginia E. Paige and Edward Francis Paige were petitioners for the adoption of the minor and Bertha Anderson was objector. From a judgment and decree of adoption and from order denying motion to vacate and from order denying motion for new trial, the objector appeals.

Appeals from order denying motion to vacate and from order denying motion for new trial dismissed, and judgment and decree of adoption affirmed.

Schofield & Hanson, of San Francisco, for appellant.

Jesse H. Miller and Joseph F. Leonard, both of San Francisco, for respondents.

BRAY, Justice.

[1, 2] In a consolidated hearing of a petition for writ of habeas corpus and a proceeding for adoption, the trial court denied the petition for the writ and granted a judgment and decree of adoption. Thereafter appellant moved to vacate the order for adoption on the ground that no findings of fact and conclusions of law were ever prepared or filed and also moved for a new trial. Both motions were denied. Appellant appeals from the judgment and decree of adoption and attempted to appeal from the order denying the motion to vacate and from the order denying the motion for a new trial. As neither of these orders is appealable, it is necessary to consider only the appeal from the judgment and decree of adoption. Moreover, as no pleadings similar to complaint and answer are necessary in adoption proceedings, no issues are joined and no findings of fact or conclusions of law are necessary. 24 Cal.Jur. 950.

There are two questions involved here. First, was the consent of the mother accepted by the State Department of Social Welfare? Secondly, under the circumstances of this case, can the mother withdraw her consent to the adoption?

Most of the facts are not disputed. On September 4, 1940, a boy child was born to appellant, who was then Mrs. Bertha West, the legal wife of Thomas West, from whom she had been separated for more than two years. Admittedly the child is not the child of West. Appellant had four legitimate children by West prior to the birth of this illegitimate child. The child was named Robert James Parker. Practically speaking, since his birth, Robert has never lived with or been cared for by his mother. For approximately the first three years of his life, Robert lived with and was cared for by various members of appellant's family. Appellant claims that this was necessary as she was required to work to support her other four children.

Immediately prior to April, 1943, Robert was living with a sister-in-law of appellant in San Francisco who took care of him in the daytime, but as she worked nights, she left the care of Robert in the night time with a blind woman. While appellant testified the child could not have been left in better hands, appellant's mother testified that the conditions under which Robert lived there were bad, and that on at least one occasion Robert was found to be sleeping in a chair on a table at night. About this time, appellant met her present husband, Anderson. They both lived in a home with another sister-in-law of appellant. Later appellant and Anderson moved to a home which they had purchased in the name of Mr. and Mrs. Anderson. Appellant stated to the State Department of Social Welfare (hereinafter for brevity referred to as the department) that she and Anderson were married in Yuma, Arizona, on January 18, 1941. (The marriage actually took place October 11, 1945. The alleged divorce from West never has been verified.) Appellant and Anderson were working at the shipyards, each earning about $80 per week. In April, 1943, Anderson and Paige, one of the adopting parents, were fellow employees at the shipyards, and were friendly. In one of their discussions, Paige told Anderson that Mrs. Paige was unable to bear children, and that they were anxious to adopt a child. Anderson told Paige about Robert, and on April 13th, Mr. and Mrs. Paige went to see Robert. They liked the child and he seemed to like them, so they took him home with them and have had him ever since. Mr. and Mrs. Anderson claim, and they are supported in this claim by appellant's mother, that the understanding was that he was to be taken for boarding only, while the Paiges claim that it was understood that the child was given them for adoption. The Paiges' version is supported by the actions of appellant thereafter. On October 10th, roughly six months after receiving the child, Mrs. Paige and Mrs. Anderson went to the office of an attorney for the purpose of arranging for adoption proceedings. Mrs. Paige claims that the delay was caused by the fact that Mrs. Anderson was working at the shipyards and did not desire to take time off for this purpose until she was forced to remain away from work because of an injury to her foot. At the attorney's office, Mrs. Anderson signed a consent to the adoption and arrangements were made for the attorney to commence the proceedings. Appellant now contends that the attorney and Mrs. Paige practically coerced her into signing by threatening if she did not sign, to tell West about Robert and thereby possibly imperil her custody of the four West children. Both Mrs. Paige and the attorney deny this, and it is not consistent with appellant's later actions, including the fact that appellant signed a consent to adoption before an agent of the department. On October 11, 1943, the petition for adoption was filed. Appellant signed before a deputy county clerk on October 13th a document entitled "Consent to Adoption When One Natural Parent Gives Custody to Unrelated Husband and Wife" in which she consented to the adoption of the child by the Paiges, "it being fully understood by me I am giving up all my right of custody, services and earnings of said child and that said child cannot be reclaimed by me." Just why this consent was signed does not appear, as it is a form to be used only in the case of a stepparent adoption. The evidence shows that after many interviews with workers of the department and after the department had satisfied itself that the child was a proper subject for adoption and that the proposed home was suitable for the child, and that the best interests of the child would be promoted by the proposed adoption, appellant on April 5, 1944, signed, in the presence of an agent of the department, her consent to the adoption, on a form prescribed by the department. This consent was in duplicate and reads:

"I, the undersigned, being the mother of the above named minor child, and entitled to the sole custody of the said child, according to Section 226 of the Civil Code, do hereby give my full and free consent to the adoption of said child by Virginia E. Paige and Edward Francis Paige, (names of petitioners) the petitioners herein, it being fully understood by me that I am giving up all my right of custody, services and earnings of said child and that said child can not be reclaimed by me.

"In signing this consent I understand that it does not become final until it has been accepted by the State Department of Social Welfare after ascertaining that the best interests of the child will be promoted by the proposed adoption.

"Said child was born on February 4, 1940 in Modesto, California
Date City and State

(Signed) Bertha Parker West, Anderson
Signature of Mother

Date April 5, 1944
Signed in the presence of

Witness to Signature of Mother

(Signed) Cornelia E. Phillips
Agent of the California State Department of Social Welfare"

The department worker testified that she explained to appellant the effect of signing the consent, that appellant did not sign that day but came back another day and signed. Appellant had told the department that she had been divorced from West prior to the birth of the child. The consent was left with the department and sometime thereafter (the record does not disclose when) Mrs. Phillips, the department agent who acknowledged the consent, wrote the word "void" across it because no record of any divorce from Mr. West could be verified nor any consent of the presumptive father obtained. For the same reason, the department on April 6, 1944, notified the court in the adoption proceeding that the department "is removing the case from its calendar until the legal status of the child and the right of the parents to give consent has been established. As soon as this has been done, the State Department of Social Welfare will complete the investigation and submit its report to the Court."

Sometime thereafter appellant accompanied the attorney for the Paiges in the adoption proceedings to the chambers of Judge Foley, the then Presiding Juvenile Court Judge, and unsuccessfully attempted to persuade the judge to grant the adoption upon appellant's consent alone. Time went on. The Paiges in the meantime took care of the child, treated it as their own, and cured a speech defect of the child. Appellant showed no desire to see the child and at no time has ever reimbursed the Paiges for the care of the child. There is a dispute between the parties as to whether or not appellant ever offered to pay for the board and room of the child. This, and other conflicts, in view of the judgment, must be resolved against appellant. On May 9, 1945, the department filed in court its adoption report in which it stated: "Because of the inability of the State Department of Social Welfare to obtain the consent of the legal father, the investigation of the adoption petition has not been completed. The home [the Paige home] has been licensed as a boarding home for the care of the minor by the San Francisco Department of Public Health, and the minor will undoubtedly remain in this home where he appears to receive satisfactory care." Based solely upon this lack of consent of the presumptive father, the department then recommended that the petition for adoption by the Paiges be denied without prejudice.

Nothing further was done in the case until May 7, 1946, when appellant petitioned for a writ of habeas corpus to obtain the child. On May 23, 1946, appellant signed a purported withdrawal of her consent to the adoption. On May 27th the adoption proceeding and the habeas corpus proceeding were consolidated and heard together.

At the hearing, the affidavit of West was filed in which he stated that he was the legal husband of appellant at the time of the conception and birth of Robert; that he was not the father of the child and that he consented to the adoption of the child by the Paiges. Upon this affidavit, the court, by its judgment and decree, found that the child is an illegitimate child, requiring for adoption only the consent of the mother. It further found that such consent had been given and that the mother had no right to withdraw her consent, and granted the decree of adoption.

The court had before it a report of an investigation made by an investigator of the Juvenile Court which concluded that there was "no *legal* reason why this mother cannot have her child." (Emphasis added.) The home which appellant could give the child at the present time is adequate physically.

Was the mother's consent accepted by the department? The consent prepared by the department was conditional in form—"it does not become final until it has been *accepted* by the State Department of Social Welfare after ascertaining that the best interests of the child will be promoted by the proposed adoption." (Emphasis added.) Miss Harris, the supervising social welfare agent of the department, testified that it was the practice of the department, followed in this case, to make the investigation before taking the consent of the mother.

Section 226, Civil Code, as it existed at the time of the filing of the petition for adoption and the signing of the consent by the mother, prescribed the duties of the department in adoption proceedings. Since that time this section has been amended. It is conceded that the questions involved here must be determined by, and our decision of the fact of acceptance is based upon, the provisions of that section as it then stood. "* * * the consent of the natural parent or parents for the adoption must be signed in the presence of an agent of the State Department of Social Welfare on a form prescribed by such department and filed with the clerk of the superior court, in the county of the petitioner's residence. * * * it shall be the duty of the Department of Social Welfare to ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child, *prior to accepting the consent* * * *" (Emphasis added.) It is then made the duty of the department to submit to the court a full report of the facts disclosed by its inquiry with a recommendation regarding the granting of the petition, within 180 days, or such additional time as may be given by the court. If the department fails for 180 days, or in the time extended by the court, to accept the consent of the natural parent or parents to the adoption, a procedure is provided where either the natural or the adopting parent or parents, may appeal from such refusal to the court and after notice to the department, the department must, within 10 days, file a report of its findings and the reason for its failure or refusal to accept the consent of the natural parent. Then, the court may, if it deems the welfare of the child will be promoted by the adoption, allow the signing of the consent by the natural parent or parents in open court.

[3] The facts of this case justify the conclusion that the department *accepted* the mother's consent at the time it was signed in the presence of the department's agent. The department had made its investigation, ascertained that the condition set forth in the consent that "the best interests of the child will be promoted by the proposed adoption" had been met; also, as required by the code, ascertained that the child was a proper subject for adoption, and that the proposed home was suitable for the child, and then permitted the mother to sign the consent. At that time it was the practice of the department to follow that procedure. The parent was not permitted to sign before these matters had been ascertained. If the department found unfavorably on these matters, the parent was not permitted to sign the consent. Under the practice of the department, there can be no conclusion other than that, after the investigation and the determination of the facts required in the code and in the form of consent had been made, and the mother instructed to sign the consent, the acknowledgment of the signature by an agent of the department and the keeping of the signed consent constituted an acceptance of it.

It is contended that if the consent was accepted by the acknowledgment of the mother's signature and the keeping by the department of the consent, there was no reason for its conditional form. However, these forms are prepared to meet all contingencies. Take the case of a father in the armed forces during the war who was about to leave this country, and who wished to consent to the adoption of his child. By the time an investigation could be made, the father would be gone. In that case, the department would not enforce its rule requiring an investigation before taking the consent of the parent, but would permit the father to sign on the condition set forth in the consent that it was only to be final after the department had satisfied itself concerning the best interests of the child. There would be many situations arising where the department would deem it advisable to take the signed consent of a parent to be held awaiting the investigation. But here, everything had been done by the department, prior to the signing of the consent, that needed to be done by the department, and its physical acceptance of the signed consent under the circumstances constituted the acceptance referred to in the code.

The acceptance of the consent is separate and apart from the report which the department must make to the court. The consent may be accepted and yet the report may recommend against the adoption.

Under the procedure set forth in section 226, if the department refuses to accept the consent, either the parent or the petitioners may appeal to the court. In this case, this procedure did not apply for the reason that the department followed the procedure where it accepts the consent, but makes an adverse report to the court. Where the department refuses to accept the consent, it does not make a report to the court except where appeal is made and the court expressly directs the department to file a report giving its reasons for failing to accept the consent. An examination of the reports filed by the department in this case nowhere shows a refusal to accept the consent but merely a statement to the court that adoption should be denied because of the lack of the consent of the presumed father.

[4-6] The very fact that the department deputy attempted to mark the consent "void" indicates that the department had accepted it. If it had not been accepted there would be no reason to attempt to void it. All the department would have to do was to refuse to accept it. Once having accepted it, the department had no power to mark it "void." The consent of the mother is separate from that of the father of either a legitimate or illegitimate child. The mere fact that the other parent does not consent, does not void the consent already given. It merely prevents the court from granting the adoption in cases where the consent of the other parent is required. Here, the child being illegitimate, no consent other than that of its mother was required. Of course, the fact of illegitimacy could not be established by the mother or the department, but had to be determined by the court, and in a case of this kind, only after the presumed father had submitted to the jurisdiction of the court, as he did here.

It is true that the department supervisor testified that the consent was never accepted by the department. However, this was a conclusion not supported by the facts themselves. As heretofore shown the acts of the department constituted an acceptance.

[7] The department had a rule of its own which provided that the consent of a parent could be withdrawn any time before the order of adoption was made. This rule, if a valid rule, is of no importance here, as there is no evidence that the rule was actually called to the mother's attention or that she signed the consent knowing of that rule.

[8] Counsel for appellant, subsequent to argument, have submitted certain rules from the "Handbook on Adoption Law and Procedure" issued by the department. They do not change the situation any. They are to the same effect as the code requirement, that the consent must not be accepted until after the determination by the department that the child is a proper subject for adop-

tion and that the proposed home is suitable for the child. "Proper subject for adoption" as used in section 226, Civil Code, refers to the adoptability of the child from a physical or mental standpoint, or perhaps even a racial standpoint. It does not mean that all the legal prerequisites must be met. A child may be a proper subject for adoption and yet cannot be adopted until the legal requirements have been satisfied. For example, the consent of one parent may have been obtained, and it may be necessary to bring an abandonment proceeding against the other parent whose consent cannot be obtained. The child, if physically and mentally fit, is a proper subject for adoption, even though the proceedings to declare it abandoned by the non-consenting parent may take considerable time. Here these matters were all determined by the department prior to the signing by the mother and the acceptance by the department.

While it is not necessary to decide here, a serious question arises as to whether or not, even assuming, as contended by appellant, that the consent never was accepted by the department, the mother, under the circumstances of this case, is not estopped, as hereinafter set forth, to withdraw even a conditional consent.

[9] The consent having been accepted, the main question in the case follows. Can a parent withdraw a consent once given and accepted? Appellant relies principally upon the decision in Adoption of McDonnell, 77 Cal.App.2d 805, 176 P.2d 778. That case can be distinguished from the case at bar in this, that the facts here are such as to estop the mother from withdrawing her consent, while there the facts did not justify nor did the court consider the matter of estoppel. In that case it would have been as great a tragedy for the natural parents and the child had the parents not been permitted to withdraw their consent, as in this case it would be for the foster parents and the child if the natural mother were permitted to withdraw her consent. The McDonnell case quoted from In re Anonymous, 178 Misc. 142, 33 N.Y.S.2d 793, 799, a statement taken from Matter of Bistany, 239 N.Y. 19, 145 N.E. 70, 72: "The rights of the natural parent are paramount." [77 Cal.App.2d 813, 176 P.2d 783.] In re Anonymous, supra, 33 N.Y.S.2d at page 798, also quotes from Matter of Livingston, 151 App.Div. 1, 135 N.Y.S. 328, 332, as follows: "While the right of the natural parents to the custody of their children is not a proprietary right in the same sense as if the child were a chattel, and while *it is accompanied by a corresponding duty* which arises from the relation of parent and child, it has ever been regarded, even in primitive civilizations, as one of the highest of natural rights." This right, then, is accompanied by a corresponding duty, and when, as in our case, the parent so completely disregards that duty that, after three years neglect of her child she places it for adoption with foster parents who expend money, love and services on its care, the parent has lost its "paramount" right to the child. Then, no longer is that right paramount, but the consideration of the best interests of the child becomes the paramount issue. The trend of the more recent authority is towards the proposition that the interests of the child in adoption proceedings must be given vital importance. Moreover, the foster parents are considered, under certain circumstances, to obtain a right to the child at least equal to that of a parent who deliberately has by his conduct placed the foster parents and the child in a position which cannot be changed without great injury to both the foster parents and the child. "* * * where a natural parent has freely and knowingly given the requisite consent to the adoption of his or her child, and the proposed adoptive parents have acted upon such consent by bringing adoption proceedings, the consent is ordinarily binding upon the natural parent and cannot be arbitrarily withdrawn so as to bar the court from decreeing the adoption, particularly where, in reliance upon such consent, the proposed adoptive parents have taken the child into their custody and care for a substantial period of time, *and bonds of affection, in the nature of a 'vested right,' have been forged between them and* the child." 156 A.L.R. 1011. (Emphasis added.)

The child is now about seven years old. For the first three years of its life it was literally placed around from pillar to post.

For no period of its life has it known its natural mother. For the past four years, for the first time in its life it has known a sense of security, and has had both a father and a mother. If it is returned to its natural mother it will be an illegitimate child with four legitimate siblings. If the adoption proceedings stand, the curse of the brand of illegitimacy will have been taken away. The situation in this respect is well stated in Re Adoption of a Minor, 79 U.S.App.D.C. 191, 144 F.2d 644, at page 649, 156 A.L.R. 1001, where the court says: "Gradually, we are coming to understand that our efforts must go far back into the lives of these children in order that they may be restored, so far as possible, to the influences of normal homes and family life. The disciplines, the affections, the achievements, and the sense of security and belonging, which are possible only with such a background, are of the essence in training for participation in modern life. Obviously, the problem and the need for remedial action is greater in the case of illegitimate children than of others. The child who, from its first awkward years, has been excluded from normal friendships and associations, who has known the disapproval of the unco guid, develops, first, a complex of fear and frustration, followed by resentment against the dominant group in organized society which permits such treatment. The illegitimate child is the visible evidence of transgression against religious and moral standards. Our forbears used to destroy inanimate objects which chanced to be agents of misadventure, or forfeit them as deodands. Similarly, these unfortunate offspring of romantic intemperance have been made whipping boys for vicarious repentance. As infants they have died in far greater proportion than their legitimate brothers and sisters; those who survived have worn the scarlet brand. It goes without saying that such people are more apt to become a burden upon organized society than cooperating members of it. The large percentage of illegitimate births in the general total is unknown to most people, and is startling in its potentialities."

Even the mother recognized the child's handicap because she stated to Attorney Meadows that she desired the adoption "because the child was an illegitimate one and would never fit into any family home for that reason as he was different from the other children."

To now wrench the child away from the people it knows as its parents, and at its age, to attempt to establish a new relationship of child with mother and stepfather would be a tragedy for the child, as well as for the foster parents. Certainly no court, having in mind the rights and best interests of all parties concerned—the natural mother, the foster parents, the child, and the state—could humanely hold that the mother's actions have not estopped her from withdrawing her consent and from claiming that she had not given to the foster parents and the child the "vested right" which under the McDonnell case she would have, except for her actions. As stated in Re Adoption of a Minor, supra, 79 U.S.App.D.C. 191, 144 F.2d 644, 650, 156 A.L.R. 1001: "It is apparent that if in particular cases the unstable whims and fancies of natural mothers were permitted, first, to put in motion all the flow of parental love and expenditure of time, energy and money which is involved in adoption, and then, as casually, put the whole process in reverse, the major purpose of the statute would be largely defeated. Doctors of medicine and of divinity, potential adoptive parents and social workers would be stymied in their rehabilitative efforts. A premium would, instead, be put upon the emotional instability which produces illegitimates; to say nothing of the possibilities for racketeering which such an interpretation of the law would put in reach of those who may be criminal in their tendencies as well as lacking in the qualities of parenthood. The new law cannot prevent illegitimacy or remove its stigma, generally, but to the extent that it may secure desirable placement of even a few illegitimate children it may avoid some of its most dangerous results. But to do so it is necessary that such children and their adoptive parents be protected against possibilities of the kind suggested. Especially in the adoption of illegitimate children it is desirable that the break between infant and consenting mother be abrupt and final. The number of children who are housed in asylums or boarded out at the expense of the public is evidence enough of the problem and of the need. These are the considerations which must be kept in mind in interpreting and administering this law."

In Lee v. Thomas, 297 Ky. 858, 181 S.W.2d 457, the court holds, as does the McDonnell case, that a parent has a superior right to his child, but then goes on to hold that that right may be lost by that parent in favor of foster parents whom the natural parent permits to change their position and to expend money on the child. The court calls attention to this fact (181 S.W.2d at page 460): "Here appellees, in reliance on appellant's written consent, not only took custody of the involved infant, but also devoted time and money in preparations for carrying out their duty as foster parents for 15 months without any objections communicated to them by the mother of the infant." It also states (181 S.W.2d at page 460): "As a general proposition parents have the primary and superior right to the custody of their offspring above that of all others, but the declared law has injected into such cases a factor of almost equal dignity as that of the right of the parents, and which is the welfare of the child afforded by the superior advantages that adopting parents are about to and can furnish it and of which it would be deprived if it remained with its natural parents. But no opinion of any court so far as we are aware approves the right in anyone to take away from natural parents the custody of their children *solely* upon the ground that the adopting parent is better prepared to provide superior advantages to the child which the natural parent for any cause might be unable to provide. But where that situation exists, and the parent has agreed that his or her child might be adopted and has executed such consent or offer in the manner pointed out by the statutory regulations of the particular jurisdiction which has been acted on by the proposed adopter, then such consent or agreement, in the absence of fraud or duress in its procurement, plus the vastly increased opportunities of the adopted child, creates a case where there is no alternative but to sustain the adoption applied for."

In Re White's Adoption, 300 Mich. 378, 1 N.W.2d 579, at page 581, 138 A.L.R. 1034, cited in the McDonnell case (77 Cal. App.2d at p. 812, 176 P.2d at pages 782, 783), the court in holding similarly to the decision in the McDonnell case used the language [300 Mich. 378, 1 N.W.2d 581], "* * * *no vested rights having intervened* * * *." (Emphasis added.)

In Re Adoption of a Minor, supra, 79 U.S.App.D.C. 191, 144 F.2d 644 at page 648, 156 A.L.R. 1001, in discussing the adoption procedure provided by Congress for the District of Columbia, the court recognized the right of estoppel in a case of this kind, for it said that Congress "knew that well established principles of contract, waiver, and *equitable estoppel* would, ordinarily, prevent capricious and arbitrary evasion of a promise made, of consent given, of representations acted upon." (Emphasis added.)

It is true that in the McDonnell case, supra, the court considered all of the authorities we have hereinbefore cited. It called attention to both the so-called majority rule which, generally, gives the parent the right before final adoption to withdraw his consent, and the minority rule, which is the more modern, and to us, the more acceptable rule, that the consent cannot be withdrawn except in the discretion of the court. However, the court did not base its decision upon either rule but upon statutory construction. As before pointed out, the court was not considering the matter of estoppel, and there were no circumstances there which would have justified the court in applying the principles of estoppel.

The appeals from the order denying the motion to vacate, and from the order denying the motion for a new trial are dismissed; the judgment and decree appealed from are hereby affirmed.

PETERS, P. J., and OGDEN, Justice pro tem., concur.

80 Cal.App.2d 936

WARE et ux. v. DUNN et al.

Civ. 15698.

District Court of Appeal, Second District,
Division 1, California.
July 22, 1947.

1. Appeal and error 🔑930(1)

Since all intendments are in favor of verdict arrived at on conflicting evidence and province of appellate court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support verdict rendered, and which is not inherently improbable, appellate court will view testimony in light most favorable to respondents.

2. Searches and seizures 🔑7(1)

The right of people to be secure in their homes against unreasonable searches and seizures is guaranteed both by Federal and State Constitutions, and the inviolability of such guarantee cannot be impaired under pretext of "making an investigation" by those clothed with official authority. Const.Cal. art. 1, § 19; U.S.C.A. Const. Amend. 4.

3. Assault and battery 🔑2

The "violent injury", contemplated by statute defining offense of assault, is not synonymous with "bodily harm", but includes any wrongful act committed by means of physical force against the person of another, even though only the feelings of such person are injured by the act. Pen. Code, § 240.

See Words and Phrases, Permanent Edition, for all other definitions of "Bodily Harm" and "Violent Injury".

4. False imprisonment 🔑2, 5, 6

All that is necessary to make out a charge of "false imprisonment" is that individual be restrained of his liberty without any sufficient complaint or authority therefor, and it may be accomplished by words or acts which such individual fears to disregard, and temporary detention is sufficient and use of actual physical force is not necessary. Pen.Code, § 236.

See Words and Phrases, Permanent Edition, for all other definitions of "False Imprisonment".

5. False imprisonment 🔑31

Proof that words and conduct of defendants, as city police officers, were of such a character as to induce a reasonable apprehension or fear on part of plaintiffs, who were husband and wife, to resist entry into hotel room occupied by them and conduct of defendants therein was sufficient to support charge of "false imprisonment". Pen.Code, § 236.

6. False imprisonment 🔑6

A detention of a person outside of a public institution, against his will and without right, amounts to "false imprisonment". Pen.Code, § 236.

7. False imprisonment 🔑7(3)

If an officer abuses his authority, he is a trespasser ab initio and liable for false imprisonment. Pen.Code, § 236.

8. Assault and battery 🔑2
False imprisonment 🔑13

Entry of defendants, as city police officers, into hotel room occupied by plaintiffs, who were husband and wife, under pretended color of official right was an abuse of authority invested in them as peace officers and relegated them to category of trespassers, so as to be liable for damages for assault and false imprisonment, even though they acted on reasonable belief that a misdemeanor was being committed. Pen.Code, §§ 236, 240, 836, subd. 1, 840; Const.Cal. art. 1, § 19; U.S. C.A.Const. Amend. 4.

9. Arrest 🔑63(4)

An arrest without a warrant may not be made on a belief, founded on information received from a third person, that a misdemeanor is being committed.

10. Arrest 🔑63(4)

An officer cannot justify an arrest on his "reasonable belief" that the person arrested was then committing a misdemeanor.

11. Assault and battery 🔑10
False imprisonment 🔑11

Fact that defendants, who were city police officers, in entering hotel room occupied by plaintiffs, who were husband and wife, had been misled by hotel clerk who informed them that room was registered only to plaintiff wife, and, hence, were acting in "good faith" in their "belief" that a misdemeanor was being committed therein did not authorize them to invade the room, and would not relieve them from liability for damages for assault and false imprisonment. Pen.Code, §§ 236, 240, 836, subd. 1, 840; Const.Cal. art. 1, § 19; U.S.C.A.Const. Amend. 4.

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Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Eugene H. Ware and Viola Alice Ware against Howard F. Dunn, Charles C. Sullans and others, for assault and false imprisonment. From a judgment in favor of plaintiff against named defendants and from order denying their motions for judgment notwithstanding verdict, the named defendants alone appeal.

Affirmed.

Irving M. Smith, City Atty., of Long Beach, Atlee S. Arnold, Frank C. Charvat, and Dewey L. Strickler, Deputies City Atty., Joseph A. Ball and Clarence S. Hunt, all of Long Beach, for appellants.

Lee J. Myers, of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs, who are husband and wife, instituted this action by the filing of a complaint titled "Complaint for Damages for Assault and False Imprisonment." Named as defendants are Howard F. Dunn and Charles C. Sullans, police officers of the City of Long Beach, Walter Lentz, as Chief of Police of said city, Orville F. Whittlesey, Inspector of the Vice Squad Detail of the Police Department of said city, Pacific Fidelity Owners, Ltd., a corporation, and J. A. Crane, as owners of the Schuyler Hotel, and Frank Mee, as night clerk of said hotel. The action is predicated upon the entry by defendant police officers, Dunn and Sullans, into the room in the Schuyler Hotel in which plaintiffs were guests, at a late hour of night, questioning plaintiffs, and requiring identification from them. The damages claimed to have been suffered resulted from shock, humiliation and embarrassment allegedly suffered by plaintiffs. Punitive damages also were prayed for. No claim is advanced that any physical force or violence was used upon the person of either plaintiff.

At the conclusion of plaintiffs' case, on their motion, the action was dismissed as to defendant Chief of Police Walter Lentz. As to defendants Crane, Mee and Pacific Fidelity Owners, Ltd., their motion for a nonsuit was granted. A similar motion on behalf of defendants Dunn, Sullans and Whittlesey was denied.

The jury returned a general verdict in favor of plaintiffs as against the defendants Dunn and Sullans, fixing damages in the sum of $1,000. The jury found for the defendant Whittlesey.

Defendants Dunn and Sullans moved for a new trial, which motion was granted "on the grounds of excessive damages and the insufficiency of the evidences to justify the verdict," provided, however, that should plaintiffs file an election to remit $500 of such judgment within a stated time, then said motion for a new trial would be denied. Plaintiffs, within the prescribed time, filed such election of remission.

From the judgment as entered and from the order denying their motions for judgment notwithstanding the verdict, defendants Dunn and Sullans prosecute this appeal.

[1] Appellants earnestly urge that the evidence is insufficient to justify the verdict and that the verdict is against law. These contentions make it necessary to epitomize the testimony given at the trial. Because it is the rule that all intendments are in favor of the verdict arrived at on conflicting evidence, and our province is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered, and which is not inherently improbable, we shall narrate the testimony in a light most favorable to respondents. We shall not attempt to analyze the evidence of witnesses who testified in behalf of appellants. That was the province of

the triers of fact. Should we conclude that there is sufficient evidence to support the findings of the jury and the judgment of the court, it would be an idle task to review evidence in conflict therewith. Authorized though we are to consider the evidence, we are without authority to weigh it.

With the foregoing rules in mind, we deem the following a fair summary of the factual background which gave rise to this litigation:

The Schuyler Hotel is a commercial hotel located in the downtown business district of Long Beach, in Los Angeles County. The appellants were members of the Long Beach Police Department, assigned to work in plain clothes out of the "Vice Squad Bureau," under the direction of defendant Inspector Whittlesey. Their duties consisted in part of policing the downtown hotels for the detection and suppression of morals offenses.

On the afternoon of June 17, 1943, plaintiff Mrs. Viola Alice Ware went to the Schuyler hotel and requested a room for herself and her husband. She was advised that the hotel did not register couples unless they were together; that she could register in her name and when her husband arrived he would be required to register also. Mrs. Ware stated that her husband was in the Navy and was expected to arrive in port that evening. An arrangement was made with the clerk whereby Mrs. Ware would be charged at the rate of single occupancy of the room, with 50 cents added thereto for the nights her husband would occupy the room with her.

Mrs. Ware then registered on a white individual registration card as "Mrs. E. H. Ware, 460 Ellis St., San Francisco," and was assigned to room 408. From this card the clerk made out a "blue house card," which was placed in a rack in the clerk's quarters for reference in the usual course of business to ascertain the occupants of a particular room. The card signed by the guest was filed away.

Plaintiff Mr. Ware did arrive at the hotel on the afternoon of June 17 about 4:30 p.m. A different room clerk was on duty, and Mr. Ware registered by adding to the white registration card previously signed by his wife the words "Mr. &" in front of Mrs. Ware's signature. This addition made upon the white registration card was not appended to the "blue house card" above referred to. Both plaintiffs then went to the room, which they occupied on the nights of June 17 and June 18.

On the night of June 19 plaintiffs returned to the hotel between 11 and 11:30 p.m., went to their room, and within 30 to 45 minutes retired. Plaintiff Mr. Ware testified that before retiring he locked the door to the room. As to what occurred thereafter is thus described by him in his testimony:

"Q. Now, did anything unusual happen that night after you had retired? A. We'd been in bed approximately half an hour when I heard someone at the door, coming in; there was enough light in the room, there, I could see the door was open, and someone was stepping in. I called, 'Who is it?' A man said, 'Police officers.' About that time a light was switched on, and I asked him what he wanted. Mr. Dunn was the first one in the door; he said, 'I want to see your ID card.' So I was still in bed, on the side of the bed nearest the door, and he walked over to me with a badge in his hand, and showed it to me. At that time I was entirely undressed, here, alongside of the bed; I had my shorts there. I put them on before I got out of bed, threw back the covers. I got up; my clothes were hanging in the clothes closet, blues, my wallet was inside there. My ID card was in it; I got the ID card out, showed it to Mr. Dunn, and about that time he called me into the bathroom.

"Q. Let me just interrupt you, Mr. Ware. Was there any knock at the door before these officers entered? A. I heard none.

"Q. And how many came into the room? A. Three.

"Q. And were they in the room before you got out of bed? A. They were.

"Q. All three of them? A. All three."

With reference to what transpired between plaintiff Mr. Ware and defendant Officer Dunn in the bathroom, Mr. Ware testified as follows:

"Q. What did he say to you with reference to the registration? * * * A. He said we were not registered properly.

"Q. * * * What did you say? A. I said we were.

"Q. And what happened? A. We all exchanged words there for a few minutes; he claimed we were not registered properly, and I said we were. We didn't seem to get any place at that.

"Q. You had some argument about that? A. Well, it was just back and forth, no real heated argument."

According to plaintiff Mr. Ware, there was further conversation with defendant Officer Dunn, wherein the latter explained that the police department was "working in conjunction with the military authorities, endeavoring to keep down the venereal rate in the area where there were so many service men," and that plaintiff Mr. Ware, being a service man, "probably understood what it was all about." This witness also testified that there were no threats uttered, no talk of arrest, no violence, and that he went into the bathroom voluntarily in response to Officer Dunn's request, "Will you come into the bathroom, I want to speak to you." Plaintiff Mr. Ware also testified that just prior to defendant Officer Dunn's exit from the room he said to the officer, "All right, I know what you are up against in this type of situation."

As to the reasons which prompted defendant officers Dunn and Sullans to go to plaintiffs' room in the Schuyler Hotel, the record reflects that defendant Inspector O. F. Whittlesey, who was in charge of the vice squad of the Long Beach Police Department, received an anonymous call over the telephone between 11 and 11:30 p.m., advising him that the police should "investigate room 408 in the Schuyler Hotel". The Police Inspector then detailed the aforesaid officers to investigate the complaint. Appellant Dunn had been a member of the police department some nine years, with six years' experience on the vice squad, while Officer Sullans had several years' experience as a police officer. Upon arrival at the hotel, both appellants proceeded directly to the hallway outside room 408. Listening, they could distinguish the voices of a man and a woman in the room, but could not understand what either was saying. They then went to the clerk's desk on the ground floor, where they asked defendant Frank Mee, the night clerk, if they could see the registration card for room 408. Thereupon the clerk "searched his files and was unable to find it, so he took out a blue card that he said was the accountant's card, the one they kept their finances on, and I (officer Dunn) noticed that it was registered to a Mrs. Ware." According to Officer Dunn's testimony, the following colloquy took place between himself and the night clerk:

> "I said, 'Is this room registered to one person?' and he said, 'Yes, according to the card,' and I said, 'Are you sure that this is registered to just one person?' and he said, 'Yes, as far as the card,' he said 'I don't know, I didn't see the people, but according to that card it is registered to one woman.'"

Thereupon the appellant officers returned to the plaintiffs' room for the purpose, as testified to by them, of investigating the possibility of a violation of two sections of the Long Beach Penal Code, viz., sections 242 and 246 (Ord. No. C-1697), both of which sections declare that any person violating the provisions thereof shall be guilty of a misdemeanor.

For the reasons heretofore stated we shall not narrate the testimony of appellant officers as to the method by which they obtained admission to the room and as to what transpired thereafter. Suffice it to say that such testimony is in many respects directly in conflict with plaintiffs' evidence and was to the effect that the door to the room was unlocked, that the officers, knocked, announced they were police officers, and were, in effect, invited into the room by plaintiff Mr. Ware.

[2] As a first ground of appeal it is earnestly asserted that the conduct of appellants did not violate any of the asserted rights of respondents. With this we cannot agree. The right of the people to be secure in their homes against unreasonable searches and seizures is guaranteed by both the Federal and State Constitutions (Const. U.S., 4th Amendment; Const.Calif., art. I, sec. 19). The inviolability of this guarantee cannot be impaired or destroyed under the

guise or pretext of "making an investigation" by those clothed with official authority.

[3] It is appellants' contention that they neither committed an assault nor falsely imprisoned plaintiffs. True, no physical violence was used upon plaintiffs nor was any bodily harm suffered by them. But the "violent injury" contemplated by section 240 of the Penal Code is not synonymous with "bodily harm," and, as was said in People v. Bradbury, 151 Cal. 675, 676, 91 P. 497, "includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act."

The primary question to be decided is whether the conduct and actions of appellants, as described by respondents, whose version thereof was believed by the jury, were unlawful. Appellant police officers had no warrant, did not witness the commission of a misdemeanor, and admittedly did not suspect the commission of a felony. The question of the "reasonableness" of the officers' conduct is not controlling in the instant case. That doctrine applies only in cases involving a felony and its application stems from section 836 of the Penal Code, which authorizes an officer to make an arrest when a person has committed a felony, though not in the presence of the officer; where a felony has been committed and the officer has reasonable cause for believing the person arrested to have committed it; on a charge made, upon a reasonable cause, of the commission of a felony; or at night, when there is reasonable cause to believe that the person has committed a felony.

In misdemeanor cases an officer is authorized to make an arrest only when such public offense is committed or attempted in his presence (Pen.Code, sec. 836, subd. 1). So zealous is the law for the liberty of the individual that unless the misdemeanor is committed in his presence an officer may not make an arrest upon a warrant at night time "unless upon the direction of the magistrate, indorsed upon the warrant" (Pen. Code, sec. 840). All of the cases cited by appellants wherein the question of "reasonable grounds" or "probable cause" for the conduct and actions of peace officers were considered, involved felonies. We are not cited to a single case involving a misdemeanor wherein the conduct of an officer in making an arrest or detaining a person was considered in the light of "reasonable grounds" or "probable cause" for causing such detention. And our search for such a case has been equally fruitless.

[4-6] False imprisonment is defined by section 236 of the Penal Code as "the unlawful violation of the personal liberty of another." To unlawfully violate the personal liberty of another does not mean that such person must be placed or confined in a prison. All that is necessary to make out a charge of false imprisonment is that the individual be restrained of his liberty without any sufficient complaint or authority therefor, and it may be accomplished by words or acts which such individual fears to disregard. Temporary detention is sufficient, and the use of actual physical force is not necessary. The essential thing in false imprisonment is the restraint of the person (Vandiveer v. Charters, 110 Cal.App. 347, 355, 294 P. 440). According to plaintiffs' testimony, which we must accept, the words and conduct of the officers may well be held to be of such a character as to induce a reasonable apprehension or fear on the part of the former of the use of force should they resist the entry into their room and the conduct of the officers therein. Certainly, the means of coercion were at hand. Under such circumstances, the restraint is as effectual as if the deprivation of liberty had been accomplished by lodging plaintiffs behind prison bars. As was said in McAlmond v. Trippel, 93 Cal.App. 584, 588, 269 P. 937, "Any detention under pretended color of official right is imprisonment. Even a detention of a person outside of a public institution, against his will and without right, amounts to false imprisonment."

[7-10] In McAlmond v. Trippel, supra, 93 Cal.App. at page 589, 269 P. at page 939, it is further stated (quoting from Weber v. Doust, 84 Wash. 330, 146 P. 623): "If an officer abuses his authority, he is a trespasser ab initio, and liable for false imprisonment. 1 Cooley on Torts (3d Ed.),

p. 314. * * *." In the case with which we are here concerned the only justification for the officers to invade the sanctity and privacy of plaintiffs' room, which was then their home, was the right to make an arrest. As heretofore pointed out, appellant officers were without such authority. Their entry under pretended color of official right was therefore an abuse of the authority invested in them as peace officers, and relegated them to the category of trespassers. "* * * the mere belief or suspicion that a misdemeanor is being, or has been, committed is insufficient to warrant an arrest without a warrant; nor may an arrest without a warrant be made on a belief, founded on information received from a third person, that a misdemeanor is being committed." (6 C.J.S., Arrest, § 6, pp. 594, 595.) An Officer cannot justify an arrest on his "reasonable belief" that the person arrested was then committing a misdemeanor (Adair v. Williams, 24 Ariz. 422, 210 P. 853, 26 A.L.R. 278, 282). Nor is it sufficient that the officer believed that the person apprehended was engaged in the commission of a misdemeanor, though such belief may have been entertained in the utmost good faith (State v. Bradshaw, 53 Mont. 96, 161 P. 710; State v. Small, 184 Iowa 882, 884, 169 N.W. 116; McGuire v. State, 19 Ala.App. 138, 95 So. 565). The cases just cited are based on statutes similar to ours on the right of a peace officer to make an arrest without a warrant.

[11] Appellants place great reliance on the fact that the officers were misled by the hotel clerk, who informed them that the room in question was registered only to Mrs. Wade. But from what we have herein stated it is manifest that were such the fact, nevertheless the officers, under the circumstances here present, would not have been authorized to invade it, however strong might have been their "belief" or unquestioned their "good faith" in the "belief" that a misdemeanor was being committed therein.

From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Today, as in ages past, we are not without tragic proof that the exacted power of some governments to ignore the inalienable right of the individual to liberty and to resort to lawless enforcement of the law is the handmaid of tyranny. No higher duty, no more solemn responsibility, rests upon the courts than to maintain the constitutional and statutory shields planned and inscribed to preserve liberty under law and protect each individual from oppression and wrong, from whatever source it may emanate.

The judgment appealed from, and the order denying the motion of defendants Dunn and Sullans for judgment notwithstanding the verdict, are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

WHITFIELD et al. v. JESSUP et al.*

Civ. 15765.

District Court of Appeal, Second District, Division 2, California.

July 28, 1947.

Hearing Granted Sept. 25, 1947.

1. Sales 🔑285(2)

The Sales Act provision requiring buyer of goods to give notice to seller of the breach of any promise or warranty within a reasonable time, before seller can be held liable, must be construed as applying to the sale of food. Civil Code, § 1769.

2. Sales 🔑445(5)

Whether notice of a breach of warranty was given to seller within a reasonable time after the buyer knows or ought to know of the breach is question of fact, but, where there is no dispute as to the time of such notice with reference to the date of the purchase, the question as to whether the time was reasonable is one of law. Civil Code, § 1769.

3. Sales 🔑285(2)

Notice of claim for damages on account of bacteria-infected raw cream, not given to the dealer by the consumer until 5 months and 18 days after consumer had been advised that her illness was the result of the consumption of the cream, was not given within the "reasonable time" required by statute in order to hold dealer liable. Civil Code, § 1769.

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* Subsequent opinion 193 P.2d 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

◆

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action by Claude Jenkins Whitfield and another against Roger Jessup and Marguerite Rice Jessup, copartners doing business under the fictitious firm name and style of Roger Jessup Certified Farms, to recover damages allegedly sustained by reason of the purchase and consumption of bacteria-infected cream. Judgment of dismissal, and plaintiffs appeal.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for appellants.

Reed & Kirtland, of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for respondents.

MOORE, Presiding Justice.

The question for decision is whether notice of a claim for damages on account of bacteria-infected, raw cream was timely where the consumer delayed notifying the dealer for five months and 18 days after she had been advised that her illness was the result of her consumption of the products of such dealer.

The defendants, Roger and Marguerite Rice Jessup, were at all times mentioned herein engaged in the sale and distribution of dairy products. In the months of January, February and March, 1944, plaintiff Dorothy Whitfield consumed certain raw cream which had been distributed by defendants and bought by her husband. Such purchases continued intermittently until about April 10, 1944. During April she experienced symptoms of an illness and on May 9 she consulted a physician who on June 2 advised her that she was suffering from undulant fever. On November 20, 1944, through an attorney not of record herein, she notified the defendants of her illness and of her claim for damages "as the result of using your dairy products." On February 28, 1945, she and her husband filed the present action predicated upon the breach of an implied warranty of fitness. When the cause came on for trial plaintiffs introduced into evidence the letter of November 20 which is in language as follows: "Gentlemen: My client, Dorothy Whitfield of 722 North Jackson street, Los Angeles, California, has retained me to press a claim against your company. She tells me that her doctor advises her that she now has undulant fever as a result of using your dairy products. Before proceeding with this matter I would like to have your attorney get in touch with me in order that we may discuss the matter of an amicable settlement." Thereupon the motion for nonsuit, having been argued, was granted. From the ensuing judgment of dismissal comes this appeal.

Such notice was conveyed to defendants almost eleven months after the purchase of the first raw cream, over seven months after experiencing her first symptom of illness, and five months and 18 days after the physician advised plaintiffs that Dorothy was suffering from undulant fever. Inasmuch as for the purpose of the motion for nonsuit the cause of the disease suffered was concededly her consumption of the products of defendants' dairy, the sole question for determination is whether the letter of plaintiff's attorney was a sufficient compliance with the law to impose liability upon the merchant.

Section 1769 of the Civil Code, sometimes known as section 49 of the Uniform Sales Act, provides as follows:

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

In Restatement of the Law of Contracts, Volume 2, Section 412, it is said:

"Under a contract for the sale of goods, the failure of the buyer, after acceptance of goods tendered as performance of the contract, to give notice to the seller of the latter's breach of any promise or warranty, within a reasonable time after the buyer knows or has reason to know of such breach, discharges the seller's duty to make compensation."

[1] The interpretation given to this uniform sales statute is that the purpose of the notice is to advise the seller that he must meet a claim for damages as to which he is entitled to have early warning that he may inspect such goods as may remain in the buyer's possession and which the latter claims to be defective. Columbia Axle Company v. American Automobile Insurance Company, 6 Cir., 63 F.2d 206, 207. The contention made by appellants has been presented before the courts of other jurisdictions from whose decisions, with one single exception, the judicial trend appears to hold as a non-compliance a belated notice of a claim against a merchant on account of bacteria-infested food. In a New York case (Kennedy v. F. W. Woolworth Co., 205 App.Div. 648, 200 N.Y.S. 121, 122) it was held that the statute was never intended to apply to the sale of "goods for immediate human consumption." But the Supreme Court of Massachusetts, in construing the statute where the plaintiff had taken ill from food purchased from the defendant, held that the giving of notice to a vendor of an alleged breach of warranty within a reasonable time "is intended for the protection of the seller against belated claims for damages," and that when a purchaser bases his action upon such alleged breach of warranty the notice of the breach to the seller "must refer to particular sales, must fairly advise the seller of the alleged defect, and specify with reasonable particularity in what the breach consists, and must be such a notice as to repel the inference of waiver." Putnam v. Great Atlantic & Pacific Tea Co., 304 Mass. 364, 23 N.E.2d 866, 867. The Supreme Court of New Hampshire was even more direct in repudiating the New York holding in an action for damages based upon the claim that plaintiffs had contracted trichinosis from eating pork purchased from the defendants. The judgment of the trial court was reversed with the pronouncement that the general provision of the sales act in regard to warranties applies to sales of food and lies at the foundation of plaintiff's case; that the subsequent provisions of the act limiting the right of recovery for a breach of one of the warranties previously imposed do apply to cases arising out of sales of food. It is a fair interpretation of the statute that the rule should be reasonably certain and at the same time avoid a hardship on the buyer by requiring that his acceptance of title necessarily deprives him of the seller's obligations. Also, the rule should avoid hardship on the seller by not allowing a buyer at any time within a period of the statute of limitations to assert the defective condition of the goods although he made no objection when they were received. This explains why the positive requirement of prompt notice was inserted in the statute. The primary purpose of the notice is to advise the merchant that he must meet a claim for damages, as to which he is entitled to an "early warning." There is no reason why a seller of food for immediate human consumption needs protection from belated claims for damages any less than a seller of food for less immediate use. Hazelton v. First National Stores, 88 N.H. 409, 190 A. 280, 282.

The Supreme Court of Washington is equally as emphatic in rejecting the New York construction of section 49. It holds that food distributed for human consumption clearly falls within the definition of 'goods'. Before it can be excluded the statute must be so amended as to leave no doubt of the intention of the lawmakers not to include it within 'goods' manufactured or distributed. There is no basis for the contention that the legislature intended, by implication, to exclude aritcles of food merely because they might be immediately consumed by the purchaser. In such a case the opportunity to investigate may be more difficult, but this does not justify a court in making exceptions. Baum v. Murray, 23 Wash.2d 890, 162 P.2d 801, 806.

There is no provision in the statute requiring that goods be returned to enable the buyer to maintain his action for breach of warranty. But the very absence of such requirement emphasizes the reasonableness of the rule requiring prompt notice of claim to the merchant, in order that he might advantageously investigate the merits of the claim of a breach of implied warranty. The position of the buyer of poisoned food has been assimilated to that of a person injured by a defective street. Sargent v. Town of Gilford, 66 N.H. 543, 27 A. 306. To be entitled to recover against the city evidence must show that he has filed a statement of his claim within the period designated by the statute. Such requirement is founded upon a principle of fairness in controversy. It is wholly apart from the statute of limitations which governs the time of commencing an action. In causes based upon negligence in the preparation of food for human consumption the protection of a merchant or processor from unjust claims renders it necessary that the claimant put the prospective defendant upon prompt notice to the end that investigation may be made and all valuable available evidence be obtained.

[2] While the question of whether a notice was given "within a reasonable time after the buyer knows or ought to know of the breach," is one of fact, yet where there is no dispute as to the time of such notice with reference to the date of the purchase the question as to whether the time was reasonable is one of law. Columbia Axle Company v. American Automobile Insurance Company, supra; Ice Bowl, Inc., Spalding Sales Corporation, 56 Cal.App.2d 918, 921, 133 P.2d 846; American Manufacturing Company v. United States Shipping Board Emergency Fleet Corporation, 2 Cir., 7 F.2d 565; Laundry Service Company v. Fidelity Laundry Machine Company, 187 Minn. 180, 245 N.W. 36.

It has been held in many cases that six months' delay in sending a notice of claim arising under section 49 of the Uniform Sales Act (Civ.Code, sec. 1769) is fatal. Stewart v. B. R. Menzel & Company, 181 Minn. 347, 232 N.W. 522; Patterson Foundry & Machine Company v. C. S. Williams Lacquer Company, 52 R.I. 149, 158 A. 721; Columbia Axle Co. v. American Automobile Insurance Company, supra; Hazelton v. First National Stores, Inc., 88 N.H. 409, 190 A. 280, 283; Putnam v. Great Atlantic & Pacific Tea Company, supra; Chess & Wymond Co. v. LaCrosse Box Co., 173 Wis. 382, 181 N.W. 313; Bomze v. M. Schwarz Textile Corporation, 100 Pa.Super. 588. In other cases a delay of four months defeated the actions. Laundry Service Company v. Fidelity Laundry Machine Company, supra; Ice Bowl, Inc., v. Spalding Sales Corporation, supra. In a recent case the Supreme Court of Massachusetts held that a delay of 40 days after the appearance of the symptoms of plaintiff's illness and 27 days after the physician had opined that the rash was a "local" condition, was not a "reasonable time" as required by the statute. Murphy v. Gilcrest Co., 310 Mass. 635, 39 N.E.2d 427, 428.

[3] While it is true that on the motion for a nonsuit (a) all the evidence must be construed most strongly against the defendant, (b) the court must indulge in every inference or presumption fairly arising from the evidence, and (c) the count must accept the view most favorable to the plaintiff if the evidence is fairly susceptible of two constructions (citing Estate of Flood, 217 Cal. 763, 21 P.2d 579; Darling v. Dreamland Bedding & Upholstering Company, 44 Cal.App.2d 253, 257, 12 P.2d 338; Slater v. Shell Oil Company, 39 Cal.App.2d 535, 539, 103 P.2d 1043; Knecht v. Lombardo, 33 Cal.App.2d 447, 450, 91 P.2d 917, yet on the question of the timeliness of appellants' notice to the defendants the evidence is of one notice only which was unreasonably delayed.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

81 Cal.App.2d 42

BALKINS v. LOS ANGELES COUNTY.

Civ. 15819.

District Court of Appeal, Second District, Division 2, California.

July 28, 1947.

1. Estoppel 🔑79

Where owner of undivided one-third interest in lot acknowledged, when he purchased lot at referee's sale in his partition action against owner of undivided two-thirds interest, that his title should be subject to mortgage against the two-thirds interest, he could not thereafter in his quiet title action against mortgagee erase mortgage by relying upon agreement between owner of undivided two-thirds interest and mortgagee, and to which he was not a party and concerning which no reference was made in his complaint.

2. Appeal and error 🔑1044
Partition 🔑49, 91, 97

In action for partition where incumbrances are of record at commencement of action and lienholder is not party to action, court must order such person to be made a party or must appoint referee to ascertain what amount if any remains unpaid, and lienholder must make proof before referee, and court must confirm referee's report, and failure to observe such requirements will warrant reversal of order confirming referee's sale. Code Civ. Proc. §§ 761, 762.

3. Appeal and error 🔑1050(1)
Judgment 🔑707

In quiet title action against holder of mortgage on undivided two-thirds interest in lot by owner of undivided one-third interest purchasing at referee's sale in prior partition action instituted by owner of undivided one-third interest against owner of undivided two-thirds interest, admission of the court file in the prior partition action was prejudicial error, since holder of mortgage was not a party to the prior action.

4. Judgment 🔑678(1)

A judgment or order is operative only upon the parties to the action and their privies, and a predecessor in interest is not a privy.

5. Judgment 🔑673

A party as to whom an action has been dismissed is not bound by the judgment subsequently rendered.

6. Contracts 🔑187(1)

While statute expressly provides that a contract made expressly for benefit of third person may be enforced by such third person, there is no law whereby one who is incidentally benefited by a contract may enforce it. Civ. Code, § 1559.

7. Estoppel 🔑98(1)

In quiet title action against holder of mortgage on undivided two-thirds interest in lot, by owner of undivided one-third interest purchasing lot at referee's sale in prior partition action instituted by owner of undivided one-third interest against owner of undivided two-thirds interest, holder of mortgage was not estopped from asserting that owner of undivided one-third interest purchased lot subject to mortgage against the two-thirds interest, by reason of contract between owner of two-thirds interest and holder of mortgage, where owner of one-third interest was not a party to such contract, and owner of one-third interest was not contemplated when contract was executed, and contract was not enforceable by owner of one-third interest. Civ. Code, § 1559.

◆

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action to quiet title by Lester Balkins against the County of Los Angeles, a body corporate and politic. From the judgment, the defendant appeals.

Reversed with instructions.

Harold W. Kennedy, County Counsel, and Loton Wells, Deputy County Counsel, both of Los Angeles, for appellant.

Van Lee Hood, Robert E. Austin and John N. Helmick, all of San Diego, for respondent.

MOORE, Presiding Justice.

From a decree quieting title in respondent this appeal comes to test the soundness of a judgment against the holder of a valid, recorded mortgage on two-thirds interest in the property where such mortgage had not been satisfied, but respondent had based his claim to a decree upon the mortgagee's agreement to accept for a release of its mortgage "50 per cent of the gross receipts from said two-thirds interest in said property," and the mortgagee was tendered only $22.01 instead of $200, the sale having been made for $600.

The evidence shows that prior to February 18, 1932, Mary D. Trowbridge became seized of two-thirds interest in lot 21, Steele Tract, in the county of Los Angeles as the result of a property settlement with her husband. The lot was improved with a double dwelling house. On that day she mortgaged her interest to appellant and the mortgage was recorded on May 12. During the subsistence of the mortgage Mrs. Trowbridge deceased but her mortgage was renewed by her executor on February 13, 1941, to secure the debt of the estate of decedent in the sum of $911.05 and the new mortgage was recorded March 27, 1941.

At a sale of tax delinquent properties on August 8, 1941, the tax collector of the county sold lot 21 to Cleon E. Balkins, hereinafter referred to as Cleon, who on September 29, 1941, sued decedent's executor to quiet title to his new possession. That lawsuit is hereinafter referred to as the Cleon action. The executor denied the validity of the tax sale. Subsequently, Lester Balkins and his wife Elva acquired the one-third interest of decedent's erstwhile husband, Charles Trowbridge, in lot 21, and sued the county and the executor for a partition of the property. Although the county was not served the trial was set for February 6, 1942, the same day as that fixed for the trial of the Cleon action. But prior to such trial date the executor and the county executed a writing the effect of which was that (1) the county and state had filed a stipulation in the Cleon action for judgment against themselves; (2) the executor has advanced costs and performed legal service in the same cause; (3) in the event a settlement be made with the executor with reference to the estate's interest in lot 21, fifty per cent of the gross amount of such settlement shall be paid to the county in satisfaction of its mortgage, and (4) in case a trial of the Cleon action should result in a recovery by the estate, then the county "shall receive 50 per cent of the gross receipts from the said two-thirds interest in said property" in satisfaction of its mortgage. Promptly following the execution of the foregoing "agreement" the attorneys for Cleon and Lester were advised of its existence and immediately a settlement of both actions followed.

In the Cleon action it was stipulated that (1) the tax collector sold lot 21 to Cleon on August 8, 1941, to satisfy delinquent taxes; (2) Cleon in reliance upon the validity of the previous proceedings paid therefor $337.81 and received the tax deed; (3) the total outlay of Cleon at the time for taxes paid and the deed was $406.36; (4) also, he paid the sum of $61.05 for taxes for 1941 and had paid an insurance premium in the sum of $7.50.

In the partition suit it was stipulated that (1) the Trowbridges had effected a property settlement in March, 1930, whereby an undivided two thirds of lot 21 went to Mary and one third to Charles; (2) deeds were executed to effect such division but the deed to Charles is not of record; (3) that the quitclaim by Charles of his one-third interest to plaintiff Lester is recorded, making the executor and Lester Balkins tenants in common of lot 21; (4) neither Cleon nor Lester is indebted to the executor, nor is the executor in debt to either plaintiff; (5) the lot cannot be partitioned "without great prejudice to the owners"; (6) Cleon has a first lien on the lot for $406.36 and (7) the county holds a valid mortgage lien upon the two-thirds interest in the lot.

Pursuant to the stipulations judgment was entered in the Cleon action declaring the tax deed void and confirming Cleon's lien on lot 21 for $406.36. In the partition action the interlocutory decree declared that (1) subject to Cleon's lien, the estate of decedent and Lester own lot 21 as tenants in common, two-thirds and one-third interest respectively; (2) the executor holds no unsatisfied claim against either Lester or Cleon or against Lester's one-third interest; (3) nor is there any unsatisfied claim in favor of either Cleon or Lester against the estate or against its two-thirds interest; (4) that the lot is subject to the lien of Cleon in the principal sum of $406.36 and interest thereon from date of this decree; (5) that subject to said lien the county of Los Angeles holds a mortgage lien of record upon the two-thirds interest of the estate of Mary D. Trowbridge, the amount of which is not determined; (6) the property cannot be partitioned without great prejudice to the owners, rendering a sale necessary. The decree then named a referee "with all the powers necessary to perform all the duties required of him." He was directed to have the lot appraised, to sell it at public auction to the highest bidder for cash upon giving legal notice, to have the sale confirmed, to have a title search made, to procure a certificate of title and to charge the expense thereof as referee's costs which he must pay as well as the lien of Cleon, then to "pay to the plaintiffs one third of the balance of the proceeds of sale after deducting the aforesaid items." After deducting such amounts the referee was directed to pay from the remainder of the proceeds to the county "such amount as may be determined and agreed upon between the said estate and the county of Los Angeles as is necessary to satisfy and discharge the mortgage lien of the County."

Pursuant to the writ in the partition suit the referee sold the property for $600. The court refused to confirm the sale upon the objection of the executor "that the sum bid is disproportionate to the value of said real estate free from said lien." At the same time it was represented that the lot could on a new sale be sold for $1,600. But at the second sale Lester and his wife Elva were the only bidders and again purchased the lot for $600. That sale was confirmed. After deducting the amount of the Cleon lien and the referee's fees and expenses, the referee tendered to the county "two thirds of the net distributable sum" which he held for the account of the estate, towit, $22.01, upon receipt of the assent of the executor of the estate of Mary D. Trowbridge and a satisfaction of the mortgage. After the county had ignored the referee's tender Lester through his attorney made demand upon the board of supervisors for a release of the mortgage upon the ground that on February 6, 1942, they had agreed with the executor of the Trowbridge estate that out of monies received as the result of settlement or suit the county "shall receive fifty per cent of the gross receipts from the said two-thirds interest in said property in satisfaction of its mortgage." The letter thus addressed to the supervisors reminded them of their knowledge of their agreement with the executor and that such agreement was a consideration for which both Cleon and Lester made the stipulation that the tax deed was ineffective and also that judgment might be entered for a partition by sale of lot 21.

Thereafter the present action was instituted by Lester to quiet his title to lot 21. The court found that on September 29, 1941, Cleon had filed suit to quiet his title against the Trowbridge estate; the contract of February 6, 1942, was executed by the executor and the county; the tax deed suit was tried upon "a stipulation of facts entered into September 11, 1942, between Cleon and the executor"; Cleon dismissed the case as against the county and judgment was entered quieting title of the estate against Cleon and his tax deed; the county for a valuable consideration stipulated and agreed to release its mortgage against lot 21, and said mortgage was and is discharged thereby; when Lester filed his partition suit March 27, 1942, against the executor, he knew of the terms of the contract between the supervisors and the executor of February 6, 1942, and by reason thereof did not serve the county with process; the judgment for partition was entered September 21, 1942, sale to Lester and wife was confirmed and the referee tendered $22.01 to the county for a satisfaction of its mortgage. Upon such findings it was decreed that Lester and his wife were owners of the lot.

[1] The judgment must be reversed because respondent stipulated to take title to the parcel subject to the county's mortgage. After the order confirming the second sale on February 25, 1943, had been entered the executor on March 8, 1943, filed his notice of motion to set aside and vacate the referee's report on the ground that the notice of such sale failed to include the

intelligence that the lot would be sold subject to the county's mortgage. On March 22 the court made its order denying such motion and included in its order that "the plaintiffs Lester Balkins and Elva Balkins having waived in open court any defect in the notice of sale by reason of the fact that it does not mention any lien of the county of Los Angeles upon the property sold, or any part thereof, and waived any and all rights which they may have or hereafter acquire by reason of the failure of said notice to mention such lien" and confirmed the sale to Lester and his wife. Upon an appeal from the order denying the executor's motion to vacate, this court affirmed the order on the ground that the county's lien was not against the entire parcel but attached only to the undivided two-thirds interest of the estate. It would have been improper to order the property sold subject to the county's lien and the interlocutory decree did not so direct, but did order the lot to be sold and that payments on account of the county's lien should come from the estate's share of the net proceeds. Balkins v. Norrby, 64 Cal.App.2d 848, 849, 149 P.2d 396.

[2] That decision did not concern itself with the fact that the county was not a party to the partition suit. In an action for partition where encumbrances are of record at the commencement of the action and the lien holder is not a party to the action, the court must order such person to be made a party or it must appoint a referee to ascertain what amount if any remains unpaid; also provision is made for such lienholder to make proof before the referee and for his report to be confirmed by the court. Code Civ. Proc. secs. 761, 762. A failure to observe such requirements will warrant the reversal of an order confirming such a sale. Wernse v. Dorsey, 2 Cal.2d 513, 516, 41 P.2d 935.

Respondent and his wife having waived all rights which they may have acquired by reason of the failure of the notice to mention the county's mortgage, they thereby acknowledged the paramountcy of appellant's interest and were thereafter in no position to deny it. They made the purchase with no intention other than that their title should be subject to the mortgage. However, if the notice had mentioned the county's lien respondent would have bought the lot subject to the mortgage against the estate's two-thirds share. This is established by the fact that at the first sale, which was made expressly subject to the ability of the referee to pay the mortgage out of the estate's share, they bid the same amount which they bid at the second sale. Their intention is further indicated by the facts (1) that the first sale on February 25, 1943, was set aside because the notice of sale did not mention the county's mortgage and (2) that when the second sale came on for confirmation the court required the plaintiffs to waive any rights they might have had prior to the mortgage as a condition of its confirming the sale. Not only had the county never been a party to the partition suit, had never been asked to prove its claim before a referee, but the court had never authorized a sale to be made free of the county's lien. Respondent knew at the time of his purchase that the referee's notice of sale had omitted mention of the county's mortgage. Obviously because of its awareness that the county was not a party the court made provision in its order of confirmation for the protection of the mortgage.

[3-5] Because the county was not a party it was prejudicial error to admit in evidence the court file in the partition suit. Martin v. Lloyd, 94 Cal. 195, 204, 29 P. 491; 22 Cal.Jur. 174. A judgment or order is operative only upon the parties to the action and their privies. A predecessor in interest is not a privy. 20 Cal. Jur. p. 473, sec. 2. A party as to whom an action has been dismissed is not bound by the judgment subsequently rendered. 15 Cal. Jur., p. 191, sec. 220; Ibid, p. 183, sec. 215. Inasmuch as respondent's only evidence against the county was the latter's valid mortgage on the land he made no adequate showing against appellant. He introduced into evidence the files in the two actions of Cleon and Lester, but since the county was dismissed from the former and was never served in the latter they were without efficacy against the county. There was no proof that respondent ever received a deed to the lot or ever paid the $540 balance of the amount of his bid at the refer-

ee's sale. Furthermore, although Lester's wife was his partner in the bid made at the referee's sale, she is not a party to the present action and no conveyance of her interest to Lester appears in the record.

[6, 7] But respondent relies for affirmance upon the doctrine of estoppel. He argues that all the parties, "including county counsel" and the attorney for the estate, relied upon the county's agreement with the executor to accept "50 per cent of what the executor could get out of any deal he could make and release its mortgage." There are three answers to such contention: First, the language quoted from respondent's brief is not the contract of the parties which has already been quoted herein. No attempt is made by respondent to show that the executor ever offered to pay the county "50 per cent of the gross receipts from said two-thirds interest" in the lot. Second, even though the agreement was made with the county, respondent was not a party thereto. While section 1559 of the Civil Code provides that "a contract, made expressly for the benefit of a third person, may be enforced by him * * *", there is no law whereby one who is incidentally benefited by a contract may enforce it. Smith v. Anglo-California Trust Company, 205 Cal. 496, 502, 271 P. 898; Sanders v. Crabtree, 44 Cal.App.2d 602, 608, 112 P. 2d 923; Buckley v. Gray, 110 Cal. 339, 345, 42 P. 900, 31 L.R.A. 862, 52 Am.St.Rep. 88. The agreement of February 6, 1942, upon which respondent asserts that he relied to estop the county was made with reference to the Cleon action. The partition suit was not filed until March 27, 1942. Therefore, respondent could not have been in the contemplation of the board of supervisors when the Cleon contract was executed by them. Third, not only did it have no reference to Lester and therefore cannot avail him as a basis for estoppel, but it was never enforcible by the executor for the reason that he never paid the amount promised the county out of the proceeds of a sale. The mere fact of the existence of the February contract as discovered by respondent's counsel during the pendency of the partition action is not of such efficacy as would serve to estop the county.

The county had a valid mortgage on lot 21 for a substantial sum. Respondent sued the executor from whom he had acquired a deed of an undivided one-third interest in the parcel and his own son Cleon who held a tax deed to the entire lot for a partition thereof. Having obtained a judgment for partition by sale of the property without having served the county with process, respondent has proceeded upon a unique course of attempting by this action to erase the county's mortgage because he relied upon an agreement to which he was not a party and concerning which he made no reference in his complaint. To do so would be an injustice which equity abhors and will not countenance.

The judgment is reversed with instructions to enter judgment for appellant.

McCOMB and WILSON, JJ., concur.

INTERNATIONAL ASS'N OF CLEANING & DYE HOUSE WORKERS, LOCAL NO 36, et al. v. CAMPBELL et al.

Civ. 16047.

District Court of Appeal, Second District, Division 1, California.

July 28, 1947.

Rehearing Denied Aug. 18, 1947.
Hearing Granted Sept. 25, 1947.*

1. Appeal and error ⚷477

District Court of Appeal has constitutional power to issue writ of supersedeas as one of the writs necessary and proper to the complete exercise of its appellate jurisdiction. Const. art. 6, § 4.

2. Appeal and error ⚷477

District Court of Appeal has inherent power to issue a writ of supersedeas for purpose of preserving the status quo of subject of litigation until final determination of an appeal from an order granting a prohibitive injunction.

3. Injunction ⚷201

Whether an injunction is prohibitive or mandatory in its operation upon the parties whom it affects is determined, not so much by particular designation given to it, as by nature of its terms and provisions and effect on parties against whom issued.

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*Dismissed per stipulation, July 22, 1949. No opinion.

4. Appeal and error 🔑460(2)

Injunction may grant both prohibitive and mandatory relief, and, when it is of such dual character that a mere appeal will not stay prohibitive features thereof, supersedeas being necessary to effect such a stay.

5. Appeal and error 🔑479(1)

Where labor union secured a preliminary injunction, restraining employer during pendency of action from refusing to rehire employees in violation of bargaining agreements, from preventing such employees from resuming work, and other matters pursuant to which union demanded that employers immediately rehire all employees previously locked out or be forced to defend contempt proceedings regardless of correctness of injunction and notwithstanding an appeal taken therefrom, District Court of Appeal, in exercise of a sound discretion, granted employers a writ of supersedeas to preserve status quo pending appeal, lest the appeal be rendered of no substantial value.

6. Appeal and error 🔑458(3)

The right to appeal from a preliminary injunction which is exceedingly broad in its terms carries with it corresponding right to have matter remain without further complications until reviewing court has passed upon the question.

WHITE, J., dissenting.

Action by International Association of Cleaning & Dye House Workers, Local No. 36, and others, against T. J. Campbell and others for specific performance, injunction, and damages for defendants' alleged breach of a labor agreement wherein defendants cross-complained. From an order granting a preliminary injunction against them, defendants appeal. On defendants' petition for writ of supersedeas to stay proceedings pending determination of their appeal.

Writ issued.

Hill, Morgan & Farrer, Carl M. Gould and Richard A. Perkins, all of Los Angeles, for appellants.

Shibley, Wanzer & Litwin, of Long Beach, for respondents.

DORAN, Justice.

The action in which the preliminary injunction herein was issued grew out of a controversy between the petitioner-appellants who operate cleaning and dyeing establishments in the Los Angeles-Long Beach area, and the respondents, International Ass'n of Cleaning & Dye House Workers, Local No. 36, hereinafter called the Union, and certain individuals including officers of the Union. The petition alleges that for some time prior to February 18, 1947, petitioners were under certain contractual arrangements with the Union alleged to constitute a "standard uniform labor agreement," which by its terms was to continue to December 3, 1948. This agreement contained provisions against strikes and lockouts, arbitration provisions, and other provisions not here material.

It is further alleged that "the Union on February 18, 1947, without previous notice of warning to petitioners called a strike and established pickets in front of the plants of said Petitioners, which purported to affect only two of the Petitioners but which your Petitioners understood to be and was in effect a strike and picketing against all the Petitioners, a breach of the no-strike provisions of said agreement and a repudiation of said agreement, giving the Petitioners a right to terminate said agreement." The petition then states that, upon refusal of the Union to call off the strike in compliance with the agreement, "and after threats by the Union that Petitioners would be struck next, Petitioners closed their plants on February 19, 1947, in order to avoid peculiar economic loss * * * and to protect the clothing of customers." The Union then established pickets in front of Petitioner's establishments. "Thereafter, on March 3, 1947," continues the petition, "Petitioners requested the Union again to call off the strike and invited the persons who had last worked for Petitioners on February 18, 1947, to return to work upon the terms and conditions which prevailed on February 18, 1947. The Union refused to comply with that request, as did many of the persons who had last worked for Petitioners on February 18, 1947." It is then alleged that petitioners "reopened their plants on March 3, 1947, hired certain new employees to replace certain employees who terminated employment * * * by refusal to report for work when requested, and rehired all former employees who were willing to return," and that on March 5, 1947, petitioners terminated "said agreement by notice to the Union upon the ground of the Union's breach and repudiation thereof. On or before April 15, 1947, Petitioners' plants were completely staffed and in full operation."

On March 17, 1947 the Union commenced an action for specific performance, injunction and damages, alleging that petitioners had "locked out" employees and otherwise breached the employment agreement which was alleged to be in full force and effect. Petitioners then answered and cross-complained, denying any lock-out, alleging breach of the no-strike clause and other breaches of the agreement, and prayed for an injunction and damages. After a hearing in the Superior Court on an order to show cause, a preliminary injunction in favor of the Union was issued on May 27, 1947, which on June 4, 1947, was amended nunc pro tunc. As amended, the defendants, Petitioners herein, were "absolutely enjoined and restrained during the pendency of the above entitled action and until its final determination, or until the Court shall otherwise order;

"1. From locking out their respective employees * * *;

"2. From failing, refusing, or neglecting to rehire their said respective employees, or any of them, * * * in violation of the said respective bargaining agreements * * *;

"3. From hiring, or discharging any employees * * * except in accordance with the provisions of the respective collective bargaining agreements * * *;

"4. From locking out their respective employees * * * in violation of the terms of the respective collective bargaining agreements * * *;

"5. From preventing the employees * * * from resuming work as such employees in accordance with (said agreements) * * *;

"6. From failing, refusing, or neglecting to recognize the existence of, or to perform, carry out, or comply with (such agreements) * * *;

"7. From failing, neglecting, or refusing to recognize or deal with Richard Myers and Victor Masters, the duly authorized representatives (of the Union) * * *;

"8. From refusing to comply with the terms of said collective bargaining agreements with reference to arbitration and/or conciliation * * *;

"9. From in any manner failing, neglecting, or refusing otherwise to comply in any respect with (said agreements) * * *;

"10. From doing, or failing to do, directly or indirectly, by any manner, means or device whatsoever, any and/or all of the last above-mentioned acts set out in subparagraphs 1 to 9 hereof, inclusive."

The petition for supersedeas affirms that on May 27, 1947, when the preliminary injunction was issued, "petitioners' plants were in full operation and completely staffed with employees, some of whom had been newly hired after March 3, 1947, and others of whom had subsequently been rehired and returned to work," and alleged that on May 27, 1947, "Petitioners still maintained their position which they had consistently maintained since March 5, 1947, that said agreement had been properly terminated by Petitioners because of plaintiff-respondents' breach and repudiation thereof and that Petitioners' plants were no longer being operated under the agreement." It is further alleged that the effect of the preliminary injunction "is to require Petitioners to take affirmative action," namely "to discharge certain of its employees now working; to rehire certain employees who are termed 'employees' but who were not on May 27, 1947"; in other words that petitioners are required "to change their position from that which existed at the time said injunction was issued." The respondents are alleged to have construed the injunction not merely as prohibiting lockouts which might occur after the issuance of the order, but in the mandatory sense hereinbefore mentioned. Attached to the petition is a copy of a notice in which the Union demands "that each and every employee heretofore locked out by you and/or who is now being locked out by you, be immediately re-hired"; and notifying petitioners that notwithstanding petitioners' appeal from the order granting the injunction, "should you fail in any particular to comply with the terms of said Preliminary Injunction, we shall immediately apply to the Court for an order citing you for contempt of court."

In reference to the appeal which has been taken by petitioners from the preliminary injunction, the petition sets forth that: "The appeal herein presents questions of substantial importance, including questions as to the construction and effect of the agreement, the adequacy of the evidence to support the preliminary injunction, and the propriety of granting a preliminary injunction (1) where the material facts are in dispute, (2) where the relief granted exceeds any benefits which plaintiffs-respondents could have secured by complete performance of the agreement, and (3) where the effect of the preliminary injunction is substantially to dispose of the cause on its merits and to do the Petitioners injury irreparable by any subsequent disposition of the cause on its merits." Unless petitioners are granted supersedeas, the petition alleges that "they will be required either to defend contempt prosecutions or to comply with said preliminary injunction notwithstanding their appeal. Enforced compliance with said injunction would effectively frustrate Petitioners' appeal, render their right to appeal of no substantial value, and oust this court of * * * appellate jurisdiction."

The answer filed by the Union admitted calling a strike but "only against the plants of the said Michael Jaffe, Winona Q. Jones and Earl H. Jones, and that the plants of the other petitioners were picketed only after the respondents were locked out"; and alleged that "petitioners closed their plants and locked out the respondents in violation of petitioners' contracts with respondents; and for the purpose of breaking the Union and establishing an open shop." It is respondents' contention that "the injunction is wholly prohibitory," and that "any so-called affirmative acts required of the petitioners are merely incidental to the creation of the proper status quo." The answer further avers that petitioners' legal "position" alleged to have been "consistently maintained since March 5, 1947," was created by "breaches of contract only about two weeks before respondents filed their action to restrain such breaches, and about one month before the * * * temporary injunction, and is not a position of status quo that petitioners are entitled to maintain pending appeal."

The controversy as to whether the injunction should be deemed merely "prohibitory" in nature, or "mandatory" and requiring "affirmative" acts on the part of petitioners, stems from the proposition, apparently conceded by both parties, that, if the injunction is mandatory then petitioners' appeal itself acts as a stay under Section 949 of the Code of Civil Procedure which provides that "In cases not provided for in sections 942, 943, 944 and 945, the perfecting of an appeal stays proceedings in the court below." It is petitioners' contention that, regardless of its form, the injunction was actually mandatory in substance; further, that if it be regarded as merely prohibitory, then supersedeas should issue to preserve the petitioners' rights pending determination of the appeal, and to prevent irreparable injury which would result from the Union's threatened contempt proceedings. On the other hand, respondents take the position that the injunction was merely prohibitory and that petitioners will suffer no injury by a denial of the writ whereas respondents will be irreparably injured by its issuance. Certain other contentions will be hereinafter referred to.

[1-4] As petitioners state, "This court has the constitutional power to issue the

writ of supersedeas, as one of the writs necessary and proper to the complete exercise of its appellate jurisdiction." Calif. Constitution, Art. VI, Sec. 4; People v. Associated Oil Co., 211 Cal. 93, 294 P. 717. There can also be no doubt of inherent power to issue a writ of supersedeas for the purpose of preserving the status quo of the subject of litigation until the final determination of an appeal from an order granting a prohibitive injunction. See Ohaver v. Fenech, 206 Cal. 118, 273 P. 555, 557. And, as said in the Ohaver case, and elsewhere: "The character of an injunction, * * * whether it is prohibitive or mandatory * * *, is determined not so much by the particular designation given to it * * * as by the nature of its terms and provisions, and the effect upon the parties against whom it is issued." Also, as mentioned in that case, the same injunction may be dual in character, granting both prohibitive and mandatory relief, in which situation, under the rule hereinbefore mentioned, a mere appeal would not act as a stay of the prohibitive features of the injunction. In this connection, however, it should be noted that regardless of the terminology employed in describing an injunction, the power of the appellate court to issue a writ of supersedeas is not dependent upon such distinction or terminology. The question here presented is, to again quote from the Ohaver opinion, "whether the appellants have presented such a state of facts as will justify this court in exercising this power in their behalf."

The propriety or impropriety of granting the preliminary injunction herein is not an issue in the present proceeding; that question is one to be decided on the petitioners' appeal. So also, the charges and counter charges concerning alleged strikes, lock-outs, breach of bargaining contracts, and the like, are important matters to be determined in such appeal, not here. The petition herein presents but the single question whether a writ of supersedeas should issue for the purpose of staying all proceedings in this cause until the final determination of petitioners' appeal.

Among other cases, Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640, 641, has been cited by both parties. This case involved a controversy between representatives of the International Ladies' Garment Workers Union, and the defendants who were manufacturers of ladies' coats and suits. An agreement had been entered into for the purpose of securing general stabilization of the industry and pursuant thereto there had been an arbitration award requiring that a certain employee should be released "from further employment." Upon defendant's failure to comply therewith the Union secured a court order confirming the award and enjoining the defendants "from employing, or continuing to employ" the said employee. Defendants appealed from this order and thereafter the lower court issued an order to show cause for contempt, following which the defendants petitioned, as in the present case, for a writ of supersedeas. The court held that the defendants were entitled to the writ "as a matter of right," and again called attention to the fact that "this court will not be bound by the form of the order but will look to its substance to determine its real nature." In respect to the particular order there involved, the court said: "In view of the fact that the gist of the whole controversy in the instant case was the continuance or noncontinuance of said employee in the employment of defendants, and in view of the fact that the order appealed from was directed solely to this issue, no contention may be legitimately made that the order although mandatory was only ancillary to or subsidiary to another or main order which was prohibitive and therefore not automatically stayed by the * * * appeal."

[5] The factual situation in the Feinberg case just referred to is not fundamentally different from that in the instant case, with the one exception, mentioned by the respondent Union, that in the present case, no order to show cause for contempt had been issued. Since this step had not been taken, the Union contends that "The issuance of a writ under such circumstances will constitute an invitation for application for supersedeas upon each and every occasion that an appellant in an injunction suit becomes offended by the comments of his adversary made outside

of court." It should be noted, however, that the Union's written notice to petitioners of June 5, 1947, which "demands" that petitioners immediately rehire all employees "heretofore locked out by you," and gives unqualified notice that compliance with the injunction is not excused by petitioners' appeal and that upon failure to comply therewith, "we shall immediately apply to the Court for an order citing you for contempt of court," is much more than a mere comment; there can, in fact, be no doubt that it meant exactly what it said. The actual mechanics of securing such an order to show cause in re contempt would require no more than a few minutes.

[6] Notwithstanding the appeal, therefore, petitioners, upon receiving this notice, were faced with an immediate dilemma; either the injunction, right or wrong, must be complied with forthwith; or, as the only alternative, petitioners would be forced to defend contempt proceedings. Should the injunction terms be complied with, petitioners would be required to discharge the present employees and reinstate the so-called "locked-out" employees, with the result that chaotic conditions would exist which could not be cured even if petitioners should obtain a reversal upon appeal. As a practical matter, petitioners' legal right to appeal and contest the propriety of the preliminary injunction might then be "effectively frustrated" as alleged by the employers; the status quo disturbed, and the appeal rendered of no substantial value. The subject matter of the litigation and the vital questions connected therewith would, as it were, have become fait accompli by the mere issuance of what purports to be only a temporary injunction. This is a situation which should not be given judicial countenance. If the petitioners possessed the right to appeal from the order granting this preliminary injunction, exceedingly broad in its terms, then obviously there must be a corresponding right to have the matter remain without further complications until the appellate court has passed upon the question.

"The purpose of the writ of supersedeas", according to Rosenfeld v. Miller, 216 Cal. 560, 562, 15 P.2d 161, 162, and many other cases, "is to preserve the rights of a litigant until there is a final determination of his appeal." It is not asserted that the appellant is entitled to this writ as a matter of right, but rather, as was said in the Rosenfeld case just mentioned, that the appellate court "may properly, in the exercise of a sound discretion, grant him the writ upon such terms as will be just and will adequately protect the rights of the respondent. * * * under the circumstances, the writ should be so granted in order to preserve the status quo until the final determination of the action."

Among other points raised by the respondents, it is argued that the issuance of the writ "will result in irreparable injury to the respondents"; that "supersedeas will not issue where the appeal is merely for the purpose of delay," and that appellants have raised no "substantial questions" on the appeal. It is sufficient to say that there is no merit in any of these contentions. The rights of the respondents appear to be adequately protected, and certainly the petitioners' appeal may be said to raise "substantial questions" which, in the interests of all parties concerned, merit a final determination.

It is therefore ordered that the writ of supersedeas issue as prayed for.

YORK, P. J., concurs.

WHITE, Justice (dissenting).

I dissent. As I read the record herein, it discloses that a strike was declared only against petitioners Jaffe and Jones, neither of whom were parties to the contractual arrangements with the union. Other members of an organization called Harbor Dry Cleaners Association, and who were parties to the union contract, elected, because of the strike against Jaffe and Jones, to rescind their contracts with the union, and thereupon proceeded to hire employees of their own choice, without regard to their several existing contracts with the union. For purposes of hearing on petition for a writ of supersedeas, the decree of the court below must be presumed to be correct. Ott v. Gotfried, 39 Cal.App.2d 397, 103 P.2d 207; Private Investors v.

Homestake Mining Co., 11 Cal.App.2d 488, 54 P.2d 535; People v. City of Westmoreland, 135 Cal.App. 517, 27 P.2d 394. The only question presented by the instant controversy, as I see it, is whether, by declaring a strike against Jaffe and Jones, who were not parties to any contract with it, the union breached its contractual relations with the other employers who had contractual relations with such union. I am impressed that the preliminary injunction issued herein does in fact preserve the status quo of the parties until that question is finally determined. It is not the status quo created by appellants when they allegedly breached their contracts with the union that the court should strike to preserve, but the status quo existing by reason of the contracts with the union, until final determination of the legality of the action of parties to the contract in rescinding it. In my opinion, the petition for the writ of supersedeas should be denied.

Rehearing denied; WHITE, J., dissenting.

30 Cal.2d 517

PALMTAG v. DANIELSON.

S. F. 17443.

Supreme Court of California, in Bank.

Aug. 5, 1947.

Rehearing Denied Aug. 28, 1947.

1. **Brokers ⟹57(2)**

Ordinarily, the price at which a broker is authorized to sell property is considered merely an asking price to guide broker in his negotiations with prospective purchasers, and if broker procures a purchaser willing to pay a lower price, owner cannot deprive broker of his commission by conducting final negotiations himself and selling at a lower figure to purchaser procured by broker.

2. **Brokers ⟹57(2)**

An owner is entitled to make a special contract with broker whereby broker is required to procure a purchaser willing to pay a particular price or meet specific condiitons imposed by owner, and if owner sells property to a purchaser procured by broker, but on different terms from those stated in the contract, broker is not entitled to a commission in absence of bad faith.

3. **Brokers ⟹71**

In "brokers' net contracts", a fixed net amount must be paid to owner and broker's compensation is limited to excess of payment by purchaser over net amount specified.

See Words and Phrases, Permanent Edition, for all other definitions of "Brokers' Net Contracts".

4. **Brokers ⟹49(1)**

Where contract entered into by broker and owner provided that price of property was $40,000 and that if broker arranged sale, client would pay 5% commission, "or a net to me of $38,000", the quoted phrase would be construed as merely illustrative of amount that owner would receive if broker sold property at the asked price, and would not be construed as requiring the property to be sold at the asked price in order for broker to be entitled to his commission. Civ.Code, § 1654.

5. **Brokers ⟹86(6)**

Evidence supported trial court's interpretation of contract entered into by broker and property owner as entitling broker to his commission upon owner selling property to purchaser procured by broker, notwithstanding that sale price was for less than the asking price quoted to broker by owner when listing the property.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Leo Palmtag against Carl E. Danielson to recover broker's commission for sale of defendant's real property. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 174 P.2d 470.

Nathan Frankel, Sloss & Turner, Sloss & Eliot and Frank H. Sloss, all of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley and Franklin C. Stark, all of Oakland, for respondent.

TRAYNOR, Justice.

Plaintiff, a real estate broker, brought this action to recover a commission for the sale of defendant's real property. Defendant sold the property to a buyer procured by plaintiff at a price lower than the figure at which plaintiff was authorized to sell. The trial court entered judgment for plaintiff and defendant appeals.

The question presented on this appeal is whether the agreement between the parties was a general contract merely stating an asking price or a special contract calling for a purchaser willing to pay a net minimum price.

In April 1943 plaintiff wrote to defendant to procure an agency to sell defendant's property. Defendant had previously attempted to sell this property personally and through brokers for a period of about four years. He replied to plaintiff's request by letter, dated April 29, 1943. The significant passages of the letter are:

"I acknowledge receipt of your letter under date of April 27 with reference to my property at 645 Watkins Street in Hayward. Yes, I am interested in selling my property in Hayward providing that I can get my price. I have had quite a few inquiries as of late; however, I have not tied up with anyone exclusively at this writing.

"The property, as you know, is one of the finest in Hayward. [Here follows an exhaustive description of the property.]

"The only reason that I would care to sell it is because I do have an opportunity to put my money into another investment that I would like to do. If it wasn't for this, I wouldn't consider selling it at any price. I have a price of $40,000.00 on the property and if you should arrange the sale, I will pay you 5% commission or a net to me of $38,000.00. [Here follow details on taxes and frontage.]

"If there is further information that you require, I would be glad to furnish it to you. I am not overly anxious to sell the property, but, however, as above stated, I would consider a sale."

Upon receipt of this letter, plaintiff immediately reported to defendant that he had discussed the property with a client. The broker informed defendant that "I did not discuss price over the telephone, but I do think there should be only one price on the property, regardless of whether you sell it or we, the price being $40,000.00."

Plaintiff made an active effort to sell defendant's property during and after May 1943. His prospective purchasers included one Elwood Johnson, the ultimate buyer. Johnson was a partner in an implement business and a competitor of the tenants then occupying defendant's premises. He gave the broker little encouragement until September 1943 when his company received a notice from its landlord terminating its tenancy. At this time Johnson requested additional information concerning defendant's property, and plaintiff conducted him through the building and grounds. He informed Johnson that a local bank was familiar with the property, and together they had a conference with the banker, who affirmed plaintiff's views concerning the value of the property.

Plaintiff next showed Johnson defendant's letter of April 29th, which stated defendant's terms and price. Johnson was not willing to pay $40,000 and mentioned $35,000 as his top price. Johnson was considering other means of solving his problem at this time, but plaintiff advised the purchase of defendant's property and raised persuasive objections to Johnson's proposed alternatives. On October 4, 1943 Johnson made arrangements for a direct meeting in Sacramento with defendant. He revealed his plans to plaintiff, who requested that defendant be informed of plaintiff's part in interesting Johnson in the property. Plaintiff made certain of defendant's knowing of his efforts by telephoning him.

There is a conflict in the testimony regarding the statements made during this telephone conversation. According to plaintiff, he told defendant that he felt he had sold Johnson the property and that Johnson was going to Sacramento to make the purchase. He testified that defendant assured him of the five percent commission if Johnson bought the property.

According to defendant's testimony, however, plaintiff stated that he was unable to sell the property to Johnson and hoped that defendant could close the sale with him. Plaintiff then asked if defendant would give him "something for what efforts" he had put forth.

On October 5, 1943 Johnson and defendant met in Sacramento. Thy discussed the merits of the property, and defendant stated his price to be $40,000. Johnson replied that the property was worth only $35,000 to him. Defendant offered the property for $38,000 and, when Johnson stood firm, suggested that they split the difference and close the deal at $36,500, subject to the approval of his wife. Johnson refused to commit himself on that figure, and the parties agreed to resume negotiations the following week.

On October 8, 1943, three days after the Sacramento meeting, defendant sent a telegram to the broker terminating his agency: "* * * my property * * * not for sale at this time through any broker. Have decided to sell direct therefore no commission to any one." Shortly thereafter defendant was persuaded to give another broker a ten day exclusive agency to sell the property. Defendant meanwhile promised Johnson that a definite answer on the $35,000 offer would be forthcoming in two weeks. The exclusive agency was not fruitful and early in November Johnson purchased defendant's property for $35,000. Plaintiff demanded a commission, but defendant refused to pay it. This action ensued, and the trial court, sitting without a jury, found that the contract was a general contract and that plaintiff had procured a purchaser ready, willing, and able to pay the sale price of $35,000. Plaintiff was therefore adjudged entitled to a five percent commission on the sale.

Defendant appealed from the judgment on the ground that as a matter of law the agreement between the parties was a net contract, calling for a commission to plaintiff only if the sale price exceeded the net figure of $38,000. Plaintiff, on the other hand, takes the position that the agreement constituted a general contract entitling him to a five percent commission on the sale price. Plaintiff also contends that even if the agreement was a net contract, he is entitled to his commission because defendant terminated the agency and sold the property at a lower figure in bad faith. Since we construe the agreement to be a general contract, it is unnecessary to consider plaintiff's contention regarding bad faith.

[1] Ordinarily, the price at which a broker is authorized to sell property is considered merely an asking price to guide the broker in his negotiations with prospective purchasers. See Rest.Agency, § 447, Comment b. If the broker procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of his commission by conducting the final negotiations himself and selling at a lower figure to the purchaser procured by the broker. See 128 A.L.R. 430; Leicht-Benson Realty Const. Corp. v. J. D. Stone & Co., 138 Va. 511, 121 S.E. 883, 43 A.L.R. 1103.

[2, 3] An owner is entitled, however, to make a special contract with the broker whereby the latter is required to procure a purchaser willing to pay a particular price or meet specific conditions imposed by the owner. In such cases, if the owner sells the property to a purchaser procured by the broker, but on different terms from those stated in the contract, the broker is not entitled to a commission in the absence of bad faith. Backman v. Guadalupe Realty Co, 78 Cal.App. 347, 353, 248 P. 296. In brokers' net contracts, a fixed net amount must be paid to the owner and the broker's compensation is limited to the excess of the payment by the purchaser over the net amount specified. Haigler v. Donnelly, 18 Cal.2d 674, 678, 117 P.2d 331.

[4] In the instant case defendant does not contend that plaintiff was required to furnish a buyer willing to pay $40,000, the price stated in the contract, before he would be entitled to a commission. Nor does defendant regard this agreement as a net contract that would entitle plaintiff to keep all in excess of $38,000. Instead, defendant conceives the agreement to be a type of net contract in which defendant must be assured of $38,000 net to him, but the broker is entitled only to a five percent commission if the property is sold for $40,000 or more.

The contract, although ambiguous, does not reasonably lend itself to defendant's construction. Defendant stated: "I have a price of $40,000.00 on the property and if you should arrange the sale, I will pay you 5% commission or a net to me of $38,000.00." If the phrase beginning "or a net to me * * *" is excluded, the letter clearly states nothing more than an asking price of the guidance of the broker. The addition of "or a net to me of $38,000.00" is illustrative of the amount that defendant would receive if the broker sold the property at $40,000. The $38,000 figure has no independent significance, but is merely the amount remaining after the commission is subtracted from the proposed sale price. Interpreted in this manner, the phrase may be explained without doing violence to the remaining language in the contract.

If the contract were construed to require $38,000 net to defendant, the provision for a five percent commission would have little meaning. In such a case, a sale price of between $38,000 and $40,000 would result in less than a five percent commission to the broker. The requirement of a $38,000 net minimum would also subordinate the proposed sale price of $40,000. The $40,000 would no longer be the proposed sale price, but would be transformed into a pivotal amount determining whether the broker should receive a five percent commission or less.

Defendant could have achieved the result he now seeks by using clear language in the letter of April 29th. He failed to do so and now attempts to construct a complicated schedule of commissions purportedly based upon an agreement capable of a more direct and reasonable construction. Civ. Code, § 1654.

[5] Moreover, the trial court's interpretation of the contract is supported by the evidence. See Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319. There was evidence from which the trial judge could infer that it was not the meaning of the contract that a price of $38,000 net to the owner was a condition precedent to the payment of plaintiff's commission.

Before the commencement of this action defendant consistently took the position that plaintiff had not procured a purchaser for the property. He regards himself and persons in Johnson's home office in San Francisco as the ones who actually procured Johnson as the purchaser. Defendant introduced evidence at the trial to establish this point but the trial court found that plaintiff was the procuring cause of the sale. At no time, however, did defendant inform plaintiff that he would be denied a commission for any reason other than that he had not been able to sell the property.

Defendant's telephone conversation with plaintiff before Johnson went to Sacramento and his subsequent communications with plaintiff are devoid of any reference to the socalled net price. According to plaintiff, defendant stated over the telephone that "if Mr. Danielson [defendant] sold the property to Mr. Johnson * * * he would pay me a five per cent commission." Defendant contends that even if he is assumed to have made that statement, it is nevertheless consistent with his present position, since he thought that Johnson was willing to pay the asking price of $40,000. Plaintiff's account of this conversation, accepted by the trial court, as stressing the commission percentage rather than the net figure gains strength, however, in the light of defendant's subsequent communications.

On October 8th defendant sent the telegram to plaintiff attempting to terminate the agency. There again no mention was made of the purported net minimum. Defendant merely stated in the telegram that the property was no longer for sale through any broker and that defendant had decided to sell direct in order to avoid the payment of commissions.

Defendant was not obligated to pay a commission, according to his present theory, unless plaintiff procured a purchaser willing to pay more than $38,000. The evidence establishes that the only purchaser then in sight was Johnson, who was willing to pay only $35,000, and defendant was then negotiating with him for the sale of the property. If defendant terminated the agency because plaintiff had failed to procure a purchaser willing to pay the net minimum figure, he could easily have so stated.

After learning of the sale, plaintiff wrote to defendant requesting his five percent commission. Defendant replied by letter and quoted his telegram of October 8th, adding: "The property was listed at various times with several real estate brokerage firms, none of whom were able to move the property. Therefore, no commission to anyone." Thus, even after the sale had been completed at a price lower than the now asserted net figure, defendant was contending that he, not plaintiff, was the procuring cause of the sale and for that reason refused to pay the commission. Had defendant contemplated that the contract called for $38,000 net to him, it is reasonable to believe that he would have added that as a ground for refusing to pay the commission.

The trial court could therefore reasonably conclude that defendant's actions were inconsistent with his contention that he understood the contract to mean that plaintiff was obligated to procure a purchaser willing to pay a minimum net sum.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ. concur.

SCHAUER, Justice.

I concur in the judgment on the ground that the evidence is legally sufficient to support all essential findings of the trial court, including its construction of the contract which is the basis of the action. No other question need engage our attention.

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30 Cal.2d 492

McCURDY v. HATFIELD.

L. A. 20012.

Supreme Court of California.
July 31, 1947.

1. Appeal and error 🔑927(3)

In passing on the propriety of a judgment of nonsuit, every favorable inference and presumption fairly arising from the evidence must be considered, and all evidence tending to sustain plaintiff's case must be accepted as true.

2. Appeal and error 🔑927(3)

In passing on the propriety of a judgment of nonsuit in a malpractice case the evidence of a defendant is to be considered, together with any other evidence, in the light most favorable to plaintiff.

3. Physicians and surgeons 🔑14(4)

A physician is required to have the degree of learning and skill possessed by physicians of good standing practicing in the same locality, and must use ordinary care and diligence in applying that learning and skill in the treatment of patients.

4. Physicians and surgeons 🔑18(8)

In malpractice action, negligence of the doctor could be established by the doctor's own testimony elicited under the statute permitting examination of adverse party as on cross examination. Code Civ.Proc. § 2055.

5. Physicians and surgeons 🔑18(8, 9)

In malpractice action growing out of treatment of plaintiff's fractured elbow by defendant physician, plaintiff made a prima facie case of malpractice, and sustaining of defendant's motion for judgment of nonsuit was error.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Bess McCurdy against J. Gordon Hatfield for damages from alleged malpractice. From a judgment of nonsuit, plaintiff appeals.

Judgment reversed.

Prior opinion 173 P.2d 670.

J. M. Clements, of Los Angeles, for appellant.

Reed & Kirtland, Henry E. Kappler, and Fred O. Reed, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

The sole question presented, on this appeal from a judgment of nonsuit, is whether plaintiff made a prima facie case of malpractice in the treatment of injuries to her arm and shoulder. She relies on the testimony of defendant doctor as to what was proper practice, and she contends that defendant negligently departed from that practice by commencing manipulative treatments at too early a date and by improperly carrying the treatments beyond the point of tolerance.

[1, 2] There are sharp conflicts in the evidence as to the time defendant began the manipulative treatments and as to their extent and character. According to defendant's testimony, the manner, time and extent of the treatments were strictly in accord with what he testified was proper practice. However, in passing on the propriety of a judgment of nonsuit every favorable inference and presumption fairly arising from the evidence must be consid-

ered, and all evidence tending to sustain plaintiff's case must be accepted as true. The evidence of the defendant in a malpractice case comes within this rule and is to be considered, together with any other evidence, in the light most favorable to plaintiff. Lashley v. Koerber, M. D., 26 Cal.2d 83, 90, 156 P.2d 441.

Plaintiff was injured on January 4, 1944, and she received immediate treatment from defendant, an osteopathic physician and surgeon, in whose office she was employed as medical secretary. X-ray pictures disclosed a fracture of the humerus which was technically described as an "epicondyle fracture, transverse fracture of the longitudinal epicondyle" extending down into the elbow joint. Her arm was placed in a plaster cast with the forearm in a horizontal position. Infra-red light treatments were administered until January 31, when the cast was cut and further X-ray pictures were taken.

Plaintiff testified that on February 3, which was about four weeks after the fracture, defendant massaged her arm and flexed her elbow about in "all directions" for about ten minutes. At that time she could not voluntarily move her elbow, and the manipulation caused very definite pain. On February 5, he gave the same manipulative treatment, except that it was more vigorous. She complained of the pain and told him she could not stand it, but he continued the manipulation after she made the complaint. Defendant massaged her arm and flexed her elbow every few days thereafter, and each of the subsequent treatments was "more violent and longer." She cried after every treatment and repeatedly told defendant the manipulation was painful and that "there was a limit to what [she] could stand," but he told her she was "babyish," and that "it had to be done to get a good arm." On March 3 or 4 defendant "did violent manipulation," pulling the arm violently. Plaintiff screamed with pain, but defendant did not stop the treatment.

On March 14, defendant, with the assistance of another doctor, gave plaintiff an anaesthetic, and her arm was then extended and straightened to the full 180 degree angle. Plaintiff stated that after this occurred her shoulder, arm and hand were swollen, inflamed and stiff, and as time went on the condition of her hand became worse. A few days later he swung her arm while she was holding a weight, and the pain was so intense she "couldn't stand it." On March 24 she again returned to his office and "screamed" from pain when her right hand was extended above her head. After this last treatment she dismissed defendant and secured another doctor.

Before plaintiff broke her arm she had operated a typewriter and played the piano. She testified that after the fracture, and before her arm was manipulated under the anaesthetic, she was able to "make a fist" and run the scale on the piano. She could not do so thereafter or at the time of trial, nor could she operate a typewriter, although in recent months she had noticed an improvement in her arm and hand.

Defendant, whose testimony preceded that given by plaintiff, was examined under the provisions of section 2055 of the Code of Civil Procedure. He testified that he gave the first manipulative treatment on February 14, which was six weeks after the arm was fractured. Defendant stated that "as a matter of precaution we don't do any degree of manipulation * * * in a four-week period," because it requires six weeks for the callus formation to be firm enough to permit manipulation. When asked whether he had continued to manipulate plaintiff's elbow after she complained of pain he replied: "No, I do not manipulate the joint of that kind. We use what is known as the manipulation to tolerance, and that is the point at which the patient begins to complain." He also stated that if manipulation was carried beyond this point "there would be danger of doing injury to the bone which had been fractured"; and that "there [are] always adhesions forming in a condition of this kind, and if you force beyond the point of a patient's tolerance you would be breaking those adhesions." He was then asked:

"Q. * * * it is necessary, then, in treatment of a fracture of this type to be very careful about the manipulation of the joint beyond tolerance. * * * A. That is correct.

"Q. In addition to being brutal, that would be bad practice, wouldn't it. * * * A. Yes."

[3, 4] A physician is required to have the degree of learning and skill possessed by physicians of good standing practicing in the same locality, and it is his duty to use ordinary care and diligence in applying that learning and skill in the treatment of patients. Lashley v. Koerber, supra, 26 Cal.2d 83, 89, 156 P.2d 441; Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604. The negligence of the doctor may be established by his own testimony elicited under section 2055 of the Code of Civil Procedure. Lashley v. Koerber, supra; Lawless v. Calaway, supra. Although the defendant here did not expressly refer to the practice followed by other doctors in the community, he did testify as to what was proper practice, and it is reasonable to infer that his testimony was based on the standard of care used by physicians in the locality. If he failed to conform to the proper practice as set forth in his testimony, he did not act as a reasonable physician should under the circumstances.

[5] When plaintiff's evidence is considered in the light of these factors, it is apparent that she has established a prima facie case of negligence. The evidence would have supported findings that the first manipulative treatment was given on February 3, about four weeks after the fracture, that four others were given within six weeks of the accident and that, despite plaintiff's protests and repeated declarations of pain, the manipulation was carried beyond the point of tolerance. Accordingly, a jury could have found that defendant was negligent in departing from the standard of care required.

The judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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81 Cal.App.2d 119

PEOPLE v. LEWIS.

Cr. 4105.

District Court of Appeal, Second District, Division 3, California.

July 30, 1947.

1. Criminal law ⚷572

Defendant need not prove alibi beyond reasonable doubt or by preponderance of evidence, but has burden to prove alibi to such degree of certainty as will leave reasonable doubt of guilt in minds of jury, and if he carries such burden, he is entitled to acquittal.

2. Criminal law ⚷572

Evidence in support of alibi of defendant accused of theft of automobile and of robbery was insufficient to raise reasonable doubt as to defendant's guilt so as to warrant acquittal. Vehicle Code, § 503.

3. Criminal law ⚷260(11)

Accuracy of observation of witnesses and discrepancies and uncertainties in their testimony are matters for trial court.

4. Robbery ⚷24(1)

Evidence warranted conviction for robbery in the first degree.

5. Larceny ⚷55

Evidence that automobile was taken and driven in violation of statute, and that defendant rode in automobile in the company of others and was sitting in automobile with another when arrested and that automobile was used in commission of robberies in which defendant participated was insufficient to support conviction of theft of automobile. Vehicle Code, § 503.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Frederick C. Lewis was convicted for theft of an automobile and for robbery in the first degree, and he appeals.

Partly affirmed, and partly reversed.

Paul E. Tapley and E. W. Miller, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was found guilty, as charged by information, with violation of section 503 of the Vehicle Code (theft of an automobile), and with the crime of robbery in the first degree. He was also found guilty, as charged by another information, with the crime of robbery in the first degree. The two cases were consolidated for trial, and trial by jury was waived. Defendant appeals from the judgments of conviction.

Appellant contends that the evidence was insufficient to identify him as one of the robbers, and that the evidence in support of his alibi created a reasonable doubt as to his guilt.

On June 7, 1946, about 10:30 a. m., one Calvert left his automobile, a blue 1940 Buick sport coupe, license number 9R9174, with the keys in the ignition lock, at 825 East 29th Street in the City of Los Angeles. About 12:15 p. m. of that day Mr. Calvert returned and discovered his automobile had been stolen.

On that same day, between 11:30 and 11:45 a. m., three negro men entered a dry goods store at 3508 South Central Avenue in Los Angeles, and robbed an employee of $115. A witness, called on behalf of the People, testified that at that time he was in the vicinity of the dry goods store and saw three negro men "right around the corner" from the store walking fast; that they "cut past" him, went through a service station, and entered a light blue "Buick Club Coupe" and rushed away; and that a man then ran up and said those three men had just held up a dry goods store. An employee of the dry goods store, Doshia Edwards, identified defendant, at a police show-up the night after the robbery, as one of the robbers. She testified that she was employed as a clerk; that defendant and two other men entered the store on the day of the robbery, and she asked them what they wanted; that the defendant said he wanted a pair of socks; that she showed him some socks and he purchased a pair; that he then walked over to the neckties and asked the witness' opinion about a necktie; that the men remained at each counter about five minutes; that they then walked to the cash register and "banged it" with their hands and attempted to open it; that defendant did not have a gun but one of the other men did have one and he placed it against the back of another clerk, Beatrice Tollman, and forced her to open the cash register; that the three robbers then took the money in their handkerchiefs and left the store; that they were in the store 15 or 20 minutes, and she waited upon one other customer while they were there; that defendant was dressed in a "brown maroon sport shirt," and brown trousers; and that she identified him at the police station after she looked at him "for awhile," after he had walked and turned around.

About 1:45 p. m. of that same day (June 7), three negro men entered the office of an automobile finance company at 1955 South Figueroa Street in Los Angeles, robbed an employee of $240, and then drove away in a 1940 blue Buick coupe automobile bearing the license number 9R9174 (the license number of the Calvert automobile). An employee of the finance company, Minerva Birkelo, identified defendant in a group of five at a police show-up as one of the robbers. She testified that she was employed as a receptionist; that defendant and two other men entered the office of the company and she asked them what they wanted; that defendant asked her for a "job," and she told him they did not need any "help"; that the three men continued to stand and talk among themselves; that she could not hear what they were saying but she became a little "suspicious"; that she asked them if they wanted anything further, and one of them said they wished to see about a loan on a 1940 Buick automobile; that she summoned a Mr. Carr, who was in charge of loans, and he went outside with them to the automobile which was in front of the office; that when they returned defendant had a "big, long gun" in his hand; that she saw the automobile outside, a blue 1940 Buick, and there were two negro men in it who had not come inside; that one of the men who came inside went into a private office and was trying to get into the safe; that defendant "covered the left window"; and the third robber was armed with a machine gun and he said, "Don't any of you move. This is a stick-up"; that an employee of the company went outside and defendant said, "one of the men went out"; that defendant then walked to the "information window," behind which the witness and another employee, Mr.Stephens, were then standing, pointed the gun at them and said, "Give me the cash"; that Mr. Stephens gave him the cash "in the top drawer," and defendant demanded "the other drawer, too," and he "scooped up the cash in his hand and left"; that the robbers were wearing hats and sport shirts, and defendant's hat and shirt were dark in color; that she had talked with them five or ten minutes at the counter before anything happened at all; and that she identified defendant at a police show-up three days after the robbery.

Another employee of the finance company, Mr. Stephens, testified that he was present when the robbery was committed; that one of the robbers was armed with a machine gun and the other two carried pistols; that defendant "strongly resembles" one of the robbers who had a pistol; that the man with the machine gun demanded the money from him, and "held" the gun on him and Miss Birkelo; that they departed in a blue coupe and he made a notation of the license number which was 9R9174.

About 5:30 p. m. on the same day (June 7) a police officer observed the Calvert automobile parked on the north side of the street in the 1300 block of East 41st Street, and he and other officers watched it until 8:15 p. m. At that time defendant and another negro by the name of Hammond appeared on the south side of 41st Street, walking in an easterly direction toward the Buick automobile. When they reached a point directly across the street from the automobile they stopped and remained there about three minutes, then they continued walking in an easterly direction, passed the automobile, then walked back, crossed the street at an angle, and entered the front of the automobile. Hammond sat in the driver's seat and defendant sat beside him. They were then arrested, and Hammond later escaped.

Appellant testified that on the day of the theft of the automobile and the robberies he was "supposed" to be at a clinic at 55th Street and Central Avenue at 8:30 a. m., but instead of going there he went to see a friend, Jerry Hiley, at 866 East 41st Place, who had just been discharged from the army; that he arrived at the Hiley residence about 6:30 a. m., and stayed there until about 3:30 p. m.; that during that time they played phonograph records and talked about the army; that while he was there he saw Hiley's mother and sister; that he decided to go to the clinic that night; that he met Hammond in a cafe on the corner of 43d Street and Central Avenue about 7:30 p. m.; that Hammond told him to wait a minute, and he would take him to the clinic; that he asked Hammond why his automobile was on 41st Street, and he replied that it had a flat tire; that on the way to the automobile they were walking on the south side of the street, and Hammond stopped when they were about 300 yards from the automobile and he (the witness) asked what they had stopped for and Hammond told him he knew a girl who stayed in one of the houses on 41st Street, who had just moved into town, and he was going up to talk with her; that they proceeded, however, to the automobile and Hammond unlocked the left front door with a key, entered the automobile, and opened the right front door and appellant got in; that appellant did not know the automobile was stolen; that he had not been in the automobile before; and that he worked for his father who is a contractor, but on the day of the robbery he did not work. He also testified that Jerry Hiley was the only person present at the address where he went to visit him; and that he had never called upon him in that manner before.

A witness, Miss Coleman, called on behalf of defendant, testified that she had known defendant three or four years; that she lived at the Hiley residence, and was there on June 7, 1946 (the day of the crimes); that defendant came to the Hiley residence on the morning of that day and stayed there until the witness went to work, which was about 3:30 p. m.; and that during that time they all played records and "talked around."

[1, 2] It is true, as asserted by appellant, that it is not necessary to prove an

alibi beyond a reasonable doubt or by a preponderance of the evidence. If a defendant introduces evidence in support of an alibi sufficient to raise a reasonable doubt as to his guilt he is entitled to an acquittal (People v. Quinn, 111 Cal.App. 614, 621, 295 P. 1042), but the burden is upon him to prove the alibi "to such a degree of certainty as will, upon a consideration of all the evidence, leave a reasonable doubt of his guilt in the minds of the jury." People v. Alexander, 78 Cal.App.2d 954, 178 P.2d 813, 816. In the present case the evidence introduced by appellant was not sufficient to raise such a reasonable doubt. There were contradictions in his testimony as to who were present during the time he allegedly visited Jerry Hiley, and he did not mention that his witness, Miss Coleman, whom he called to corroborate his aibi, was present. Furthermore, appellant was positively identified as one of the robbers by two witnesses to the robberies.

[3, 4] Appellant states that there were conflicts in the testimony of Miss Birkelo and Mr. Stephens as to the size of the robbers, what type of gun each carried, and which one pointed his gun at them and demanded the money. Those conflicts are of minor significance considering the positive nature of the testimony as to the identity of appellant. Appellant also claims that the testimony of Miss Birkelo is unreliable because she testified that she was confused and "scared." In addition to her observations of appellant during the time the robbery was actually occurring, she had an opportunity to observe him for a period of 5 or 10 minutes before the robbery during which time the robbers inquired about work and a loan on the automobile. Miss Edwards also had an opportunity to observe the robbers for about 10 minutes prior to the robbery in the dry goods store. The accuracy of the observation of witnesses, and discrepancies and uncertainties in their testimony are matters for the consideration of the trial court. See People v. Fierro, 58 Cal.App.2d 215, 221, 136 P.2d 94. The evidence was amply sufficient to support the judgments of conviction on the two counts of robbery.

[5] Appellant further contends that there was no evidence that he either took or drove the automobile in violation of Section 503 of the Vehicle Code. That section provides that any person who drives or takes a vehicle without the consent of the owner with intent to permanently or temporarily deprive the owner of his title to or possession of such vehicle, or any person who is a party or accessory to or an accomplice in any such driving or taking is guilty of a felony. The evidence was sufficient to establish that the automobile was taken and driven in violation of that section, that defendant rode in it in company with others, and that he was sitting in it with another when he was arrested. The evidence was not sufficient, however, to show that defendant took or drove the automobile away or that he aided any one in so doing, or that he had knowledge that it was taken or driven without the owner's consent. The evidence that the automobile was used in committing the robberies in which appellant participated, and that he was arrested while sitting in the automobile, is not inconsistent with the theory of innocence in the matter of the unlawful taking or driving of the automobile. In People v. Flores, 58 Cal.App.2d 764, 137 P.2d 767, wherein a judgment of conviction of theft of an automobile was reversed, the defendant had been in the automobile with another person. In that case the court said, at page 769 of 58 Cal.App.2d, at page 769 of 137 P.2d, that the fact that appellant had been in the automobile did not "overcome the presumption of innocence," and did not "establish guilt beyond a reasonable doubt of the gravamen of the offense of grand theft which is the asportation of the property."

The judgments of conviction as to the two counts of robbery are affirmed, and the judgment of conviction as to violation of section 503 of the Vehicle Code is reversed.

SHINN, Acting P. J., and KINCAID, J. pro tem., concur.

80 Cal.App.2d 809

SOLORZA v. PARK WATER CO. et al.

Civ. 16034.

District Court of Appeal, Second District, Division 1, California.

July 14, 1947.

Hearing Denied Sept. 8, 1947.

1. Appeal and error ⟹477

Supersedeas will not issue to restrain or prevent a party from acting or proceeding under a judgment from which an appeal has been taken, where no process of, or action by, the court is involved.

2. Appeal and error ⟹477

An appellate court under certain circumstances, has inherent power to issue a writ of supersedeas to preserve the status quo of the subject of the litigation until final disposition of the matter on appeal but when the judgment or order from which an appeal has been taken is self-executing and no process is required for its enforcement, the writ of supersedeas will not issue.

3. Appeal and error ⟹477

A judgment was "self-executing" and no process was required for its enforcement precluding issuance of writ of supersedeas where petitioner sought judicial rescission of sale of property to defendant which was denied because petitioner declined to comply with conditions imposed by trial court for rescission.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing Judgment".

4. Supersedeas ⟹1

The purpose of the writ of "supersedeas" is to maintain the status quo that existed before the entry of the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Supersedeas".

5. Supersedeas ⟹7

The writ of "supersedeas" does not operate to set aside a judgment, but merely to stay the enforcement of it by process of the court.

6. Appeal and error ⟹479(1)

Where a "take nothing" judgment was entered against petitioner in action by petitioner in behalf of himself and other shareholders to rescind a contract under which water company in which petitioner was a shareholder sold its assets to defendant, a writ of supersedeas would not issue in such form as to restrain the defendant from discontinuing water service to nonpaying dissident shareholders, since such a writ would in effect be an injunction, and petitioner did not show that in absence of supersedeas, petitioner, or the shareholders petitioner represented, would be deprived of a successful appeal.

7. Appeal and error ⟹477

The district court of appeal could not resort to the writ of supersedeas to perform the functions of an injunction.

8. Appeal and error ⟹479(1)

Where a take nothing judgment was entered against petitioner in action by petitioner in behalf of himself and other shareholders to rescind a contract under which water company in which petitioner was a shareholder sold its assets to defendant, defendant being under the jurisdiction of the Public Utilities Commission could not discriminate between customers receiving the same character of service, and alleged threat of defendant to shut off water supply of dissident shareholders unless they paid for water service did not indicate that trial court was seeking to enforce the "take nothing" judgment, so as to authorize issuance of supersedeas. Gen.Laws, Act 6386, § 19.

◆

Appeal from Superior Court, Los Angeles County.

Action by Dolores Solorza on behalf of himself and all other stockholders of the Mutual Water Company of El Jardin Tract, a corporation, against Park Water Company, a corporation, G. G. Telamantes and others. From an adverse judgment plaintiff appeals. On petition by plaintiff for a writ of supersedeas to stay enforcement of the judgment.

Order to show cause and temporary restraining order issued in connection therewith discharged, and petition denied.

Manuel Ruiz, Jr., of Los Angeles, for appellant-petitioner.

Overton, Selig & Wilson and Paul Overton, all of Los Angeles, for respondents.

WHITE, Justice.

On June 10, 1947, petitioner and appellant herein filed his petition for a writ of supersedeas, whereupon this court ordered that respondents show cause on June 23, 1947, why such writ should not issue and further ordered that all proceedings to enforce the judgment be stayed pending final determination of the application.

From the petition it appears that petitioner was the plaintiff in an action in his own behalf and on behalf of other shareholders in the Mutual Water Company of El Jardin Tract against Park Water Company and the officers and directors of the Mutual Water Company seeking rescission of a contract whereby the Mutual Water Company sold its entire assets to Park Water Company. The ground upon which rescission was sought was that the meeting of the Mutual Water Company shareholders at which the sale was ratified was illegally called, the notice of such meeting having been promulgated solely by means of handbills.

The trial court found that the sale was made in consideration of the payment by Park Water Company of $18,800, $4,300 of which was to be used to liquidate the outstanding indebtedness of the Mutual Water Company, and the balance to be used in improving the water system; that following such sale the Park Water Company took possession of the system and operated it as a public utility water system, furnishing water to the shareholders in the Mutual Water Company and other consumers in the area involved; that of the $14,500 to be used for improvements the Park Water Company had expanded $6,763.39 for such purpose. The court further found that proper notice of the shareholders' meeting was not given; that a majority of shareholders was not present at the meeting; and that the transfer to Park Water Company was without the consent of a majority of the shareholders of Mutual Water Company. The court thereupon entered its judgment decreeing that the purported sale be rescinded "upon condition" that within 60 days the Park Water Company be paid the sum of $4,300 plus all moneys expended by it for improvements and additions to the system, and that upon such payment Park Water Company account for profits, if any, made by it while holding possession of the system and restore the system to Mutual Water Company; and that upon compliance with the aforesaid conditions "final judgment of rescission shall be entered herein." After the expiration of the 60-day period, plaintiff having failed to comply with the conditions of the interlocutory judgment, the court entered a final judgment, reciting the failure of plaintiff to comply with the terms of the interlocutory judgment, and adjudging "that plaintiff take nothing either individually or on behalf of all or any stockholders of said Mutual Water Company * * *." From such final judgment plaintiff appealed. Since the sale, Park Water Company has been in possession of the water system and has been furnishing water to the consumers at a flat rate of $1.50 per month.

The ground upon which petitioner seeks a writ of supersedeas is set forth in his petition as follows: "* * * that the Park Water Company has sent notices to shut off the water supply of the dissident stockholders whose names appear on attached writing marked Exhibit 'A'. That said persons whose names appear on said Exhibit 'A' have nevertheless heretofore been paying the regular water rate into a trust fund pending the outcome of the appeal, so that in the event said appeal is lost the said Park Water Comany will suffer no damage whatsoever * * * said water Company, as aforesaid, is about to and has already commenced to shut off the water service to the homes and families of said dissident stockholders."

In answer to the petition, respondent, Park Water Company, asserts that it is not invoking any process of the court for the enforcement of the judgment and points out that the final judgment is that plaintiff take nothing against the defendant company, and that "the effect of this is that rescission is denied because of plaintiff's refusal to comply with the rule of equity that restoration be first made by the party seeking rescission. Petitioner sought the appointment of a receiver, but that was denied by the trial court. No provisional relief was granted him by the trial court." Petitioner alleges that some of the dissident stockholders whose water supply has been shut off for non-payment of the $1.50 per month charge have reconnected their lines and that respondent has threatened to apply to the superior court for an injunction against such reconnecting.

[1] It has been repeatedly held that a writ of supersedeas will not issue to restrain or prevent a party from acting or proceeding under a judgment from which an appeal has been taken, where no process of, or action by, the court below is involved. City of South Gate v. City of Los Angeles, 6 Cal.2d 593, 595, 58 P.2d 1288; In re Imperial Water Co. No. 3, 199 Cal. 556, 250 P. 394; People v. City of Westmoreland, 135 Cal.App. 517, 27 P.2d 394, 395. In the last-cited case an appeal was taken by a city from a judgment in a quo warranto proceeding declaring that the city had never been lawfully incorporated. In denying a supersedeas, the court said:

[2] "It is settled that in certain cases an appellate court has inherent power to issue a writ of supersedeas to preserve the status quo of the subject of the litigation until final disposition of the matter on appeal. Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161. However, it is equally well settled that, when the judgment or order from which an appeal has been taken is self-executing and no process is required for its enforcement, the writ of supersedeas will not issue (citing cases).

"We entertain the opinion that the judgment whose effect is sought to be stayed by the issuance of the writ of supersedeas is self-executing and that no process is required for its enforcement and that the rule announced by the authorities last cited is therefore applicable. * * *"

In the case of In re Imperial Water Co. No. 3, supra, it was said (quoting from Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 P. 123): "It (the writ of supersedeas) cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment * *. Its effect is merely to leave the parties to the judgment in the same position as they were prior to its entry, and to prevent the appellant from being prejudiced by its enforcement. There are many judgments, however, which are self-executing, or which have a intrinsic effect, upon which there are no proceedings to be stayed, and which will not be affected by an appeal therefrom. * * *" [199 Cal. 556, 250 P. 395.]

And in McCann v. Union Bank and Trust Co., 4 Cal.2d 24, 27, 47 P.2d 283, 285 it was said: "This court has repeatedly denied the existence of original jurisdiction in injunction matters, refusing on that ground to grant temporary injunctive relief pending appeals from orders denying an injunction (citing cases); to issue a supersedeas where the 'effect would be that this court would grant the injunction which the court below refused to grant' (citing cases); or to stay the effect of a self-executing judgment * * *."

[3, 4] The present cause falls within the scope of the principles above set forth. Prior to the commencement of the action the respondent, Park Water Company, was in possession of the property, pursuant to a sale. Plaintiff by his action sought a judicial rescission of such sale. Rescission was denied because plaintiff declined to comply with the terms imposed by the trial court. In other words, because the plaintiff refused to accept the conditions imposed, the trial court by its judgment declined to grant any relief or disturb the status quo theretofore existing. The judgment required no process for its enforcement. So far as here pertinent it decreed neither a change of possession nor the payment of money. To stay any process that might be issued under the judgment would be an idle act, as there is nothing to supersede. The purpose of the writ of supersedeas is to maintain the status quo that existed before the entry of the judgment, but in this cause the judgment does not purport to change the status quo, but confirms it. The status quo remains the same after entry of judgment as it was

at the time of commencement of the action. It must be held that the judgment herein falls into the classification of those describin the above-cited authorities as self-executing."

[5, 6] The writ of supersedeas does not operate to set aside a judgment, but merely to stay the enforcement of it by process of the court. Such a stay would not operate to alter the rights of respondent, Park Water Company, as the party in possession of the water system in dispute, but would merely leave the parties as they were before the entry of the judgment appealed from. The respondent water company would still be in possession. Should a writ be issued in such form as to purport to restrain Park Water Company from discontinuing its service to nonpaying dissident shareholders, such a writ would be in effect an injunction, falling directly within the interdiction of McCann v. Union Bank & Trust Company, supra, to the effect that an appellate court may not issue a supersedeas where the "effect would be that this court would grant the injunction which the court below refused to grant."

Moreover, petitioner has not succeeded in showing that in the absence of a supersedeas he, or the shareholders he represents, will be deprived of the fruits of a successful appeal. It is admitted that the respondent, Park Water Company, is financially sound. The object of the appeal is to secure rescission of the sale without being obliged to pay to respondent sums allegedly expended by it in improvement of the system. By its interlocutory decree the trial court provided that upon payment of the amounts required as a condition of rescission the Park Water Company should account to the Mutual Water Company for the profits, if any, made by Park Water Company while the system was in its possession. This provision would appear to be adequate to protect the dissident shareholders. The only burden placed on them pending the appeal is that they must pay $1.50 per month for water service. Prior to the sale they had the burden of maintaining a water company that was $4,300 in debt.

[7, 8] Were we to issue the writ of supersedeas prayed for herein, we cannot perceive how it would operate to stay any order or process of the court, but in effect it would amount to an injunction to restrain respondent, Park Water Company, a public utility water corporation, from collecting charges for water service under rates, rules and regulations adopted by the Public Utilities Commission of the State of California, which commission has sole jurisdiction over such matters. We are not authorized to resort to the writ to perform the functions of an injunction. Rose v. Mesmer, 131 Cal. 631, 632, 634. With reference to appellant-petitioner's claim that defendant-respondent Park Water Company has threatened to shut off the water supply of the dissident shareholders unless they pay for water service, such action does not indicate that the court is in any respect seeking to enforce its judgment. Being under the jurisdiction of the Public Utilities Commission of the State of California, defendant-respondent, Park Water Company, may not discriminate as between customers receiving the same character of service, and is therefore required to collect from the dissident shareholders rates and charges, and to furnish them service and facilities, in conformity with the charges made, and the services and facilities furnished, to other water users. Public Utilities Act, sec. 19, Gen.Laws, Act 6386.

The order to show cause and temporary restraining order heretofore issued in connection therewith on June 10, 1947, are and each is discharged. The petition for a writ of supersedeas is denied.

YORK, P. J., and DORAN, J., concur.

80 Cal.App.2d 965

PESSARRA v. PESSARRA.

Civ. 13494.

District Court of Appeal, First District,
Division 1, California.
July 24, 1947.

1. Divorce ⟹181

Under rule, date of entry of minute order granting motion to set aside interlocutory and final divorce decrees, and not the date of signing formal order, started the time running for appeal from order setting aside such decrees, where minute order contained no direction for preparation, finding, and filing of written order. Rules on Appeal, rule 2(a), (b) (1); Code Civ.Proc. § 939.

2. Appeal and error ⟹347(1)

Under rule that time for taking appeal begins to run from date of entry of minute order unless entry in minutes expressly directs preparation, finding, and filing of written order, in which event date of entry shall be date of filing of signed order, the minute entry, in absence of direction that written order be prepared, filed and signed, starts the time running without regard to whether court contemplated filing of formal order. Rules on Appeal, rule 2(a), (b) (1); Code Civ.Proc. § 939.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Divorce action by Emma Pessarra against William Pessarra. From an order vacating interlocutory and final decrees of divorce, the plaintiff appeals.

Appeal dismissed.

J. W. Ehrlich and Roy A. Sharff, both of San Francisco, for petitioner.

Samuel Vartan, of San Francisco, for respondent.

PETERS, Presiding Justice.

This is a motion to dismiss the appeal of plaintiff from an order of the Superior Court vacating, on motion, interlocutory and final decrees of divorce on the ground that they had been secured by fraud.

The pertinent facts and dates are as follows:

The plaintiff secured an interlocutory and a final decree of divorce from defendant. Thereafter, defendant moved for an order vacating and setting aside these decrees.

February 24, 1947—after a hearing the court made a minute order "Motion to set aside Interlocutory and Final Decrees granted." The minutes contain no direction that a written order should be prepared, signed and filed. This minute order was inadvertently entered in the minute book as of February 22, 1947, but by an order correcting the record dated May 9, 1947, the proper date was fixed for the entry of the order. Subsequently the defendant submitted a proposed form of written order and plaintiff objected. A hearing was had on March 18, 1947, and the court directed counsel for both parties to prepare proposed orders. Defendant avers that at this hearing his counsel repeatedly called attention to the minute order of February 24th, pointed out that such order was final, and that findings were improper. Both sides submitted proposed orders.

April 4, 1947—the trial court signed the formal order proposed by defendant. This order contains findings, and not only purports to vacate the interlocutory and final decrees of divorce, but also purports to nullify a property settlement agreement made in contemplation of the divorce.

May 2, 1947—plaintiff filed a notice of appeal from the order of April 4, 1947. No appeal was taken from the order of February 24, 1947, and the time to appeal therefrom expired prior to May 2, 1947.

Appeals from orders must be taken within sixty days from their entry. Rule 2(a). Obviously, if the order of February 24, 1947, disposed of the motion, the time for appeal having elapsed, such order has become final. It is clear that, if the order of February 24, 1947, finally disposed of the motion, the trial court had no power to modify or change its order on April 4, 1947, the purported formal order of that date is a nullity, and the appeal therefrom should be dismissed.

The decisive question presented on this motion to dismiss is whether or not the order of February 24, 1947, finally disposed of the pending motion and was therefore appealable. If so, the appeal from the order of April 4, 1947, is abortive.

[1] There would seem to be no reasonable doubt but that under the Rules on Appeal now in effect the entry of the order of February 24, 1947, started the time running for the appeal. Rule 2(b) (2) provides that for purposes of computing the sixty-day limit within which to appeal "The date of entry of an order which is entered in the minutes shall be the date of its entry in the minutes, unless the entry in the minutes expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order."

[2] This rule was adopted to clarify a most uncertain and confusing condition of the law existing prior to the adoption of this rule in July, 1943. Prior to that date, when orders were made by the trial court and entered in the minutes, and subsequently a formal written order was prepared, signed and filed by the judge, it was practically impossible for the lawyers to know when the time for appeal started to run. This was caused by the delusive simplicity of the language of sec. 939 of the Code of Civil Procedure which then controlled and which provided that the time to appeal began to run from the "entry of said judgment or order." Under this section the courts announced the rule that where the minute order was intended to be a mere memorandum from which a proper written order was to be drafted then the time for appeal started to run from the date of the filing of the last order. From a practical standpoint the cases, prior to 1943, held that the determinative factor was what the judge had in mind when he announced his first decision. Estate of Yale, 208 Cal. 102, 280 P. 358; Scrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 36 P.2d 688; McColgan v. Jones, Hubbard, etc., Inc., 11 Cal.2d 243, 78 P.2d 1010; Smith v. Smith, 45 Cal.App.2d 212, 113 P.2d 892. Such a subjective test, depending as it did upon the personal and frequently only partially disclosed intent of the trial judge, proved highly unsatisfactory. It was to rectify this condition that Rule 2(b) (2) was adopted. In his article discussing the new Rules, in 17 So. Cal.L.Rev. 79, the draftsman of the rules, after first discussing the complexities and ambiguities existing under the old statute, has this to say about the purposes of the new rule (p. 86): "The rule proceeds upon the theory that under the statutes and practice the normal method of evidencing and authenticating an order is by entry in the minutes. Presumptively, therefore, the minute entry is the 'entry of the order' for the purpose of fixing time to appeal, and the parties may rely upon it unless the contrary is indicated on the face of the minute entry itself. *It is immaterial that the court contemplates the filing of a formal order, and considers the oral pronouncement as preliminary and ineffective. The parties need not and cannot, speculate on such undisclosed intentions.* For them the minute entry starts the time running unless the court as part of its oral pronouncement directs that a written order be prepared and filed, and this direction is made a part of the minute entry." (Italics added.)

That this is the purpose and effect of the new rule is made crystal clear by its language. It provides that the date of entry of an order entered in the minutes "shall be the date of its entry in the minutes, unless the entry in the minutes expressly directs that a written order be prepared, signed and filed." There is no room for interpretation. The language is clear and certain.

The plaintiff's argument that the time to appeal did not commence to run until the signing and filing of the formal order on April 4, 1947, is largely predicated on the reasoning of the cases above cited announcing the old rule. The rule of those cases has been changed by the adoption of the new rules. The plaintiff also places considerable reliance on the decision of the appellate court in Trubowitch v. Riverbank Canning Co., 163 P.2d 739, and contends that the court in that case applied the rule of the old cases after the adoption of the new rules. Whatever the appellate court may have decided in that case (an examination of the opinion shows that it was based on old § 939 of the Code of Civil Procedure which had been repealed by implication by the new rules and has since been expressly repealed) is no longer the law because the Supreme Court granted a hearing, and has since decided the case. 30 Cal.2d 335, 182 P.2d 182. That case involved an appeal from a judgment denying an application to enforce an agreement to arbitrate. On October 21, 1944, the court, after hearing, announced that the petition was denied and defendant's motion to dismiss granted. The record does not show that this order was entered in the minutes. On October 27, 1944, the court ordered the defendant to prepare findings. On January 5, 1945, the court adopted these findings. The Supreme Court properly held that the time to appeal ran from the date of the signing and filing of the formal judgment. Not only did the record not disclose when the order of October 21, 1944, was entered in the minutes (such date of entry being the date specified in Rule 2(b) (2)), but on October 27th (presumably before the date of entry in the minutes) the court expressly directed the preparation of findings, thus bringing the case within the provisions of Rule 2(b) (2). The Supreme Court also held that the type of judgment there involved, by express statutory provisions, required that findings be prepared, and that in such case there can be no final judgment until findings are signed and filed. That is sound law. It should be noted that, although the decision in the Trubowitch case is by a divided court, the three dissenting justices did not disagree with this holding, contained in the majority opinion, and do not mention it in their dissent. The case stands for the proposition that Rule 2(b) (2) does not require the appeal to be taken from the minute order where the law requires such order to be followed by the filing of formal findings and a judgment. In such case, even if the order is silent as to an express direction to prepare findings and judgment, the time to appeal runs from the filing of such findings and judgment. In such case Rule 2(b) (1) provides that the time starts to run from the entry of the "judgment." The rule of this case can have no application here because in the instant case, involving as it does an order after motion, no findings were required. Waymire v. California Trona Co., 176 Cal. 395, 168 P. 563; Wood v. Peterson Farms Co., 132 Cal.App. 233, 22 P.2d 565; Luitwieler v. Luitwieler, 57 Cal.App. 751, 207 P. 931; In re Principal, 101 Cal. App. 669, 282 P. 26; Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194; 24 Cal.Jur. pp. 950, 952, sec. 191.

Counsel also refer to the case of Estate of Lair, 65 Cal.App.2d 245, 150 P.2d 560. There the appeal was from a decree settling the final account of a testamentary trustee. The decree was signed by the judge and filed June 3, 1943. It was entered June 8, 1943. Notice of appeal was filed August 5, 1943. The court held that the time for appeal, under Rule 2(b) (2), started to run from the date the signed decree was entered in the minutes—June 8, 1943. It was further pointed out that the signed decree of June 3, 1943, expressly directed that a minute entry be subsequently made. Under such circumstances the court held, at page 248 of 65 Cal.App. 2d, at page 561 of 150 P.2d: "Under the Rules on Appeal, the decree herein having been entered in the minutes and said entry not having directed that a written order be prepared, signed and filed, the date of entry of the decree was the date the decree was entered in the minutes, June 8, 1943, and the date of the filing of the signed decree herein, June 3, 1943, did not constitute the date of entry of the decree." That is in exact accord with the views herein expressed.

From what has been said it is quite clear that for purposes of appeal the order of February 24, 1947, finally disposed of the case; that the court had no power to change or modify that order in the manner attempted by the order of April 4, 1947; that the order of April 4th was totally void and the appeal therefrom abortive; that no appeal was taken within sixty days from the entry of the order of February 24th, and such order has become final. For these reasons it is ordered that the appeal here involved is dismissed.

BRAY, J., and OGDEN, Justice pro tem., concur.

81 Cal.App.2d 205

In re DARGO.

Cr. 4118.

District Court of Appeal, Second District, Division 3, California.

Aug. 6, 1947.

Hearing Denied Sept. 5, 1947.

1. Infants 🔑16

Mother and stepfather of minor were entitled to appeal from judgment and order of juvenile court redeclaring the minor a ward of the court and returning him to the Youth Authority for further disciplinary training, for the purpose of protecting their own interests as well as those of the minor.

2. Infants 🔑16

Proceeding in juvenile court, in which minor was redeclared a ward of the court and was ordered returned to the Youth Authority for further disciplinary training, was not a "criminal proceeding" or of a criminal nature. Welfare and Institutions Code, §§ 720–750.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Proceeding".

3. Infants 🔑16

Though care should be taken in construing and applying the provisions of the Welfare and Institutions Code relating to minors, so as not to impinge constitutional safeguards, a trial, as such, is not contemplated. Welfare and Institutions Code, §§ 720–750.

4. Infants 🔑16

Evidence sustained judgment and order of juvenile court declaring minor a ward of such court and returning him to the Youth Authority for further disciplinary training. Welfare and Institutions Code, §§ 720–750.

5. Infants 🔑16

In delinquency proceeding against minor in juvenile court, fact that specific acts, on which delinquency charge was based, would be a felony if committed by an adult, did not require that the acts be proved in substantially the same manner as would apply in a felony prosecution. Welfare and Institutions Code, §§ 720-750.

6. Infants 🔑16

In delinquency proceeding against minor, juvenile court was not required to admonish the minor that he need not testify to any act or fact which might tend to incriminate him and that any such testimony, if given, might be used against him. Welfare and Institutions Code, §§ 720–750.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Proceeding in the matter of Fridolin J. Dargo, a person under the age of 21. From a judgment and order of the juvenile court declaring the minor a ward of such court and returning him to the Youth Authority for further disciplinary training, the minor's mother and stepfather appeal.

Judgment and order affirmed.

F. N. Farris, in pro. per., for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

KINCAID, Justice pro tem.

Appeal is taken by the mother and stepfather of Fridolin J. Dargo, a minor, from the judgment and order of the juvenile court redeclaring the minor a ward of such court and returning him to the Youth Authority for further disciplinary training. The judgment and order followed specific findings by the court that the allegations contained in paragraphs I and II of the petition filed January 6, 1947, are true, and that those contained in paragraph III are not sustained and are therefore dismissed. The court further found the said minor to be 14 years of age, and that he is a person defined in subdivision M, of section 700, of the Juvenile Court Law of California, Welfare and Institutions Code; that he has been tried on probation, has failed to reform and that the welfare of the minor requires that his custody be taken from his parent or guardian. Paragraph I of the petition alleges that the minor, on January 1, 1947, entered a building of the McCall used car lot in Los Angeles with intent to commit theft and stole therefrom 12 sets of ignition keys, $11.26 in cash and one radio, and paragraph II alleges that on the same day he stole an automobile from such used car lot. The record before us also discloses findings and judgment following two prior hearings on other charges concerning the same minor wherein he was declared a ward of the juvenile court and was permitted to return to the home of his mother under terms and conditions stated.

The hearing pursuant to the petition in the instant case began on January 20, 1947, the record disclosing the minor, his mother, stepfather, sister and the probation officer of the juvenile court as being present. A full reporter's transcript of the subsequent proceedings is before us disclosing a thorough and complete, but informal, question and answer discussion to have followed. To questions propounded by the juvenile court judge concerning the allegations of the petition, the minor readily and fully admitted his entry into the building described in paragraph I for the purpose of committing a theft and his stealing and driving away of the automobile from the used car lot as charged in paragraph II. As to the burglary charged in paragraph III the minor denied entering the building there described, saying that other boys committed this burglary while he waited outside in an automobile. A two weeks continuance was then granted in order to permit the mother and stepfather of the minor to submit some plan for his future care and supervision.

On Monday, February 3, 1947, the hearing was resumed with the same parties being present. The matter of the placement of the minor was discussed in detail by the interested parties, the mother, stepfather and sister urging the court to send him to a place for delinquent boys in another state. The order recommitting him to the Youth Authority of California followed.

Appellants complain on appeal that the minor was convicted without any competent evidence being offered against him and upon the testimony of the minor alone, without being advised by the judge that he was not required to testify unless he so desired, and that any testimony that he gave might be used to convict him.

[1, 2] The mother and stepfather of the minor are entitled to appeal from the foregoing judgment and order for the purpose of protecting their own interests as well as those of the minor. In re Hill, 78 Cal. App. 23, 26, 247 P. 591. They mistakenly assume, however, as evidenced by their briefs on appeal, that the minor herein was a "defendant" in a criminal proceeding, that he was found guilty of the crimes of burglary and theft of an automobile, and that his recommitment to the Youth Authority was a "sentence." Proceedings of the juvenile court in dealing with incorrigible minors or those committing crime are not of a criminal nature. In re Daedler, 194 Cal. 320, 332, 228 P. 467; In re Jones, 34 Cal.App.2d 77, 82, 93 P.2d 185; In re Brodie, 33 Cal.App. 751, 752, 166 P. 605. Instead the summary procedure provided by the juvenile court laws for such cases (Welfare & Inst. Code, secs. 720 to 750) is more in the character of a guardianship whereby the minor is relieved of the stigma of a criminal conviction by placing him upon probation with individuals or in institutions having the facilities to give him corrective care, supervision and training. People v. Renteria, 60 Cal.App.2d 463, 470, 141 P.2d 37.

[3] While care should be taken in construing and applying the provisions of such laws to minors so as not to impinge con-

stitutional safeguards (In re Tahbel, 46 Cal.App. 755, 762, 189 P. 804), a trial, as such, is not contemplated under the spirit of or procedure provided by the juvenile court laws. As aptly said in People v. Superior Court, 104 Cal.App. 276, 282, 285 P. 871, 874: "From its very nature, and because of necessary qualification for doing the work for which it is intended, the juvenile court is not designed as a trial court in the ordinary sense. Not only is its purpose more reformative than punitive, but its method of operation is very different from that of a criminal court. Technicalities and formalities are largely done away with, and its simple procedure is designed to gain the confidence of those coming within its operations, and to enable the judge thereof to best guide and control its wards, with more consideration for their future development than for their past shortcomings. The circumstances attendant upon contested jury trials are not only out of place there, but might have an injurious effect, not only upon the methods, but upon the atmosphere and confidence that have been built up around the work of the juvenile court, and which are so largely responsible for its success."

[4] The informal manner in which the record discloses the hearing in this case was conducted is entirely consistent with the foregoing principles. The approach to the problems confronting the court and parties present was sympathetic, understanding and without pressure. In response to fairly worded questions the minor related his version of his participation in the acts charged against him by the petition. The parents both asked and answered questions and entered fully into the discussions. No objections were interposed by anyone present as to any question or to the procedure being followed. The testimony of the minor sufficiently shows the commission by him of those acts covered by paragraphs I and II thereof. No additional evidence was offered nor was any required to sustain the judgment.

[5, 6] The contention is now made that, because the specific acts upon which the delinquency charge is based would be a felony if committed by an adult they must be proved in substantially the same manner as would there apply, including an admonishment by the judge that the minor need not testify to any act or fact which might tend to incriminate him and that any such testimony, if given, might be used against him. With this contention we are unable to agree. The leading case giving answer to these questions, and with which we are in accord, is People v. Lewis, 260 N.Y. 171, 183 N.E. 353, 86 A.L.R. 1001 (with note 1008), (Certiorari denied by U. S. Supreme Court, 289 U.S. 709, 53 S.Ct. 786, 77 L.Ed. 1464). The court there said (page 174 of 260 N.Y., page 354 of 183 N.E., page 1002 of 86 A.L.R.): "The judgment, it is said, is supported by no evidence received in the boy's presence, and hence rests solely upon his own confession made without a warning against self-incrimination.

"Even in a criminal trial the confession which requires corroboration to sustain conviction is only the extrajudicial confession, not the admission made in open court on the witness stand. 16 C.J. 735, § 1514. If the hearing here had been a criminal trial, its sole defect would have been the failure to warn against self-incrimination. But it was not a criminal trial and there was no defect."

And (260 N.Y. at page 177, 183 N.E. at page 355, 86 L.R.A. at page 1004): "Since the proceeding was not a criminal one, there was neither right to nor necessity for the procedural safeguards prescribed by constitution and statute in criminal cases. Many cases in many jurisdictions so hold." (Citing cases.)

See 22 C.J.S., Criminal Law, § 816c, p. 1423. See also In re Lemon, 15 Cal.App.2d 82, 59 P.2d 213; 31 Am.Jur. 807, par. 42.

While any witness may refuse to give an answer to a question which will have a tendency to subject him to punishment for a felony (Code Civ.Proc. sec. 2065), no such situation is here presented. We have considered other points raised by appellants and find them lacking in merit.

The judgment and order appealed from are affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

SANDSTROM v. CALIFORNIA HORSE RACING BOARD et al. *

Civ. 15922.

District Court of Appeal, Second District, Division 2, California.

July 9, 1947.

Hearing Granted Sept. 3, 1947.

1. Theaters and shows 🔑3

Rule of the Horse Racing Board providing that a trainer shall be the absolute insurer of a condition of horses entered in a race on which there is wagering, regardless of the acts of third parties, and that he may be suspended or ruled off the track, if tests show presence of stimulants or drugs in horses, is not invalid on ground that it is not a legitimate exercise of delegated authority under the Horse Racing Act, in view of express constitutional sanction of the act. St. 1933, pp. 2047, 2050, 2054, §§ 3, 9, 19; Const. art. 4, § 25a.

2. Mandamus 🔑172

In proceeding for writ of mandate to compel Horse Racing Board to cancel order suspending trainer's license to train horses in the state, court had no concern with the wisdom of Horse Racing Act, and the inquiry was limited as to whether board's action was arbitrary, unreasonable or capricious. St. 1933, p. 2047.

3. Theaters and shows 🔑3

The Horse Racing Board must be presumed to have knowledge of conditions which underlie and motivate its regulatory action in the enactment and adoption of rules, and unless it is demonstrated that those rules are not founded on a reasonable factual basis, a court should not interfere with the exercise of such discretion vested in the board. St. 1933, pp. 2047, 2050, §§ 3, 9.

4. Theaters and shows 🔑2

One of the objects of the Horse Racing Act is to protect the public in wagering on horse races. St. 1933, p. 2047.

5. Evidence 🔑20(1)

It is common knowledge that in horse racing it is practically impossible to detect any one in the act of administering drugs or stimulants to a horse before a race.

6. Theaters and shows 🔑3

Rule of the Horse Racing Board providing that a trainer shall be the absolute insurer of the condition of horses entered in a race on which there is wagering, regardless of the acts of third parties, and that he may be suspended or ruled off the track, if tests show presence of stimulants or drugs in horses, is not unreasonable, arbitrary or capricious. St. 1933, pp. 2047, 2050, §§ 3, 9.

7. Theaters and shows 🔑3

Rule of the Horse Racing Board providing that a trainer shall be the absolute insurer of a condition of horses entered in a race on which there is wagering, regardless of the acts of third parties, and that he may be suspended or ruled off the track, if tests show presence of stimulants or drugs in horses, is not contrary to provisions of statutes that conclusive or unanswerable evidence is that which the law does not permit to be contradicted and no evidence is by law made conclusive or unanswerable unless so declared by statute. St. 1933, pp. 2047, 2050, §§ 3, 9; Code Civ. Proc. §§ 1837, 1978.

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Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding for writ of mandate by W. L. Sandstrom against the California Horse Racing Board, and Loyd Wright, Dwight Murphy, and Nion R. Tucker, members of the California Horse Racing Board, to compel defendants to cancel an order suspending petitioner's license and privilege to train horses in the state of California for a six month period. For a judgment in favor of the petitioners, the defendants appeal.

Judgment reversed with directions to enter judgment for defendants and discharge alternative writ of mandate.

Fred N. Howser, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for appellants.

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* Subsequent opinion 189 P.2d 17.

Joseph Scott, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment granting petitioner's (respondent herein) application for a writ of mandate to compel the California Horse Racing Board and the members thereof (appellants) to cancel an order which the board had made suspending petitioner's license and privilege to train horses in the state of California for the period of six months after August 12, 1946.

Conceded Facts

Petitioner was duly licensed as a trainer of horses for the year 1946 by the California Horse Racing Board pursuant to the provisions of section 19510 of the Business and Professions Code. On October 7, 1946, respondent board pursuant to notice theretofore given held a hearing at which petitioner was present and upon oral and documentary evidence produced at such hearing found "that analysis of urine sample taken from the horse Cover Up after running in a race at Del Mar Race Track, in San Diego County, California, on August 12, 1946, showed the presence of a caffeine type alkaloid, and that W. L. Sandstrom was the trainer and had the care of said horse at the time of and immediately prior to the running of said horse in said race." Thereupon respondent board decided that Rule 313 of the California Horse Racing Board had been violated by petitioner and suspended his license for a period of six months.

So far as material here Rule 313 of the California Horse Racing Board provides:

"The Trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties. Should the chemical, or other analysis of saliva, or urine samples, or other tests, prove positive, showing the presence of any narcotic, stimulant, chemical, or drug of any kind or description, the Trainer of the horse may be suspended or ruled off, and in addition, the Foreman in charge of the horse, the Groom signing the Pre-Race Examination Slip and Paddock Certificate, and any other person shown to have had the care, or attendance, of the horse may be suspended or ruled off, in the discretion of the Board."

The trial court held that Rule 313 of the board was arbitrary, unreasonable and capricious, and issued a writ of mandate requiring respondents to restore petitioner's license.

Proposition Urged by Respondent Herein
(Petitioner in the Superior Court)

Rule 313 of the California Horse Racing Board (a) is not a legitimate exercise of delegated authority, (b) is arbitrary, unreasonable and capricious, and (c) is contrary to the provisions of sections 1837 and 1978 of the Code of Civil Procedure.

This proposition is untenable.

(a) Section 3, chapter 769, Statutes of 1933, p. 2047, provides in part as follows: "Said racing board shall have full power to prescribe rules, regulations and conditions under which all horse races, upon the results of which there shall be wagering, shall be conducted within the State of California. * * * All horse owners, riders, agents, trainers, stewards, starters, timers, judges and others acting as officials at any such racing meeting shall be licensed by the board, pursuant to such rules and regulations as the board may adopt, * * *."

Section 9 of the same act contains this provision: "All licenses provided to be granted under the provisions of this act, including those granted pursuant to the provisions of section 3 hereof, shall be subject to all rules, regulations and conditions from time to time prescribed by the board and shall contain such conditions as shall be deemed by said board necessary or desirable for the purposes of this act."

Finally, section 19 of the act reads thus: "This act shall take effect upon the adoption of a constitutional amendment ratifying its provisions."

[1] This act known as the "Horse Racing Act of 1933" was given express constitutional sanction on June 27, 1933.[1] It was pursuant to the authority vested in re-

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[1] Article IV, Section 25a of the Constitution provides as follows: "The Legislature may provide for the regulation of horse races and horse race meetings

spondent board by the Horse Racing Act of 1933 and Article IV, Section 25a of the California Constitution that Rule 313 was adopted. Therefore respondents' authority to adopt the rule in question stems from the Constitution of the state of California in an amendment to such instrument duly adopted by the people of this state. Hence no question arises of a legislative delegation of authority to adopt the rule here in question. Such authority comes directly from the Constitution of the state.

[2, 3] (b) With the wisdom of the legislation we have no concern. Our inquiry is limited as to whether the action of respondent board was arbitrary, unreasonable or capricious. (Pacific States Box & Basket Co. v. White, 296 U.S. 176, 182, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853; Ferrante v. Fish & Game Commission, 29 Cal.2d 365, 374, 175 P.2d 222.) Our state Constitution entrusts the jurisdiction, supervision and regulation of all horse racing in this state, upon the results of which there shall be wagering, to respondent board. The board must be presumed to have knowledge of the conditions which underlie and motivate its regulatory action in the enactment and adoption of rules, and unless it is demonstrated that those rules are not founded upon a reasonable factual basis the court should not interfere with the exercise of such discretion vested in the board.

Rule 313 makes the Trainer the "absolute insurer" of the condition of the horses under his care entered in a race regardless of the acts of a third party. This is a reasonable obligation imposed upon such trainers by the board. The law pertains only to horse races "upon the results of which there shall be wagering" or "on the result of which there is wagering."

[4-6] One of the objects of the law is to protect the public in wagering on horse races. Essential requisites for the protection of the public in such cases are that the horses entered in a race shall be in the best possible condition and that a race is not subject to manipulation by means of artificial stimulation or depression of any of the horses entered therein. It is a matter of common knowledge that in horse racing it is practically impossible to detect any one in the act of administering drugs or stimulants to a horse before a race. All that can be done with certainty is to establish by chemical analysis of samples of the urine and saliva of a horse, taken immediately after the race, that a drug has been administered. To make a trainer liable for the sound condition of a horse he enters in a race upon which there is wagering, even though he does nothing to bring about the unsound condition of the animal and has no knowledge of such condition, is not unreasonable, arbitrary or capricious. It simply places upon the trainer, who has held himself out as being skilled in the handling and care of horses, the duty of insuring and protecting at all times prior to a race the horses in his care. He guarantees to the public that through his vigilance, care and watchfulness no one has been in a position to tamper with the animals under his charge. Such an obligation imposed upon the trainer is a reasonable one, tending to eradicate the pernicious habit of doctoring horses for the purpose of defrauding the public of their money which has been wagered upon the outcome of horse races.

In principle we see no difference between the present obligation placed upon the trainer for the benefit of the public and the absolute liability placed upon the owner of a dog for the damage which it may do if it bites a person who is in a public place, or who is lawfully in a private place, including the property of the owner of such dog (Stats.1931, p. 1095, vol. 1, Deering's Gen.Laws, 1931, p. 174,

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and wagering on the results thereof. The provisions of an act entitled 'An act to provide for the regulation and licensing of horse racing, horse race meetings, and the wagering on the results thereof; to create the California Horse Racing Board for the regulation, licensing and supervision of said horse racing and wagering thereon; to provide penalties for the violation of the provisions of this act, and to provide that this act shall take effect upon the adoption of a constitutional amendment ratifying its provisions,' are hereby confirmed, ratified, and declared to be fully and completely effective; provided, that said act may at any time be amended or repealed by the Legislature."

Act 384a; Goldberg v. Rabuchin, 65 Cal. App.2d 111, 149 P.2d 861), or the obligation placed upon the dispenser of unwholesome or adulterated food to respond in damages to an injured purchaser even though the seller has no knowledge of such adulteration or unwholesomeness, and had no part in bringing about such a condition. (Wolfe v. Great Atlantic & Pacific Tea Co., 143 Ohio St. 643, 56 N.E.2d 230.)

The Jockey Club of New York, recognized as the parent organization of horse racing in North America, has enforced similar rules for many years. This together with the fact that Rule 313 has been in force in this state for over 14 years without its reasonableness having been questioned is persuasive of the fact that such rule is neither unreasonable, arbitrary nor capricious. We are, of course, aware that these latter facts would not justify our holding if the rule was in fact unreasonable, arbitrary or capricious. On the other hand, such facts do support our conclusion on this phase of the case.

Smith v. Cole, 270 App.Div. 675, 62 N.Y.S.2d 226, is not here in point for the reason that in such case there was evidence before the board from which the trainer's responsibility for the treatment administered to the horse could have been established. Although Mahoney v. Byers, Md., 48 A.2d 600, is pertinent, this court cannot adopt the reasoning in the Maryland case. Decisions from other states are merely persuasive, and in the last analysis the effect which we give to such decisions depends upon the soundness of the reasoning supporting the conclusions reached. Hence we decline to follow it.

[7] (c) Section 1837[2] and section 1978[3] of the Code of Civil Procedure are inapplicable to the present case. Those sections pertain to rules of evidence and not to matters of substantive law. In the present case Rule 313 simply makes the trainer the absolute insurer of the condition of the horse under his charge. There is no rule of evidence or procedure involved. It is analogous to the rule of substantive law which makes a common carrier of goods absolutely liable for the safe carriage of the same against all injuries except, (1) an inherent defect, (2) an act of a public enemy of the United States, (3) an act of the law, (4) an act of God, or (5) an act of the owner. (Section 2194, Civil Code.)

The judgment is reversed with directions to the trial court to enter a judgment in favor of appellants and to discharge the alternative writ of mandate heretofore issued.

MOORE, P. J., and WILSON, J., concur.

80 Cal.App.2d 841

THOMAS v. SEASIDE MEMORIAL HOSPITAL OF LONG BEACH.

Civ. 15846.

District Court of Appeal, Second District, Division 2, California.

July 15, 1947.

1. Appeal and error 🔑927(3)

On appeal from a judgment of nonsuit, court considers only evidence most favorable to appellant's cause of action, together with every reasonable inference to be drawn therefrom and every presumption that can be fairly deemed to arise in support of appellant's allegations.

2. Hospitals 🔑7

A private hospital owes to its patients the duty of protection.

3. Hospitals 🔑7

The duty of hospital to use reasonable care and diligence in safeguarding a patient committed to its charge is measured by capacity of patient to care for himself.

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[2] Section 1837 reads thus: "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it."

[3] Section 1978 of the Code of Civil Procedure reads: "No evidence is by law made conclusive or unanswerable, unless so declared by this code."

4. Hospitals ⚷7

Private hospital owed a higher degree of care in attending an eight-month-old patient than it would have if patient had been an adult.

5. Hospitals ⚷7

A private hospital must exercise such reasonable care toward a patient as his known condition may require and is liable for want of ordinary care.

6. Hospitals ⚷8

Where baby, who had been placed in hospital as a paying patient, was placed under general anesthetic for minor surgery, and, after completion of operation, baby died from atelectasis, whether hospital was negligent in leaving baby unattended, except for an unskilled nurse's aide who was engaged in changing beds, notwithstanding general practice which required that a skilled nurse watch baby until it recovered from effects of anesthetic, was for jury.

7. Hospitals ⚷8

Allegation that death of baby was brought about by negligence of hospital in failing to watch and protect baby while unconscious and under influence of a general anesthetic, in addition to allegation that hospital permitted child to smother from collapse of her lungs, was sufficient to establish a duty of care under the general law and to permit proof of failure to render ordinary care notwithstanding that evidence showed death as the result of atelectasis.

8. Hospitals ⚷8

In action against hospital for death of a baby, evidence that death was caused by "atelectasis," which was caused by a clot in the bronchus preventing entry of air, did not negative allegation that hospital allowed baby to "smother", since word "smother" was to be given its ordinary and customary meaning rather than a technical medical definition, and both pleading and proof indicated that baby died as the result of being deprived of air.

See Words and Phrases, Permanent Edition, for all other definitions of "Atelectasis".

9. Pleading ⚷34(5)

"Smother", as used in complaint charging hospital with negligence in permitting baby to "smother from a collapse of her lungs", was to be given its ordinary meaning of to deprive of air or to prevent the entrance of air into the lungs by either external or internal stoppage of air passages and was sufficient to apprise defendant that baby died for want of air and that failure of air to enter its lungs was caused by hospital's negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Smother".

10. Hospitals ⚷8

Where cause of death was established by operating surgeon and hospital officials did not request an autopsy and it did not appear that one was necessary so that there was no occasion for an objection by parents to an autopsy, question as to whether parents opposed performance of an autopsy was properly excluded.

11. Evidence ⚷547

Where surgeon testified that operation was of a minor nature and neither party claimed that operation was cause of death, question addressed to medical witness as to whether an operation of nature performed on child would endanger life as much as an abdominal incision was immaterial.

12. Evidence ⚷548

In action against hospital for death of a baby while under anesthesia after minor surgery and while not properly attended, surgeon should have been permitted to testify as to whether there was anything about room in which child was placed and its occupancy that in his opinion would be a cause for action of hospital authorities in keeping mother from bed side of baby while it was under the anesthesia.

13. Death ⚷60
Hospitals ⚷8

In action against hospital for death of baby from atelectasis while baby was recovering from effects of general anesthesia, and while mother was excluded from room and while baby was unattended except for an untrained nurse's aide, testimony of mother of a boy who was in room about time plaintiff's baby was there that, while he was under influence of anesthetic, an attendant of hospital remained in close proximity to his bed until he had completely recovered consciousness was admissible to show custom with regard to watching a patient under anesthesia and to negate necessity of compelling mother to absent herself in order to preserve oxygen.

14. Witnesses 🔑269(1)

Questions propounded to witness on subjects not touched upon in her direct examination were properly excluded as improper cross-examination.

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Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Melvin G. Thomas against the Seaside Memorial Hospital of Long Beach for damages for the death of plaintiff's baby. Judgment of nonsuit and plaintiff appeals.

Reversed.

Frank C. Wellar and Thomas S. Tobin, both of Los Angeles, for appellant.

Spray, Davis & Gould, of Los Angeles, for respondent.

WILSON, Justice.

Charging negligence on the part of respondent which resulted in the death of his eight months old baby, appellant brought this action for damages. At the conclusion of his evidence a motion for nonsuit was granted. This appeal is from the judgment of nonsuit.

The complaint alleges that appellant and his wife caused their baby to be placed in the hospital operated by respondent for a minor surgical operation—the removal of a tumerous birthmark known as haemonglioma on the child's shoulder; the birthmark was successfully removed by the operating surgeon; at the time of performing the operation ether was administered to the child which rendered her unconscious; after her removal from the operating room she was placed in a room in which there were four or five other patients; the mother was not permitted to remain in the room while the child was unconscious; during her absence the nurses employed in the hospital negligently failed to give proper attention to the child and permitted her "to smother from a collapse of her lungs while unconscious;" the mother upon returning to the room after an absence of approximately one hour and twenty minutes found the child dead in bed; the nurses who were in charge of the child did not know that she had been dying and were unaware of the fact that she was dead until informed by the mother. It is further alleged that "the death of said minor child was brought about by the negligence of the defendants herein for failure to watch and protect said minor child while unconscious and under the influence of a general anesthetic."

[1] In determining this appeal and in considering whether the court was justified in granting the nonsuit we must consider only the evidence most favorable to appellant's cause of action, together with every reasonable inference to be drawn therefrom and every presumption that can be fairly deemed to arise in support of appellant's allegations. Anthony v. Hobbie, 25 Cal.2d 814, 817, 155 P.2d 826; Lashley v. Koerber, M.D., 26 Cal.2d 83, 84, 156 P.2d 441; Wood v. Samaritan Inst., 26 Cal.2d 847, 849, 161 P.2d 556; Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 181 P.2d 935, and cases cited.

Considering according to the rules stated and elaborated in the foregoing citations the evidence is as follows: When taken to the hospital the child was placed in a crib by hospital attendants in a room with five other children. She was in the operating room for approximately one hour and was returned to her crib, at which time she was sleeping; she was placed on her abdomen with a small pillow under her and with her head and face slightly lower than her abdomen; she was lying on her right cheek, with her face showing toward her mother; Mrs. Thomas remained at the side of her child for 15 or 20 minutes during which time the baby continued to sleep.

but was throwing her arms around; Mrs. Thomas covered the child's arms with a blanket several times; there were two other visitors in the room; Mrs. Mitchell, the nurse in charge, came into the room and ordered Mrs. Thomas and the other mothers to leave while the nurses bathed the other children; Mrs. Thomas protested against being compelled to leave her unconscious baby but was told by the nurse that the hospital rules required that she go out of the room while the other children were bathed; when Mrs. Thomas and the other mothers left the room the baby was lying on her abdomen with her pillow under her, and her face on the right side; she was breathing and had stopped throwing her arms around.

Mrs. Thomas later went back to the room and finding the door closed remained in the hall approximately one half hour. When the door was opened from the inside she stepped into the room and found a nurse's aide with her arms full of soiled clothes and bedding. Mrs. Thomas immediately noticed that her baby was very white; "her face was down into the mattress" and the pillow had been removed; the child's arms were raised parallel with her shoulders; her fingernails were blue, her body was white, and her hands were cold; Mrs. Thomas asked the nurse's aide whether her baby was all right and was told that she was just sleeping from the ether; the nurse's aide started from the room but at Mrs. Thomas's request came back dropped the bed clothing on the floor, picked up the baby, turned her over on her back and found that she was dead. There were no hospital attendants in the room other than the nurse's aide; the latter called Mrs. Mitchell, the graduate nurse, and two or three doctors who used oxygen and other means of artificial respiration and administered adrenalin but failed to resuscitate the child.

The operating surgeon testified as follows: The cause of death was atelectasis, which he defined as a sudden collapse of a part or of the whole of the lung tissue whereby oxygen or air does not enter the lung; it is caused by a tenacious plug of mucous in a bronchus far down in the lungs which prevents the air from entering and causes the collapse; such a plug of mucous in a smaller or a larger bronchus will cause an atelectasis of a small or a larger section, depending upon where that bronchial tree is and upon the condition of the bronchus. There are other causes, such as psychic causes or sympathetic nerve stimulation. The heart beat and the lung and blood vessel contractions are controlled by the involuntary or sympathetic nervous system. Stimulation of or an assault upon the sympathetic nervous system, a psychic shock, a sudden fall on the ground, or a kick on the body, may produce a sudden atelectasis of the lungs. There could be a sympathetic nerve shock when a patient is under a complete general anesthetic, or a psychic shock, depending upon the depth of the anesthetic.

The doctor further testified that the baby was completely unconscious during the surgery and while it was under the influence of the anesthetic; customary treatment where atelectasis takes place during or subsequent to anesthesia depends upon how massive it is; sometimes it is so massive that it is too late to do anything; artificial respiration, oxygen and stimulants do no good. If the patient is so young as to be unable to tell its symptoms then it may be so rapid and so tremendous that it may be impossible to do anything to save the life. From the outset of an atelectasis until death the time is "all the way from right now to a few days." There are no premonitory symptoms of any kind. The symptoms occur after the atelectasis has taken place, not before. There is no way to determine when anyone is going to have an atelectasis. After it has set in there is rapid breathing, such as air hunger, not getting sufficient oxygen, rapid pulse, and there may be pain in the chest. As to whether anything can be done when these symptoms occur depends on whether "there has been a massive [atelectasis], sometimes they don't have time to complain, * * * they are just gone right then." If the person is too young to complain about it you have none of those symptoms because it does not complain, doesn't speak.

He said further that in the case of a child not old enough to talk there are symptoms that a skilled doctor or nurse could discover right after the onset of an atelectasis. There is rapid breathing. In a case of that kind after cyanosis appears the child should receive oxygen and if the heart shows evidence of weakening it should receive heart stimulants. A baby under the influence of ether should be placed on its stomach, the face should be turned to one side; the child should be kept in that position if unconscious in order to keep the mucous from clogging up—it gives better drainage; if the child vomits or if there is mucous in the mouth or throat it drains out much better instead of draining back into the lungs or bronchus.

In response to a question as to good hospital custom or the usual custom in regard to watching a patient in connection with atelectasis after surgery, the doctor testified that the usual custom has varied during and since the war because it has been impossible to receive as much help as was obtainable before the war; "but there is some one in the room with these children until they are out of unconsciousness, in other words, until they are becoming conscious;" the usual custom in regard to post-surgical care of a child coming out from under ether who is unable to complain is that it is watched until it is out of unconsciousness. He stated that he examined the child prior to the operation and that with the exception of the tumor her condition was good—normal. The tumor which he removed was not malignant.

That the operation was not a serious one is indicated by the doctor's statement to Mrs. Thomas after he had completed the operation that she could take her baby home at four o'clock in the afternoon.

[2-4] The child was placed in the hospital as a paying patient and not as a charity patient. A private hospital owes its patients the duty of protection. Meyer v. McNutt Hospital, 173 Cal. 156, 159, 159 P. 436. It was the duty of the hospital to use reasonable care and diligence in safeguarding a patient committed to its charge (Valentin v. La Societe, etc., 76 Cal.App.2d 1, 4, 172 P.2d 359; England v. Hospital of the Good Samaritan, 22 Cal.App.2d 226, 230, 70 P.2d 692 and such care and diligence are measured by the capacity of the patient to care for himself. Valentin case, supra. By reason of the tender age of appellant's baby respondent owed a higher degree of care in attending it than if she had been an adult.

[5] A review of the cases arising under the general rule governing hospitals in their relation to their patients discloses the law to be that (a) a private hospital must exercise such reasonable care toward a patient as his known condition may require, and (b) it is liable for want of ordinary care. Welsh v. Mercy Hospital, 65 Cal.App.2d 473, 478, 151 P.2d 17; England v. Hospital of the Good Samaritan, 22 Cal.App.2d 226, 230, 70 P.2d 692; Valentin v. La Societe, etc., 76 Cal.App.2d 1, 4, 172 P.2d 359; Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 99, 114 P.2d 1; Wood v. Samaritan Institution, 26 Cal.2d 847, 851, 161 P.2d 556; Rice v. California Lutheran Hospital, 27 Cal.2d 296, 302, 163 P.2d 860; Timbrell v. Suburban Hospital, Inc., 4 Cal.2d 68, 72, 47 P.2d 737; Williams v. Pomona Valley Hospital Ass'n, 21 Cal.App. 359, 361, 131 P. 888.

It is unnecessary to discuss the point raised by respondent as to whether the degree of care, skill and diligence exercised by a hospital toward its patients must be shown to be the same as that which is generally exercised by hospitals in the same community, by reason of the fact that evidence on the question was supplied in this case by the testimony of the medical witness that the usual custom in hospitals is to watch a child coming from under anesthesia until consciousness has returned.

[6] It was the duty of respondent to observe the progress of the baby in its recovery from the effects of the anesthetic with such care and diligence as required for its comfort and safety, and whether respondent exercised such reasonable care under the circumstances of the case is for the determination of the jury. Valentin v. La Societe, etc., 76 Cal.App.2d 1, 5, 172 P.2d 359.

The operating surgeon testified that in the case of an operation on an eight months old baby, as long as it is under an anesthetic it is either unconscious or bordering onto unconciousness and from an atelectasis point of view it is advisable, until the child can crawl around, to have someone in the room to check on it at frequent intervals. He stated that he often had had relatives or parents stay with their children and had instructed them to notify the nurses if everything was not all right.

Mrs. Mitchell, the graduate nurse who was in charge of the room in which appellant's baby was left and of other rooms, testified that she visited the child several times between its return from the operating room and its death. It was established that she was not in the room during the 15-minute period preceding Mrs. Thomas's entry when she found the baby dead. During that period, according to the doctor's evidence, the atelectasis could have taken place and caused death. Although the nurse's aide, an unskilled person, was in the room she was engaged in changing the bed clothing on other beds and it is manifest from the evidence that she gave little if any attention to the Thomas baby in view of the fact that death overtook it without her knowledge and even when Mrs. Thomas addressed her she stated that the baby was sleeping from the effects of the ether. It was at Mrs. Thomas's insistence that the nurse's aide picked the baby up and found that she was dead; her nails were blue and her hands were cold.

If the proper observation and care of the child had been maintained its condition would have been observed and there is a possibility that its life could have been saved. When reference is made to the doctor's evidence that atelectasis is caused by a plug of mucous in a bronchus or by sympathetic nerve stimulation that may come when a patient is under a general anesthetic; that there are no premonitory symptoms of any kind; that the symptoms occur after atelectasis has taken place; that there is no way to determine when a person is going to have an atelectasis; that in case of a child there are symptoms that a skilled doctor or nurse could discover right after the onset of an atelectasis; that the usual custom in regard to a child coming out from under ether is that it is watched until it returns to consciousness, it is clear that a reasonably careful management of respondent would have had a proficient nurse at the bedside of the baby during the time it was under the effect of the anesthetic and that reasonable care and diligence were not exercised when the only person in the room was an unskilled nurse's aide who was not watching over the baby but was changing the clothing and the bedding of other children. Valentin v. La Societe, etc., 76 Cal.App.2d 1, 4, 172 P.2d 359; England v. Hospital of the Good Samaritan, 22 Cal.App.2d 226, 230, 70 P.2d 692. Whether the nurse's aide would have noted the symptoms of atelectasis if she had watched the baby carefully is questionable, since she did not know that the baby's face was down on the mattress instead of on the side as it had been placed when the child was returned from the operating room and she did not recognize death until the knowledge was forced on her by the baby's mother.

Respondent maintains that the nonsuit was properly granted because of the allegation in the complaint that it permitted the child "to smother from a collapse of her lungs." It is argued that by reason of the testimony of the surgeon that atelectasis is caused by a clot of mucous in a bronchus, the allegation of smothering is completely negated by the evidence.

[7] The complaint does not stop with that allegation but further alleges that the death of the child was brought about by the negligence of respondent "for failure to watch and protect said minor child while unconscious and under the influence of a general anesthetic." This allegation supplements the averment that respondent permitted the baby to smother and is sustained by the doctor's testimony. Such general allegation of negligence, if there had been no specific allegation of smothering, is sufficient to establish a duty of care under the general law and to permit proof of failure to render ordinary care. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 99, 114 P.2d 1.

[8] Furthermore, in reference to the term "smother" neither appellant nor his counsel nor the court is limited either by the technical medical definition of the word,

if there be one, (none is suggested in the briefs and none appears in Dorland's Medical Dictionary) or by the fact that atelectasis is caused by a clot in a bronchus. In considering a pleading such as this the ordinary and customary meanings of words must be adopted rather than a technical definition that is known only to persons skilled in a particular science. "Smother" is defined as: "To destroy the life of by suffocation; to kill, murder, etc., by depriving of air" (Webster's New International Dictionary, 2d Ed., 1939, p. 2376); "To suffocate by the prevention of breathing; to deprive of life by suffocation." (Oxford English Dictionary, Vol. 9, p. 290). "Suffocate" is defined as: "To kill by stopping respiration, as by strangling or asphyxiation; * * * To extinguish or destroy by, or as by, deprivation of air" (Webster's, Id. p. 2520); "To kill (a person or animal) by stopping the supply of air through the lungs, gills, or other respiratory organs. To interrupt or impede respiration in (a person); to stifle, choke. * * * To destroy as if by the exclusion of air; to smother, overwhelm, extinguish." (Oxford, Id. Vol. 10, p. 109). "Suffocation" is defined in Dorland's American Illustrated Medical Dictionary (17th Ed., 1937, p. 1314), as "The stoppage of respiration, or the asphyxia that results from it."

"Strangle," which is used in the foregoing definitions, means: "(Trans.) To stifle, choke, or suffocate in any manner; esp. to interrupt the breathing of, by entering the windpipe; * * * (Intrans.) To be strangled, or suffocated." Webster's, p. 2490. In Allen's Synonyms (1938 Ed., p. 375) "choke," "smother," and "strangle" are listed as synonyms of "suffocate." One of the definitions of "atelectasis" given in Dorland's Medical Dictionary (p. 161) is "partial collapse of the lungs."

Since all the words above defined mean to deprive a person or animal of air and since the collapse of a lung is caused by the inability of air to enter it, the objection to the allegation that the baby was permitted "to smother from a collapse of her lungs" is purely technical. The truth is that she died by reason of the fact that air was prevented from entering her lungs. This fact and not the technical word describing the means by which air was excluded is the gravamen of the complaint.

[9] To the ordinary person who is without knowledge of medical terminology the term "smother" would mean to deprive of air—to prevent the entrance of air into the lungs by either external or internal stoppage of the air passages. Respondent is fully apprised by the complaint that appellant charges that his baby died for want of air and that the failure of air to enter its lungs was caused by respondent's negligence. Justice is not served when, by a hypertechnical objection to a pleading or by a trivial imperfection in the choice of words, a litigant is deprived of his right to have his case submitted to the decision of a jury, especially so when the words pleaded are commonly used and understood and the opposing party is not deceived or confused by their use.

The evidence may be thus epitomized: The baby's life was brought to a close by reason of the fact that its breathing organs were so obstructed that oxygen could not enter. Atelectasis was not necessarily fatal. Its symptoms may be readily recognized by a skilled doctor or nurse. It is the custom for hospitals in the community of respondent to watch a small child under anesthesia until it returns to consciousness. Appellant's baby was not safeguarded by having the attention of a skilled person and the unskilled nurse's aide did not give such attention to the baby as was in her power.

It was in the domain of the jury to determine from the evidence before it whether respondent had used the degree of care required of it under the rules of law above laid down and sustained by the decisions cited. If the case had been submitted to the jury upon no other evidence than that introduced before the nonsuit was granted a verdict in appellant's favor would have been justified. The granting of a nonsuit was error.

Appellant assigns several errors of the court in sustaining objections to questions, and since the case may be tried again the alleged errors will be disposed of for the guidance of the court.

[10] (a) The court sustained an objection to the question as to whether the parents of the child opposed the performance of an autopsy. The cause of the child's death was established by respondent's witness, the operating surgeon. The officials of the hospital did not request an autopsy and it does not appear that one was necessary. There was no occasion for an objection by the parents.

[11] (b) The medical witness was asked whether an operation of the nature performed on the child would endanger life as much as an abdominal incision. The surgeon had testified that the operation was of a minor nature, so much so that it was his intention to permit the child to be taken home in the afternoon of the day on which the operation was performed. Neither party claimed that the operation was the cause of the death. The question was immaterial.

[12] (c) The doctor was asked whether there was anything about the room in which the child was placed and its occupancy that in his opinion would be a cause for keeping the mother from the bedside while the child was under the anesthesia. The objection was sustained on the ground that it called for a conclusion. The doctor was unquestionably qualified to answer the question. There was evidence that the mother had been excluded from the room for the reason, as stated by the nurse in charge of the room, that she and other outsiders would consume oxygen that was necessary for the children. The doctor testified that in other cases he had permitted a parent or relative to remain in the room with a child until it had recovered from the effects of anesthesia and that the size of the room and the number of people therein would determine whether outsiders should be permitted to remain. He knew the size and condition of the room, the number of its occupants, the number and size of the windows, and other facts which, in his opinion, might or might not have justified the nurse in excluding Mrs. Thomas from the room. He should have been permitted to answer the question.

[13] (d) An offer was made to prove by the mother of a boy who was in the room about the time appellant's baby was there that while he was under the influence of an anesthetic an attendant of the hospital remained in close proximity to his bed until he had completely recovered consciousness. The offer of proof was stated by counsel to have been for the purpose of showing the custom with regard to watching a patient under anesthesia. The evidence was admissible for the purpose stated and for the additional purpose of negating the necessity of compelling Mrs. Thomas to absent herself in order to preserve oxygen as stated by the nurse.

[14] (e) Three questions were propounded to Mrs. Mitchell, the graduate nurse, wherein she was asked to express her opinion concerning the effect of an anesthetic and the custom of hospitals to keep an attendant at the bedside of an anesthetized patient. Since these subjects were not touched upon in her direct examination objections on the ground that the questions were improper cross-examination were rightly sustained.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

In re FLEMING'S ESTATE.

KUCHEL, State Controller, v. FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO.*

Civ. 3653.

District Court of Appeal, Fourth District, California.

July 18, 1947.

Hearing Granted Sept. 15, 1947.

1. Charities 🔑31

Gifts for charitable purposes are highly favored.

2. Taxation 🔑876(1)

Where testamentary trust provided scholarships annually for some nine young people who made the lowest scores in golf tournament conducted each year and any player making a score in excess of a certain maximum was ineligible for such award, bequest was "charitable" or "educational" and hence was exempt from inheritance tax. Revenue and Taxation Code § 13842.

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* Subsequent opinion 190 P.2d 611.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Bequest" and "Educational Bequest".

3. Statutes ⚷205

In seeking to discover general intention, statute as a whole should be considered and not merely one clause thereof.

4. Taxation ⚷876(1)

Under statute providing for inheritance tax exemption if "property transferred is limited for use within this state", the condition was directed more to use of property transferred than to ultimate use of income therefrom after that income is disposed of and distributed to individuals in accordance with terms of charitable trust. Revenue and Taxation Code, § 13842.

5. Taxation ⚷876(1)

Where property is transferred in trust to local corporation doing business in state, and property is invested in state by trustee and distributed to beneficiaries personally present in state and such results are provided for in terms of bequest, transfer of such property is "limited for use within this state" within statute exempting from inheritance tax if property transferred for charitable or educational purposes is limited for use within state. Revenue and Taxation Code, § 13842.

See Words and Phrases, Permanent Edition, for all other definitions of "Limited for Use Within this State".

6. Taxation ⚷876(1)

Under testamentary trust providing for income to be given as scholarships to young people making the lowest scores in golf tournament, no inheritance tax was payable in connection with such trust under statute exempting from inheritance tax if property transferred for charitable or educational purposes is "limited for use within this state" notwithstanding beneficiaries were not limited to residents of state and beneficiaries might attend school outside of state. Revenue and Taxation Code, § 13842.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of Harvey Fleming, deceased, wherein the First National Trust & Savings bank of San Diego was executor of the estate of Harvey Fleming, deceased. From a judgment declaring that no inheritance tax was payable in connection with a trust fund established by will of deceased, Thomas H. Kuchel, Controller of the State of California, appeals.

Affirmed.

James W. Hickey, of Sacramento, and Donald R. Peck and Morton L. Barker, both of Los Angeles, for appellant.

Herney & Herney and Monroe & McInnis, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment declaring that no inheritance tax was payable in connection with a trust fund established by the will of the deceased.

The facts are not disputed. By his will the decedent left the residue of his estate in trust to the respondent bank, the income therefrom to be used for the purpose of aiding in the education of boys and girls of good character who are citizens of the United States. It was provided that as many awards for this purpose should be made each year as the income from the trust estate would permit; that each award should be for a sum not exceeding $200; that such awards should be used only for the purpose of paying all or a part of the tuition or other charges incurred by the recipient at any school, college or university approved by the trustee; and that payment of the certificates of award should be made by the trustee directly to the school, college or university attended or to be attended by the award holder, upon satisfactory proof that the money was to be used for that purpose. It was further provided that, for the purpose of selecting the young people to whom such awards were to be made, the trustee should hold a golf tournament each year on golf courses situated in San Diego County to be selected by the trustee; that applicants must make written application for permission to enter such competition and be approved by the trustee; that awards to the number made possible by the available income each year should be made to those making the lowest scores in this tournament; and that any player making a score in excess of a certain maximum should be ineligible for such an award.

During the probate proceedings an inheritance tax appraiser filed a report fixing the inheritance tax in connection with this trust at $5531.29. Objections to this report were filed by the respondent on the ground that this transfer is exempt under section 13842 of the Revenue and Taxation Code, as being one exclusively devoted to charitable and educational purposes and limited for use within this state. After a hearing the court found, among other things, that this trust was created for the purpose of awarding scholarships to young men and women found by the trustee to be of good moral character and to be citizens of the United States; that competition therefor was open to all such persons; that the awards may be used in any school or university approved by the trustee; that the trustee is a local banking institution operating for profit and located in the city of San Diego; that under the terms of the will the trust thus created is to be administered in this state and persons to whom such an award is made must personally compete in a tournament to be conducted in the county of San Diego; and that the property thus transferred to this trust is to be used exclusively for charitable and educational work and is limited for use within this state, as that term is used in section 13842 of the Revenue and Taxation Code. As a conclusion of law, it was found that the property so transferred in trust was exempt from the inheritance tax. A judgment was entered sustaining the objections to the report of the inheritance tax appraiser, and adjudging that no inheritance tax is due. This appeal followed.

It is first contended that the bequest establishing this trust is not charitable in character because it is limited, by the provision requiring the beneficiaries to shoot a fair game of golf, to a class which is not a sufficiently large proportion of the population. Reliance is placed on In re Estate of Henderson, 17 Cal.2d 853, 112 P.2d 605, holding that the class to which a charity is restricted must be large enough to make the enforcement of the gift beneficial to the community, and In re Estate of Huebner, 127 Cal.App. 244, 15 P.2d 758, where it was held that the trust there in question was not for the benefit of an indefinite number of persons but was intended for the benefit of some one person.

[1, 2] Gifts for charitable purposes are highly favored in this state. In re Estate of Yule, 57 Cal.App.2d 652, 135 P.2d 386. The trust in question was designed to provide scholarships for some nine young people each year, which would presumably go on for many years. It was for the benefit of an indefinite class for educational purposes, and it cannot be said that the number in this class is not sufficiently large to make the enforcement of the gift beneficial to the community. We cannot agree that the number of young people who can play the kind of golf which is here required is so limited as to affect the charitable nature of this trust. Moreover, the golf requirement, while unusual, merely relates to the method of selection from among a large class of young people who desire assistance in continuing their education. It must be held that the bequest in question is charitable or educational in nature, within the meaning of section 13842. In re Estate of Purington, 199 Cal. 661, 250 P. 657; In re Estate of Bartlett, 122 Cal.App. 375, 10 P.2d 126; In re Estate of Bailey, 19 Cal.App.2d 135, 65 P.2d 102.

Appellant's main contention is that this bequest is not exempt from this tax because section 13842 provides that in order to exempt a transfer of property in trust to a corporation, for charitable or educational purposes, one of two conditions must be present: Either the corporation, to which the property is transferred in trust, must be one organized solely for charitable, educational, public or other like work under the laws of this state or of the United States, or the property transferred must be "limited for use within this State." It is conceded that the first of these conditions was not here present since the respondent is a banking corporation. In support of its contention that the second of these conditions is not here present the appellant argues that the reason for giving an exemption in such cases is, as stated in People v. O'Donnell, 327 Ill. 474, 158 N.E. 727, that the benefits bestowed will relieve the state of burdens which it otherwise would be obliged to carry; and that it has usually been held in other states that a bequest to a foreign corporation would not be exempt from such a tax, citing In re Thomas' Estate, 185 Wash. 113, 53 P.2d 305, 307, and similar cases from other states.

In the Thomas case just cited, where the bequest was not given in trust but given absolutely to a foreign corporation, the exemption was denied solely because "the exemption provisions * * * of the statute do not exempt bequests to charitable institutions or religious organizations located outside this state from an inheritance tax." That and similar cases from other states are not very helpful on the question as to the meaning of the clause of our statute which is here involved. Nor do we think that the reason thus given for this exemption, that the benefits bestowed must relieve the state of burdens which it otherwise would be obliged to carry, may be accepted as entirely controlling in this state. While that may be one of the reasons it does not disclose the sole purpose for the exemption provided by our statute. A somewhat broader definition of charity is applied in this state. Scripps, etc., Hospital v. California Emp. Comm., 24 Cal.2d 669, 151 P.2d 109, 155 A.L.R. 360. This is especially true in the fields of religion and education where the general beneficial effect on society is a main consideration, and where the matter of saving expense to the state is not the controlling element.

The issue here is as to the meaning and intent of subd. (b) of section 13842, which provides that in order for the exemption to apply in such a case as this it must appear that "the property transferred is limited for use within this State." It is conceded that the young people who may receive the scholorships contemplated by this bequest are not limited to residents of this state, and that the recipients of these awards may attend school outside of this state, if those schools are approved by the trustee. The appellant contends that the words "for use within this State," as applied in this case, mean that the persons receiving these awards or scholarships must be residents of this state. It was conceded at the oral argument that the exemption would still apply if a recipient of an award, who was a resident of this state, were permitted to attend a college outside of the state. The respondent contends that section 13842 contains no indication that the legislature intended to limit the recipients of such a charity to residents of this state. It is contended that the words "limited for use within this State" apply to the administration of the trust, the selection of the beneficiaries, and the distribution of the benefits to them; that in this case all of these things are confined to and must occur within this state; and that it was not intended by the statute to provide that the ultimate use by the beneficiary of the benefits, after he receives them, must be made in this state. As the respondent aptly points out, under a contrary interpretation of the statute few charities would come within the exemption, other than soup kitchens, as otherwise the recipient might wear the clothes given to him, or use a part of the benefits conferred on him, on the other side of the state line.

Not only does the statute fail to expressly provide that the exemption shall not apply unless the beneficiary is a resident of this state, or that the ultimate use of the benefit conferred must be made in this state, but the history of this exemption in this state indicates a somewhat broader intention. Formerly, our statute was so worded that it did not have the effect of limiting such a bequest to a domestic corporation, as was done in some states. In re Estate of Fiske, 178 Cal. 116, 172 P. 390. In 1921 the statute was amended (Stats. 1921, Ch. 821, p. 1506) so as to provide that the exemption applied only if such a corporation was organized under the laws of this state or if the property transferred was limited for use within this state. In thus changing the law either one, but not both, of these conditions was required to create the exemption. In 1929, it was again amended (Stats. 1929, Ch. 844, p. 1840) to add a reciprocal clause permitting such exemptions in this state where similar treatment was accorded us by the laws of other states. In 1939, the statute was amended (Stats. 1939, Ch. 694, p. 2210) to extend the exemption to cases where the corporation in question was organized solely for charitable, educational and like purposes under the laws of the United States.

[3] These changes are hardly consistent with an intention to strictly confine the beneficiaries of such a trust to residents of this state, or to follow and control the ultimate use of the benefits after they have reached the hands of the beneficiaries. In seeking to discover the general intention, the statute as a whole should be considered and not merely one clause thereof. Since 1921, where property is transferred to a corporation in trust for charitable, educational and like work, the exemption has applied where either (a) the corporation is organized in this state for charitable, educational or like purposes, or (b) where the property transferred is limited for use within this state. Where the first of these conditions exists no limit, as to residence or otherwise, is placed on those who may be the beneficiaries of the trust. If, in the present case, the trustee had been a charitable corporation organized under the laws of this state, the scholarships provided for could have been awarded to persons regardless of their place of residence, or regardless of the place where the benefits were ultimately used. Where such an intention so clearly appears, with respect to the first condition provided, it seems unreasonable to believe that an entirely different and contrary intention should be presumed in connection with the second condition named, in the absence of any definite expression of such contrary intention.

[4-6] While the second condition, "for use within this State," means something, it does not necessarily follow that it was intended to mean that the beneficiaries of the trust must be residents of this state, or that they must spend the money received within this state. By the language used it would seem that the condition was directed more to the use of the property transferred than to the ultimate use of the income therefrom, after that income is disposed of and distributed to individuals in accordance with the terms of the trust. It would seem that where the property is transferred in trust to a local corporation doing business in this state, where the property is retained and invested here by the trustee, where the property is distributed to the beneficiaries in this state, where the beneficiaries must be personally present in this state and by their efforts, performed in this state, prove their eligibility to share in the benefits of the trust, and where these results are provided for in the terms of the bequest, it may reasonably be said that the transfer of the property was limited for use within this state, within the meaning of this statute. This was the interpretation placed upon it by the trial court and, being a reasonable one, it may not be disturbed on appeal. A contrary holding would involve reading into this statute something which the legislature could easily have, but has not, included therein.

Incidentally, any nonresident who desired to become a beneficiary under this trust would have to come here to achieve that purpose. There is authority, more or less respectable, for the assumption, based somewhat on experience, that having "come and seen" he would elect to remain and become a resident of this state.

The judgment is affirmed.

MARKS, J., concurs.

81 Cal.App.2d 102

In re MERRILL'S ESTATE.

McMAHON v. MERRILL'S ESTATE.

Civ. 15895.

District Court of Appeal, Second District, Division 1, California.

July 30, 1947.

Rehearing Denied Aug. 18, 1947.

Hearing Denied Sept. 25, 1947.

1. Executors and administrators ⚷506(3)

In proceedings on accounts of special administrator after revocation of his letters, evidence sustained recovery by executrix of amount paid by special administrator to his attorney, on basis of findings that attorney had been paid without court order, that no services of the attorney had resulted in any benefit to the estate, and that neither administrator nor attorney were entitled to any fees, ordinary or extraordinary.

2. Appeal and error ⚷1010(1)

Where the record discloses substantial evidence to support the findings, an appellate court will not attempt to weigh such evidence.

3. Executors and administrators ⚷122(1)

Where no general powers have been conferred, a special administrator has no powers except to collect, conserve, and protect the estate of his decedent, and his obligations are to the estate solely.

4. Appeal and error ⚷909(1)

The District Court of Appeal would assume that attorney at law was aware of limitations on special administrator's power, that attorney was cognizant of law concerning appointment of special administrators, and of requirement that attorney fees in such cases should be fixed by the court. Probate Code, § 467.

5. Executors and administrators ⚷32(2)

The trial court had power to order attorney for special administrator to return fees improperly paid him without court order prior to revocation of the special letters of administration. Probate Code, § 525.

6. Executors and administrators ⚷32(2), 122(1)

The statute providing that all acts of an executor or administrator as such, before revocation of his letters, are as valid as if he continued lawfully to execute the duties of his trust, does not increase the power of a special administrator or prevent the court from controlling the acts of the administrator and attorney with respect to improper expenditure of funds by the special administrator without court order, after administrator's special letters have been revoked. Probate Code, § 525.

7. Executors and administrators ⚷114

Executrix was not estopped from objecting to fees theretofore paid to attorney by special administrator without court order or approval by her alleged acceptance of benefits, or by alleged approval of attorney's services by pretermitted heir.

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Rae S. Merrill, deceased, wherein a special administrator was appointed. Thereafter the letters of special administration were revoked but not until after the special administrator had made various expenditures including the sum of $3,640.90 paid to his attorney and a further sum of $150 paid at attorney's request to another attorney. From a judgment in favor of the estate directing John J. McMahon, the attorney, to restore to the estate the $3,790.90 with interest, the attorney appeals.

Affirmed.

John J. McMahon, in pro. per., for appellant.

Arthur E. Schifferman, of Los Angeles, for respondent Helen Hillin, executrix.

C. E. Spencer, of Los Angeles, for respondent Evelyn M. Aumick.

DORAN, Justice.

The record herein discloses that Fred B. Merrill, brother of the decedent Rae S. Merrill, was appointed special administrator of said decedent's estate, on ex parte proceedings before Judge William R. McKay, on April 17, 1944. The petition for such appointment, prepared by appellant attorney John J. McMahon, was signed and verified by Fred B. Merrill, and contained the usual statement "That due search and inquiry have been made to ascertain if said deceased left any Will and Testament, but none has been found, and according to the best knowledge, information and belief of your petitioner said deceased died intestate." However, notwithstanding this sworn statement, it appears from appellant's brief that "Fred B. Merrill stated to appellant and to Mr. Verge (the Merrill family attorney) that he had had a previous talk with one Harry B. Ellison, an attorney, concerning the death of Rae S. Merrill at Tucson, Arizona, and in this conversation Mr. Ellison mentioned that he had a copy of a will in his office and knew nothing about the original and did not know if there was an actual will. Fred B. Merrill said that he asked Mr. Ellison if a daughter was mentioned in the copy of the will and Mr. Ellison replied that she was not mentioned in the copy of the will. Mr. Verge then replied that the decedent, Rae S. Merrill, was an inebriate, an alcoholic, and was confined in jail at odd times off and on for years past and was an habitual drunkard, and that if any will should be found that he had no capacity to make a will and was wholly incompetent and that Fred B. Merrill should be appointed as special administrator of the estate of the decedent."

The deceased was the owner of a one-fourth interest in a bungalow court located at Glendale, California; Helen Hillin, a sister, William Jack Merrill, a brother, and Fred B. Merrill, a brother, each owning a like one-fourth interest therein. Prior to the death of Rae S. Merrill, the said Fred B. Merrill had filed a partition action in reference to this property. It appears that from the proceeds of the partition sale, the special administrator, Fred B. Merrill, received the bulk of all that came into the estate, a small part being rents received from the property, and the total receipts being $7,199.90.

On or about March 7, 1945, and after a contest, the will of Rae S. Merrill, deceased, was duly admitted to probate, Helen Hillin being appointed executrix thereof. As indicated in the conversation between Fred B. Merrill and Attorney Ellison previously referred to herein, this will did not mention decedent's daughter, Evelyn M. Aumick, and according to the briefs of all parties hereto, this pretermitted heir is entitled to the decedent's property. Thereafter and on October 16, 1945, Judge Thurmond Clarke rendered judgment that "the Letters of Special Administration heretofore issued to Fred B. Merrill on April 17, 1944 be, and the same are revoked and declared null and void as of and from the date of issuance thereof, * * * and that all powers of the said Fred B. Merrill to act herein are hereby revoked and annulled." This judgment also ordered Merrill to "file his verified final accounting" within ten days.

It further appears that just previous to the hearing of the will contest and on December 19, 1944, the special administrator had filed a "First Current Account" which discloses that, without order of court, Merrill had paid to the appellant attorney, John J. McMahon the sum of $1,750 as attorney fees out of total receipts reported as $6,908. On July 17, 1945, the special administrator filed a "Second Current Account", showing in the recapitulation, total disbursements of $5,174.90, and a balance on hand of $1,786.70. This second account states "Amount due to John J. McMahon (appellant attorney) $600"; and seeks credit for the special administrator's "extraordinary services."

Following the judgment revoking Merrill's letters of special administration, there was filed on October 31, 1945, a "Final Account and Report of Special Administration," which had been prepared by Attorney McMahon but was not signed by Merrill, and not verified. The three accounts came on for hearing before Judge Clarke on November 14, 1945, joint and several exceptions and objections to these accounts having been made by Helen Hillin, the executrix, and Evelyn M. Aumick, decedent's pretermitted daughter. These parties therein entered objection to the various items of said accounts relating to payments of and credits for attorney fees, special administrator's fees, expenses, etc., on the grounds that such items were excessive and unreasonable in amount, unauthorized, and the alleged services of no value to the estate. It appears that the special administrator in whose behalf the final account was filed, also objected to an item in respect to certain expenses claimed to have been advanced by the attorney.

The trial court found that Special Administrator Merrill had received $7,199.90 in money belonging to the estate; that Merrill had expended $4,191.90 "without any order of court and to persons and for purposes for which he is entitled to no credit; that said executrix (Helen Hillin) is entitled to possession of said sum"; that neither Merrill nor Attorney McMahon was entitled to any fees, ordinary or extraordinary, that the only sum Merrill was entitled to was $33.10 expended for filing fees, bond premium, etc. The court further found that the special administrator, without order of court, had paid to John J. McMahon, "at the instance and request of said McMahon," the sum of $3,640.90 and a further sum of $150 paid at McMahon's request to another attorney; that "no service of the said McMahon has resulted in any benefit to the estate," and that McMahon "was instrumental in procuring the appointment of said Merrill as special administrator and participated in and procured said appointment by failure to disclose all facts known to him to the judge making the appointment." Many of the claims, the court found, were for services "not in connection with this estate," and for services rendered to an individual claimant. Judgment was accordingly rendered in favor of the executrix, and ordering Attorney McMahon to restore to the estate the $3,790.90 with interest. The present appeal by the attorney only, is from this judgment.

Shortly after rendition of the judgment, according to appellant's brief, "the special administrator took up negotiations with Arthur E. Schifferman without the consent of the appellant and withdrew his (Merrill's) appeals * * * and satisfied the judgment without the knowledge or consent of this appellant." In this connection it may well be noted that appellant's briefs do not suggest that any part of the attorney fees received were returned by the recipient attorney although the judgment in question ordering such return has now been satisfied by the special administrator.

On mandamus proceedings to compel the Superior Court to settle and certify transcripts on the attorney's appeal, the Supreme Court in Estate of Merrill, 29 Cal. 2d 520, 175 P.2d 819, 821, held that "under authority of section 911 of the Probate Code, 'an attorney may proceed independently, and maintain an action or an appeal' for fees"; that notwithstanding the satisfaction of judgment by the special administrator, McMahon "has the right to have (this matter) reviewed on the merits," since the "money decree does not mark the limits of McMahon's concern herein," and the findings of fraud "constituted a direct attack upon his integrity and conduct as an attorney."

Only a "partial" Reporter's Transcript has been furnished; the briefs filed by the appellant do not strictly comply with the rules and are, in the main, unsatisfactory. The respondent executrix, however, desires "a settlement of the matter on the merits," and after the long, acrimonious dispute disclosed by the record, involving many different actions, proceedings, motions and petitions, such a settlement is without doubt, highly desirable.

[1] Appellant insists that "The evidence is utterly insufficient to support the findings as to appellant, John J. McMahon," but the briefs filed make little definite reference to the record to substantiate this point. In the instant case, however, there can be no doubt that even the partial record furnished, discloses substantial evidence in support of the findings and the judgment rendered thereon. For example, on page 238 of the reporter's transcript occurs the following cross-examination of the appellant:

"Q. * * * So the picture of that is that you received $3,640.90? A. That is about correct.

"Q. From the special administrator in this case? A. Yes.

"Q. Mr. McMahon, it is also a fact, is it not that at no time did you ever have any order for the payment of any fee to you; is that correct? A. I don't need any court order.

"Mr. Babb (attorney for McMahon): I will stipulate that is correct".

[2] The appellant then claimed to have received only $2,600; $1,750 on the first account, and $850. on the third account, and that there had been some personal "adjust-

ment" with the special administrator. There was also evidence to the effect that certain items of legal service for which fees were claimed had been rendered not to the estate but for Evelyn Aumick whom appellant represented at one time. In regard to certain other items it was stipulated in court that the alleged service "added no money to the estate," and that "no benefit accrued to the estate." Reference has hereinbefore been made to the fact, admitted in appellant's brief, that at the time McMahon prepared and filed the petition for special administration Merrill had stated to appellant that another attorney, Harry B. Ellison, had a copy of a will made by the deceased. At the probate hearing of this petition the court was not informed of this knowledge, and by way of deposition Judge William R. McKay testified that had there been a disclosure of the facts, "I would not have made such an appointment." The usual rule that where the record discloses substantial evidence to support the findings, an appellate court will not attempt to weigh such evidence, must be applied in this case.

[3, 4] Where no general powers have been conferred, a special administrator "has no powers except to *collect, conserve, and protect* the estate of his decedent. Probate Code, secs. 460, 463. His obligations are to the estate solely." Dodson v. Greuner, 28 Cal.App.2d 418, 421, 82 P.2d 741, 743. It must be assumed that the appellant, an attorney at law, was fully aware of such limitation of power on the part of the special administrator. It must likewise be assumed that the appellant was cognizant of the law concerning the appointment of special administrators; also that it is required that attorney fees in such cases "shall be fixed by the court" as specified in Section 467 of the Probate Code. This section further provides that "the total fees paid to the attorneys both of the special administrator and executor * * *, must not, together, exceed the sums provided in this code as compensation for the ordinary and extraordinary services of attorneys for executors or administrators."

[5, 6] In respect to the power of the trial court to order appellant to return the fees received, it may be said, in the language of Estate of De Barry, 43 Cal.App.2d 715, 726, 111 P.2d 728, 734, that "Where an officer of the court (such as an attorney) without authority withholds personal property of the estate the probate court may require him to restore the property to the estate." The appellant's contention that "All the acts of the special administrator until he was superseded by the appointment of the executrix were valid under the provisions of Section 525 Probate" is obviously without merit so far as the present problem is concerned. McCarthy v. Mitchell, 54 Cal.App.2d 173, 176, 128 P.2d 681, cited in support of that proposition is not in point; neither that case, nor Section 525 of the Probate Code providing that "All acts of an executor or administrator, as such, before the revocation of his letters * * * are as valid, to all intents and purposes, as if he continued lawfully to execute the duties of his trust," can be so construed as to increase the power of a special administrator or to prevent the court in a case such as the present one, from controlling the acts of the administrator and the attorney.

As said in Estate of De Barry, 43 Cal.App.2d 715, 731, 111 P.2d 728, 736: "Not only does the probate court have the power to determine the distribution of an estate and to control the conduct of interested parties with reference to their receipts of distributable shares and other payments made by the estate but it is an inherent power of the court to entertain and exercise summary proceedings in its discretion against attorneys who are guilty of misconduct in handling the assets of the estate. Brunings v. Townsend, 139 Cal. 137, 72 P. 919; 6 Cor.Jur. 711-713; 7 C.J.S., Attorney and Client, § 159. Whether the court will exercise its summary powers is a matter within its discretion." The De Barry case held, moreover, that "however valuable his services might have been, he (the attorney) was in no position to withhold $10,000 or any money of the estate for fees without a court order so to do." While it is true, as urged by the appellant, that the facts in the De Barry case are not identical with those herein, it is nevertheless true that the fundamental principle involved is the same.

[7] Appellant's brief argues that "The respondents are estopped from objecting to the reasonable fees asked"; that Helen Hillin "accepted the benefits of appellant's acts in selling the property and is thereby estopped to question his power to act"; that the pretermitted heir, Evelyn Aumick, had authorized appellant to render the legal services in question, and "that she was thoroughly satisfied with the work." This conclusion is based on letters from Mrs. Aumick to "Uncle Fred" Merrill, the special administrator, and also seeks to draw support from a more formal document filed in the case on January 10, 1945, evidently prepared by an attorney, in which Mrs. Aumick states that "she has read over the First Account Current * * * and is familiar with the work done by John J. McMahon, attorney for the undersigned, and approves the services rendered by said John J. McMahon for said Special Administrator, and consents to the payment of said attorney fees." In this connection reliance is placed on the case of Estate of Lankershim, 6 Cal.2d 568, 58 P.2d 1282 in which appellants were held estopped to object to certain fees *allowed by the court.* The factual situation in the Lankershim Estate was entirely dissimilar from that in the instant case where the fees under discussion were paid without order of court and without any petition therefor having been made by the appellant attorney. In other words, in the present case the special administrator and the attorney prejudged the matter, set the fees and paid the same without seeking court approval, and having done so, now assert that the court can do nothing about the matter. This cannot be and is not the law, and there is no merit in the claim of estoppel under the facts of this case.

The trial court was possessed of power to make the judgment in question; the record discloses substantial evidence to support findings and judgment; and no prejudicial error is apparent either in reference to the admission of evidence or otherwise.

The judgment is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

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81 Cal.App.2d 76

In re BUTIN'S ESTATE.

CHRISTIANA et al. v. RYERSON.

Civ. 7381.

Sac. 5831.

District Court of Appeal, Third District, California.

July 28, 1947.

Rehearing Denied Aug. 22, 1947.

Hearing Denied Sept. 25, 1947.

1. Charities 🔑10

Bequest authorizing executors to erect at Madera a granite tower to contain a carillon of 18 bells at a reasonable cost, "dedicated to the memory of all those who strove to make Madera and Madera County all that it is", constitutes a valid public charitable gift.

2. Charities 🔑10

The fact that proposed charity may be intended as a private memorial does not affect its public character or its validity.

3. Charities 🔑10

Bequests for the promotion of public, religious, educational or moral welfare by the construction of buildings, monuments or fountains are charitable in their nature.

4. Charities 🔑31

The language of a charitable bequest should receive a liberal construction in accordance with intention of testator.

5. Charities 🔑22(1)

Will containing a charitable bequest must designate the purpose thereof with reasonable certainty, but it is not necessary that a detailed plan of execution shall be stated.

6. Charities 🔑22(2)

When the general nature of charitable trust is adequately designated in will its execution may be delegated to named trustees subject to court approval.

7. Charities 🔑22(2)

Where will contained a valid charitable bequest for the erection of a designated type of public memorial, alternative provision that, if it was impractical to erect that type of memorial, executors were authorized to use their own discretion as to type of memorial to be erected did not change the charitable purpose and was a valid and proper authorization for the exercise of discretion by executors as trustees.

8. Charities ⚿22(2)

Where will provided a charitable bequest for the erection of a public memorial of a designated type which proved impractical, alternative provision in will giving executors discretion to determine upon some other type of monument in accord with same designated purpose would authorize exercise of discretion to erect a building to be used as a memorial health center.

9. Wills ⚿15

Where public charitable memorial provided for in Will could be located on property other than the "courthouse park," which will designated as a preferred location, and was intended as a memorial for the public at large and was not necessarily intended to become property of county or to be confined to sole benefit of county as a subdivision of state, section 42, relating to bequests to political subdivisions of state, did not take bequest out of inhibitions of section 41, restricting charitable bequests to one third of estate as against testatrix' niece as her heir. Probate Code, §§ 41, 42.

10. Charities ⚿31

In determining whether bequest is charitable, court should ascertain from language of will and from competent oral evidence the nature and purpose of gift, rather than motive of donor; identity of trustees, although it is not necessary to mention them as "trustees"; and identity of beneficiaries who are to profit thereby.

11. Charities ⚿10

Where bequest is for benefit of the public or of an indefinite number of persons in the legal sense, it is immaterial that donor may also benefit by his request that the inscription on the monument shall contain his name, and bequest remains charittable in nature.

12. Charities ⚿33

Provision in will specifically directing executors to erect a designated memorial of a public character sufficiently designated executors as trustees of charitable trust, notwithstanding that it did not name them as trustees, since nature of services they were directed to perform determined their relationship.

13. Charities ⚿37

Where provision in will for the erection of a memorial tower with carillon of bells was for a public charitable use, as distinguished from a private trust, and construction of tower and location in court house park was impractical, the doctrine of cy pres was applicable.

◆

Appeal from Superior Court, Madera County; Glenn L. Moran, Judge.

Proceeding in the matter of the estate of Mary Ryerson Butin, also known as Mary Eva Butin, deceased. On the petition of Vera V. Ryerson, a legatee, for partial distribution, opposed by A. E. Christiana and Stanley Murray, executors. From two orders of partial distribution, executors appeal.

Orders affirmed as modified.

Mason A. Bailey, of Madera and David E. Peckinpah and L. N. Barber, both of Fresno, for appellant.

W. M. Conley, Philip Conley and Matthew Conley, all of Fresno, for respondent.

THOMPSON, Justice.

The executors of the estate of Mary Ryerson Butin, deceased, have appealed from two separate orders of partial distribution to Vera V. Ryerson, a niece of the decedent and a legatee under the will. The first order, dated February 28, 1946, distributed to the niece the sum of $12,000. The second order, dated May 11, 1946, distributed to the niece, as residuary legatee, real and personal property, reserving sufficient funds with which to close the administration of the estate, and a sum, "not to exceed" $35,000, for the construction of a monument "to the memory of all those who * * * strove to make Madera and Madera County all that it is."

The executors contend that the will of the deceased created a charitable trust of the entire residue of the estate; that the will directed the executors to erect a monument for the purpose indicated, which will cost much more than the residue left in the estate; that the orders are not supported by the evidence, and that the distribution of said properties is in violation of the trust, excessive and void.

The appeals involve the necessity of construing the will to determine whether a valid charitable trust was thereby created to construct the monument, and, if so, whether the reasonable cost thereof would exceed the reserved sum of $35,000.

Mary Ryerson Butin died testate March 30, 1944, in Madera County, where she had lived and practiced her profession as a physician for many years. She was possessed or real and personal property of the appraised value of $75,074.61. The will was admitted to probate and Judge Stanley Murray and A. E. Christiana were appointed and qualified as executors thereof. The will provides in part that:

"First: I direct that all my lawful debts and funeral expenses be paid as soon after my demise as can be legally and conveniently done.

"Second: I give, devise and bequeath to my niece, Vera V. Ryerson of Omaha, Nebraska, all that certain real property in the City of Madera, County of Madera, State of California, and particularly described as follows: Lot five (5) in Block five (5) of the Town, now City of Madera, * * * together with all the furnishings in said house including clothing and jewelry, and whatever may be upon said property, including an automobile, if I have one.

"Third: I direct that my executors, hereinafter named, erect in the courthouse park at Madera, California, a granite tower, constructed of Raymond granite, to contain a carillon of eighteen bells. Said tower and bells to be placed in the park at a reasonable cost. I request an inscription in sand blast letters, to be cut in a conspicuous place upon the granite composing the tower to read as follows:

" 'Dedicated to the memory of all those who during the years between 1891 and 19— strove to make Madera and Madera County all that it is.

" 'John L. Butin, M. D.'

" 'Mary Ryerson Butin, M. D.'

"If said tower cannot be erected in the courthouse park, I then request my executors to erect it in some other suitable place. I realize that future conditions are very uncertain, and if, for any good reason, it is impractical to erect this type of memorial, my executors are then authorized to use their own discretion as to the type of memorial to be erected and the cost thereof. It is my intention that my executors shall freely exercise their own good judgment in all things set forth in this third paragraph.

"Fourth: All the residue of my property, both real and personal, I give, devise, and bequeath to my niece, Vera V. Ryerson."

No other legacies, devises or bequests were provided for in the will. It specifically states that testatrix purposely has made no provision for any other person, and that any person who contests the will or any provision thereof, shall be given the sum of $1 in lieu of whatever share of the estate such person might otherwise take.

The executors petitioned to distribute to Vera V. Ryerson, in accordance with the second paragraph of the will, Lot five, Block five in Madera, together with the household goods, clothing and jewelry contained in the dwelling house thereon, and one automobile. That petition was granted, and, on December 14, 1944, the court made its decree distributing that property, which was specifically enumerated therein, to Vera V. Ryerson. That decree is not involved on these appeals.

Upon petition of the niece and legatee, Vera V. Ryerson, for partial distribution, to which objections were filed by the executors, it appearing that all claims presented against the estate, amounting to $659.93, have been paid, it was ordered that the petitioner be paid the sum of $12,000, and that the hearing of said petition be continued for further evidence. Upon the further hearing of that petition oral and documentary evidence was adduced, from which the court determined that "the memorial provided for in the third paragraph of her will should be constructed at a reasonable cost; that the reasonable cost of the memorial should not exceed the sum of $35,000.00.' The court then declared that it was necessary to retain in the estate the sum of $32,800.57, cash on hand, and certain specified bonds, with which to pay the costs of closing the estate and the cost of constructing the monument. The balance of the real and personal property, specifically enumerated, was thereupon ordered to be distributed to petitioner. It was provided that distribution of the real and personal property last mentioned should be "deemed to include the said sum of $12,000.00", previously ordered to be paid.

From both last-mentioned orders of partial distribution the executors have appealed. They claim that they are entitled to retain the entire residue of the estate with which to pay the necessary cost of erecting the monument in accordance with the designated purpose of the charitable trust contained in the will. The respondent has not appealed from the orders of partial distribution. She does not contend that the bequest for the construction of a monument is void or uncertain. In fact she concedes that it is valid, and asserts that: "The interpretation and construction of the will made by the trial court is reasonable and consistent with the intention of the testatrix."

The respondent does raise the question as to whether the bequest for the construction of a monument creates a charitable trust, but asserts that the amount thus expended shall be limited, under Section 41 of the Probate Code, to the value of one-third of the estate of the testatrix.

From the evidence adduced at the hearing for partial distribution, it appeared that it was impractical to construct the memorial with the carillon of bells, on the courthouse park in Madera, for the reasons that a site for the tower to be located on county property could not be procured; that it would interfere with the public business conducted in the courthouse, and that it would cost more than $100,000, which is in excess of the value of the entire estate.

[1-6] The bequest in the will authorizing the executors to erect at Madera a "granite tower, * * * to contain a carillon of eighteen bells, * * * at a reasonable cost, * * * 'Dedicated to the memory of all those who * * * strove to make Madera and Madera County all that it is,'" constitutes a valid public charitable gift. Estate of Henderson, 17 Cal.2d 853, 112 P.2d 605; Estate of Coleman, 167 Cal. 212, 138 P. 992, Ann.Cas. 1915C, 682; Society of California Pioneers v. McElroy, 63 Cal.App.2d 332, 146 P.2d 962; 5 Cal.Jur. 2, sec. 1; 14 C.J.S., Charities § 14, p. 443; 10 Am.Jur. 621, sec. 52. The fact that the proposed charity may be intended as a private memorial does not affect its public character or its validity. Estate of Coleman, supra; 10 Am.Jur. 624, sec. 54. Bequests for the promotion of public, religious, educational or moral welfare, by the construction of buildings, monuments or fountains, have been held to be charitable in their nature. In the present case, the charitable bequest was evidently intended to create respect for the benefactors of Madera County and also for the benefit of the general public. The language of the charitable bequest should receive a liberal construction in accordance with the intention of the testator. 14 C.J.S., Charities § 11, p. 437. It is true that the will must designate the purpose of the charitable bequest with reasonable certainty. 14 C.J.S., Charities § 20, p. 453. But it is not necessary that a detailed plan of execution shall be stated. When the general nature of the trust is adequately designated, its execution may be delegated to the named trustees, subject to the approval of court. Russell v. Allen, 107 U.S. 163, 2 S.Ct. 327, 27 L.Ed. 397; 14 C.J.S., Charities § 7, p. 436.

[7, 8] The will provides in this case that "if, for any good reason, it is impractical to erect this type of memorial, my executors are then authorized to use their own discretion as to the *type* of memorial to be erected." The foregoing provision gives the executors discretion, in the event that it is impractical to erect the tower with bells, to determine some other "type of monument" in accord with the same designated purpose. The alternative provision does not change the *purpose* for which the tower or memorial was to be constructed. It is a proper authorization to the trustees to exercise their discretion. We think the provision is valid, and that it merely permits the type or character of monument to be changed, in case of necessity, without in-

terfering with the purpose for which it was to be constructed. That alternative provision authorizes the substitution of some other appropriate monument which will carry out the same purpose expressed by the testatrix since the erecting of the tower with a carillon of bells is impractical, as the court has found it to be, even though the memorial may consist of a building to be used as a "health center," such as was proposed by the executors for the approval of the court.

[9] The bequest for a charitable use is limited, as against certain designated heirs, including nieces, under Section 41 of the Probate Code, to one-third of the value of the estate of the testatrix. That section provides in part that: "If [the will was] so executed at least thirty days before death, such devices [devises] and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise * * * have taken the excess over one-third."

Section 42 of the Probate Code is not applicable to the present case for the reason that the charitable bequest was not for the benefit of the County of Madera, as a municipal corporation. Under the substituted or alternative provision of the will, the tower or memorial could be located on property other than "the courthouse park at Madera." It was intended as a memorial for the benefit of the public at large. It was to be "Dedicated to the memory of all those who * * * strove to make Madera and Madera County all that it is." It is evident from the will that the memorial was not necessarily intended to become the property of the county. Certainly the expressed purpose of the memorial was not confined to the sole benefit of the county as a subdivision of the state. Section 42, therefore, may not be construed to take the bequest out of the inhibitions of Section 41 of the code.

[10, 11] In determining whether the bequest is charitable, the courts should ascertain from the language of the will, and from competent oral evidence to aid in its construction (Noice v. Schnell, 101 N.J.Eq. 252, 137 A. 582, 52 A.L.R. 965, 979; 50 A.L.R. 593, note), the *nature and purpose* of the gift rather than the motive of the doner, the identity of the trustees, although it is not necessary to mention them as "trustees", and the beneficiaries who are to profit thereby. If the bequest is for the benefit of the public or of "an 'indefinite number of persons' in the legal sense" (14 C.J.S. Charities § 37, p. 471), it is immaterial that the donor may also benefit by his request that the inscription on the monument shall contain his name. Estate of Coleman, supra; In re Graves' Estate, 242 Ill. 23, 89 N.E. 672, 673, 24 L.R.A.,N.S., 283, 134 Am.St.Rep. 302, 17 Ann.Cas. 137; 14 C.J.S., Charities, § 12, p. 440, and § 37, p. 471. In the authority last cited, it is said at page 440 that: "In determining whether a gift is charitable, the courts look to the nature and purpose of the gift, rather than to the donor's motives in making it; and hence, where the nature of the gift is such that it must be deemed to be for a public purpose, the fact that there is also a private motive in making it does not deprive the gift of its public character so as to render it noncharitable. It is immaterial whether or not the purpose is called charitable in the gift itself if it is so described as to show that it is charitable in its nature."

[12] The will in the present case sufficiently designates the executors named therein as trustees. It specifically declares that "I direct that my executors, hereinafter named, erect * * * a granite tower," etc. Clearly the named executors were designated to act for that purpose, which constitutes them trustees. When the will makes it clear who are authorized to act in administering the charitable bequest, it becomes immaterial that they are not specifically designated as such "trustees." The nature of the services they are directed to perform determines their relationship. 14 C.J.S. Charities, § 25, p. 458; In re McArdle's Will, 147 Misc. 876, 264 N.Y.S. 764.

In 2 Restatement of the Law of Trusts, p. 1193, sec. 397 e., it is said: "If the owner of property devises or bequeaths it upon trust for a charitable purpose, the intended charitable trust is not invalid because of his failure to name a trustee. In such a case the court will appoint a trustee if no method of selecting the trustee is provided for in the terms of the trust, *and if the testator did not manifest an intention that his executor should also be trustee.*" (Italics added.)

In the last-cited authority, at page 1194, section 397 f., it is said: "* * * The executor of the will will be permitted to act as trustee if the testator manifested an intention that he should so act."

In this case the testatrix designated her named executors to administer the trust. That designation is sufficient and valid.

In Re Graves' Estate, supra, a bequest of a testator merely authorized "my executors" to erect a drinking fountain "on the north side of Fifty-Fifth street boulevard", in Chicago, in memory of "Ike Cook", a famous race-horse, and directed that the inscription thereon should contain "my name as the person erecting said monument, the name of said horse and the time or record of speed said horse made." The court determined that the bequest was for a charitable purpose.

Monuments or memorial structures which have been erected in public places to beautify parks or public buildings, to commemorate historical events or prominent citizens for the benefit of the general public, as distinguished from private monuments in memory of the donor or his immediate relatives, have uniformly been held to be charitable in their nature. We think the bequest in the present case falls within that class of memorial gifts, and that it is charitable in its nature, in spite of the fact that the names of the donor and her deceased husband were to be inscribed on the monument. It was evidently intended primarily to inspire honor and respect for those citizens who had devoted a share of their time, talent and resources to the public welfare of Madera County. It is not unreasonable to assume that the monument was intended also to stimulate other public spirited persons to similarly serve the public. The eneficiaries of that charitable bequest are chiefly the public. It was therefore a charitable bequest.

[13] The doctrine of cy pres appears to be applicable to the charitable bequest in this case, since it is for a public charitable use as distinguished from a private trust, and the construction of the specific type and location in the courthouse park of the tower with a carillon of bells is impractical. Society of California Pioneers v. McElroy, supra; In re Peterson's Estate, 202 Minn. 31, 277 N.W. 529, 533; 2 Bogert, Trusts and Trustees, § 436, p. 1307; 2 Restatement of the Law of Trusts, 1208, sec. 399.

In the text last cited it is said:

"If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. * * *

"d. * * * If the application made by the trustees is such as the court would have directed, the court may approve the application, and such approval will be as effective as though the court had authorized the application before it was made."

In this case the testatrix specifically authorized the alternative application of the charitable bequest, and the court approved the substitution of a different type of memorial to conform to the general purpose designated by the donor. When the type of that substituted memorial is determined by the trustees, it should be approved by the court, together with the cost of construction within the limitations herein prescribed, which may not exceed one-third of the value of the estate of the testatrix. The monument in question has not been constructed. The court merely determined that a sum *not to exceed* $35,000 should be expended for that purpose. It is directed that when the probate court is petitioned to approve the type and cost of the memorial constructed pursuant to what we have previously said in that respect, it first ascertain the value of the estate, and allow not more than one-third thereof for the cost of the memorial.

As so modified, the orders for partial distribution are affirmed. The respondent may recover her costs on appeal.

ADAMS, P. J., and PEEK, J., concur.

In re SMITH'S ESTATE.

GROSS et al. v. JONES et al. *

Civ. 15814.

District Court of Appeal, Second District, Division 1, California.

July 28, 1947.

Rehearing Denied Aug. 18, 1947.

Hearing Granted Sept. 25, 1947.

1. Wills 🔑167, 170

Revocation of a will depends on intention of testator and compliance with statutory requisites. Probate Code, §§ 53, 74(1).

2. Wills 🔑179

Revoking instrument which was entirely written, dated, and signed by the hand of testatrix constituted a valid holographic writing within statutes. Probate Code, §§ 53, 74(1).

3. Wills 🔑173

Statement written by testatrix across the first and second pages of unexecuted carbon copy of will revoking the will and declaring it void was neither ambiguous nor uncertain.

4. Wills 🔑297(4)

Declarations of a testatrix are admissible on issue of revocation.

5. Wills 🔑306

In will contest, evidence sustained finding that testatrix did not intend to revoke will by holographic writing across face of unexecuted carbon copy. Probate Code, §§ 53, 74(1).

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Katherine Allen Smith, deceased, wherein Peter Gross and Mary Schmitt filed a contest of purported will against Ernest E. Jones and Pomona College. From a judgment admitting will to probate, the contestants appeal.

Affirmed.

Louis Thomsen, of Los Angeles, for appellants.

Schweitzer & Schweitzer, of Los Angeles, for respondents Jones and Pomona College.

YORK, Presiding Justice.

Katherine Allen Smith died on January 5, 1946. During her life, on July 22, 1942, she had executed a will by the terms of which she had given her entire estate to Pomona College, and on July 10, 1945, she had written across the first and second pages of an unexecuted carbon copy of said will of July 22, 1942, the following:

(1) "I Katherine Allen Smith do here
by revoke this will
It is now nul and void Katherine Allen Smith
(Nul & Void) July 10th, 1945."

(2) "I Katherine Allen Smith do hereby revoke this will it here by becomes nul and void Katherine Allen Smith July 10th, 1945."

On January 31, 1946, Peter Gross filed his petition for letters of administration and on March 7, 1946, Albert E. Jones filed his petition for the probate of the will of July 22, 1942, and for the issuance of letters testamentary to him. Peter Gross and Mary Schmitt, uncle and aunt respectively of decedent, filed a contest to said purported will before probate, on the ground it was revoked by the holographic writings of decedent across the two pages of the carbon copy of the will of July 22, 1942.

The trial court found that testatrix "did not intend by writing said words of July 10, 1945, to revoke or alter said Will of July 22, 1942, in whole or in part. * * * That the Will of July 22, 1942, is the Last Will and Testament of Katherine Allen

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* Subsequent opinion 191 P.2d 413.

Smith, deceased, was considered as such by decedent at all times from the date of its execution until the date of her death, and at no time was revoked by decedent, in whole or in part."

From the judgment admitting the will of July 22, 1942, to probate and appointing respondent Jones as executor thereof, denying probate to the testamentary writing of July 10, 1945, denying the petition of Peter Gross for letters of administration, and decreeing that contestants Gross and Schmitt take nothing by reason of their contest before probate, said contestants have perfected this appeal.

It is here contended that the court erred in admitting the will to probate because it had been revoked by decedent's holographic writing of July 10, 1945; and that the evidence is insufficient to support the court's finding that the revoking instrument was not executed animus revocandi.

[1] "When it is alleged that a will duly executed has been revoked, two questions are raised: (a) Did the testator intend to revoke it? (b) did he comply with the statutory requisites prescribed for the revocation of wills?" 3 A.L.R. 833.

[2] The revoking instrument here in question was "entirely written, dated and signed by the hand" of the testatrix herself, therefore it constituted a valid holographic writing (Section 53, Probate Code), and complied with subdivision 1 of section 74, Probate Code, which provides for the revocation of a will by a written will or *"other writing of the testator, declaring such revocation * * * and executed with the same formalities required for the execution of a will."* (Emphasis added.) See, also, 1 Page on Wills, Lifetime Edition, p. 823, sec. 459, and authorities there cited.

[3] In the instant case, it cannot be said that the revoking instrument was either ambiguous or uncertain. It was written across a carbon copy of the will of July 22, 1942, which was referred to in the writing as "this will." However, certain statements and declarations made by testatrix subsequent to the date of the so-called revocation, negative the fact that she intended thereby to revoke such will.

[4] The weight of authority is that "declarations of a testatrix are admissible on the issue of revocation." Estate of Thompson, 44 Cal.App.2d 774, 776, 112 P.2d 937, 938, citing 79 A.L.R. 1498.

[5] Mr. Virgil L. Catching, testatrix' nephew-in-law, testified that he had a conversation with testatrix at the hospital a few days before her death at which time she said "that in case anything should happen to her, for me to get in touch with Mr. Schweitzer, who had all the papers pertaining to her estate, and instructions as to what to do, that she wished to be buried in the same order or building as her mother and father, and that she was leaving her home to my mother and myself." This witness identified the revoking instrument which he found in testatrix' desk at her home in Los Angeles after her death.

Mr. Schweitzer testified that he had been decedent's attorney for ten or fifteen years and drew her will of July 22, 1942; that in August of 1945, he talked with decedent on the telephone at which time she told him she had been ill, and that he said to her "You know I have your will and papers here"; to which she replied, "Yes, I know that."

The deposition of Mrs. Julia O. Spencer, the mother of Mr. Catching, avers as follows: "Shortly after I arrived at her (testatrix') home, on or about the first part of December, 1945, Mrs. Smith told me that she had made a will and had given what property she had to the Pomona College; that she had left her property to the Pomona College with instructions for them to create a fund for educational purposes to be called the Katherine Allen Smith Fund; that she had in her attorney's office, the office of Mr. Dell Schweitzer, her papers and a letter with instructions as to what she wanted to have done after her death."

Such testimony is sufficient basis for the court's finding that testatrix "did not intend by writing said words of July 10, 1945, to revoke or alter said will of July 22, 1942, in whole or in part."

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

81 Cal.App.2d 50

BLISS v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 15845.

District Court of Appeal, Second District, Division 2, California.

July 28, 1947.

1. Life estates 🔑5

A life tenant has the right and duty to protect the corpus of the estate against waste, and is a trustee for the remaindermen and obliged to take any action for the protection of the corpus of the estate.

2. Life estates 🔑21

Where testator bequeathed to his wife a life estate in a note secured by a trust deed, with remainder to his daughter, the wife had the duty to take such action as might be necessary to foreclose the mortgage in default, so that the estate might not be dissipated by the accumulation of delinquent taxes and unpaid interest and by the expenditure of any other sums necessary for protection of the property. Civ. Code, § 818.

3. Life estates 🔑5

A life tenant is entitled to the full use and enjoyment of his life estate, but the remaindermen's estate should not be permanently diminished in value by the life tenant's neglecting to do what an ordinarily prudent person would do in preserving his own property. Civ.Code, § 818.

4. Life estates 🔑5

Though a life tenant is privileged to convert one kind of property into another, he must at all times be guided by principles of prudence so that the value of the property is not diminished. Civ.Code, § 818.

5. Wills 🔑681(1)

Where a testator makes a life tenant trustee of property bequeathed, the will should be searched for evidence of the testator's intention that the life tenant should be trustee subject to the general rules pertaining to the obligation of a trustee to his cestui que trust.

6. Executors and administrators 🔑315(5)
Life estates 🔑21

Where a decree distributes a legacy to a person for his natural life with the unused portion thereof to go to a remainderman, it creates a mere life estate in the first taker and vests the unused portion of the estate in the remainderman, and the first taker holds the estate, not as owner, but as an implied trustee in the sense that he must have due regard for the rights of him who will succeed to the title in fee.

7. Life estates 🔑21
Mortgages 🔑335

Where testator bequeathed to his wife a life estate in a note secured by a trust deed, with remainder to his daughter, wife, as life tenant, held corpus of estate as trustee for benefit of daughter and had duty to take any steps necessary for protection of the daughter, and therefore signature of daughter on notice of default and election to sell under trust deed was not essential to its validity, and signature of wife with oral consent and approval of daughter was sufficient compliance with legal requirements as to notice. Civ.Code, §§ 860, 2924.

8. Mortgages 🔑335

Oral authorization by remainderman having remainder interest in note secured by trust deed, to life tenant to give notice of default and election to sell under trust deed when trustor became delinquent in payments, was sufficient, and no written authorization was necessary. Civ.Code, § 2309.

9. Notice 🔑9

Where a notice is necessary to be served on a party who has breached his obligation, it is sufficient to prove at the trial that the person who signed the notice was authorized to do so, and written authorization is not necessary, in absence of a statute requiring such writing, and the fact that the notice of breach of the obligation purports to come from the obligee is sufficient.

10. Mortgages ⚷335

Remainderman, who had remainder interest in note secured by trust deed, by purchasing realty at sale held under power of sale contained in trust deed confirmed act of life tenant in giving notice of default by trustors and election to sell under trust deed. Civ.Code, § 2310.

11. Judgment ⚷747(6)

Judgment for purchaser of realty who purchased at sale under power of sale contained in trust deed, in action of unlawful detainer against trustors, was conclusive on the parties under doctrine of res judicata as to title to the realty in a subsequent action by trustors against purchaser to quiet title to the realty and to nullify trustee's sale thereof.

12. Judgment ⚷634

The doctrine of "res judicata" is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is in all subsequent actions conclusive of the rights of the parties thereto and of their privies on all material issues which were, or might have been, determined.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

13. Mortgages ⚷372(4)

A person who has acquired ownership of a piece of realty under provision of trust deed must prove in an unlawful detainer action that such realty was sold to him in accordance with statute providing for the proceedings on sale of realty under trust deeds for breach of covenant. Civ. Code, § 2924; Code Civ.Proc. § 1161a.

14. New trial ⚷108(2)

Trial court did not abuse discretion in action to quiet title to realty and to nullify trustee's sale of realty under trust deed, in denying plaintiff's motion for new trial, because of discovery of evidence of mental incompetency of one who gave notice of default and election to sell under trust deed, and evidence that note secured by trust deed was not in default.

15. Appeal and error ⚷981
New trial ⚷99

Whether newly discovered evidence could with reasonable diligence, have been discovered and produced at the trial, and whether, if produced, a different conclusion might have resulted, are questions addressed to the trial court's sound legal discretion, and its action will not be disturbed unless it is clear that such discretion has been manifestly abused.

16. New trial ⚷99

The claim of newly discovered evidence as ground for a new trial is universally regarded with distrust and disfavor, since sound public policy requires every litigant to exhaust all diligence and reasonable efforts to produce at the trial of his cause all existing evidence in his behalf.

17. Appeal and error ⚷981

A trial court's decision on question whether newly discovered evidence will effectuate a different result, cannot be disturbed on appeal in absence of a clear showing of an abuse of discretion.

18. Appeal and error ⚷981

Before newly discovered evidence, on which motion for new trial is based, will receive consideration from a reviewing court, the evidence must be of such character as will make it reasonably certain that on a new trial a different judgment will result.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Josephine A. Bliss against the Security First National Bank of Los Angeles, a national banking association, and Edna Grigsby to quiet title to certain realty and to nullify trustee's sale thereof. From an adverse judgment and from an order denying a new trial, the plaintiff appeals.

Judgment affirmed and purported appeal from order denying new trial dismissed.

Edgar G. Wenzlaff, of Los Angeles, and Glenn E. Whitney, of Glendale, for appellant.

Gibson, Dunn & Crutcher, and Sherman Welpton, Jr., all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Two questions for decision: (1) Where a testator bequeaths a life estate in a note secured by a deed of trust on real property to a life tenant with the remainder to another and the trustor becomes delinquent in his payments, is the notice of default and election to sell under the deed of trust signed by the life tenant only with the oral consent and approval of the remainderman a sufficient compliance with legal requirements as to such notice? (2) Where after a sale of the trust property the purchaser thereof sued the trustors for unlawful detainer pursuant to section 1161a, Code of Civil Procedure, alleging ownership by virtue of her purchase at a trustee's sale regularly conducted, and such allegations were denied, is the judgment in such action res judicata of an action to set aside the trustee's sale?

From an adverse judgment in an action to quiet title to certain real property and to nullify the trustee's sale thereof plaintiff has appealed.

By his holographic will W. M. Holeman bequeathed to his wife Eva a life estate in a note secured by trust deed upon Lot 50, tract 4661 in the city of Glendale, with the remainder to his daughter Edna Grigsby. The trustee under the trust deed was the Security First National Bank. The decree construing the will directed that such property "be held intact as to principal during the lifetime of Eva * * * and upon her death, the same shall pass to Edna * * *" More than four years after the estate had been distributed Eva Holeman gave notice of default and election to sell under the trust deed on account of the nonpayment of delinquent taxes and of all the monthly installments of interest due on and after May 18, 1941; "and that by reason of such breach, the undersigned present beneficiary under said deed of trust, has executed and delivered to said trustee a written declaration of default and demand for sale * * * and has declared and does hereby declare all sums secured thereby immediately due and has elected to cause the property * * * to be sold * * * to satisfy the obligations secured thereby." Although appellant received a copy of such notice in August, 1941, neither she nor her husband attended the trustee's sale.

At the trustee's sale Edna Grigsby was the purchaser. Following her demand for possession and the refusal of appellant and her husband to vacate, Edna filed an action of unlawful detainer in the justice's court of Glendale township against appellant and her husband. By her complaint she alleged that lot 50, then held by the Blisses, had been sold to her in accordance with section 2924 of the Civil Code under a power of sale contained in the deed of trust executed by Mr. and Mrs. Bliss; that a deed thereto from the trustee to Edna had been recorded in the office of the county recorder, and the title thereto having been duly perfected, Edna was the owner and entitled to possession. Appellant and her husband denied the allegations of that complaint and upon the issues thereby created it was later stipulated that judgment be entered in favor of the plaintiff. Thereupon the court adjudged that Edna Grigsby was entitled to the immediate possession of lot 50. Pursuant to such judgment Edna gained possession of the property in June, 1942, and thereafter exercised all the rights of ownership.

The instant action was commenced on June 8, 1945. Upon the conclusion of the trial the court found as follows: (1) The notice of default and election to sell were properly given to the trustee by Eva Holeman; (2) such notice was given with the knowledge and consent of Edna Grigsby, the remainderman of the beneficial interest; (3) throughout the entire proceedings Mrs. Holeman acted as the agent of Edna; (4) the latter consented to and in all respects ratified the actions of Eva in giving the notice of default and in all matters pertaining to the proceedings of the trustee's sale; (5) a valid title to lot 50 became vested in Edna by virtue of the trustee's sale and neither Mrs. Bliss nor the bank has any further interest in the property; (6) Edna as plaintiff sued Josephine Bliss and her husband in an unlawful detainer action in the justice's court of Glendale township for possession of lot 50; (7) in that action

Edna was plaintiff, and appellant herein and her husband were defendants who there contended that they were owners and entitled to the possession of the very property herein involved but the court awarded judgment denying their contentions and adjudged Edna to be owner and entitled to immediate possession; (8) such judgment is res judicata of the issue of ownership in the instant action. Upon such finding the Superior Court concluded and adjudged that Edna Grigsby is the sole and unconditional owner of the real estate and that appellant has no further interest therein.

The first contention of appellant is that the sale by the trustee under the deed of trust was a nullity by reason of the failure of Edna Grigsby to sign the notice of default and election to sell. She argues that the trustee had no right to act under such circumstances in the absence of a formal written request authorizing the trustee to do so. She cites section 2924 of the Civil Code which provides in substance that the power of enforcement shall not be exercised until the trustee or the beneficiary shall first file for record in the office of the recorder a notice of default and of his election to sell the property to satisfy the trustor's debt. She cites also section 860 of the Civil Code which provides that where a power is vested in several persons all must unite in its execution. Her thesis then is that since Edna was the remainderman, she was a beneficiary and her failure to sign the notice of default rendered it void.

[1, 2] The answer to such contention is that it is the right and the duty of the life tenant to protect the corpus of the estate against waste. As such life tenant she is a trustee for the remainderman and is obliged to take any action for the protection of the corpus of the estate. In such a situation as that presented by the instant action it is the duty of the life tenant to take such action as may be necessary to foreclose a security that is in default, to the end that the estate may not be dissipated by the accumulation of delinquent taxes and unpaid interest and by the expenditure of any other sums necessary for the protection of the property. Such wastage may become even more serious than the depreciation and decay in the case of a home that is subject to a lien likely to be foreclosed. Not only was the life tenant herein as such trustee obliged during her tenancy to prevent loss to the remainderman, but the very terms of the will vested in her the control of the property. Indubitably, one of the primary purposes of the testator, if not his chief aim in imposing such obligation, was to protect the estate of the remainderman.

[3, 4] The owner of a life estate is required by law to do no act to the injury of the inheritance. Civil Code, sec. 818. When successive interests exist in a thing other than land and the present interest is a life interest, then in the absence of a manifestation of an inconsistent intent in the instrument creating the successive interests each future interest includes a right correlative to the duties of the owner of such present interest that (a) he shall for the duration of his interest act relative to the thing in the manner in which the owner of complete property in a like thing normally would act; (b) that he shall not intentionally inflict harm upon the owner of a future interest by the manner in which he exercises his power to transfer or surrender his present interest; and (c) that when the provisions of the instrument creating the successive interests entitle another to such thing, the holder of the present interest shall deliver to the person next entitled the original thing or lawfully substituted things, including all capital gains made during the continuance of the then ending prior limited interest (Rest. of Law of Property, sec. 204.)[1] This means nothing more nor less than that while a life tenant is entitled to the full use and enjoyment of his life estate the only restriction upon such use is that the estate

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[1] The illustration given by the Restatement under this section is that where A owns bonds worth $100,000, transfers them to his wife, B, for life and at her death to his son C, when B learns that the bonds of a certain corporation included in A's transfer is likely to fail and that the publicity of such failure will cause a substantial decrease in the selling price of such bonds, it is B's duty to C forthwith to sell the bonds.

of the remainderman shall not be permanently diminished in value by the life tenant's neglecting to do what an ordinarily prudent person would do in preserving his own property. (33 Am.Jur., sec. 217.) Although a life tenant is privileged to convert one kind of property into another, he must be at all times guided by principles of prudence to the end that the value of the property is not diminished. 21 C.J., § 245, p. 1040. See also 31 C.J.S., Estates, § 135.

[5, 6] A testator has the right to make the life tenant trustee of the property bequeathed; and when this is done the will shall be searched for evidence of the testator's intention that the life tenant should be trustee subject to the general rules pertaining to the obligation of a trustee to his cestui que trust. In re Garrity, 108 Cal. 463, 471, 38 P. 628, 41 P. 485. Where a decree distributes a legacy to a person for his natural life with the unused portion thereof to go to a remainderman, it creates a mere life estate in the first taker and vests the unused portion of the estate in the remainderman. And the first taker holds the estate not as owner but as trustee in the sense that he must have due regard for the rights of him who will succeed to the title in fee. This constitutes him an implied trustee. Hardy v. Mayhew, 158 Cal. 95, 104, 110 P. 113, 139 Am.St.Rep. 73; Collins v. Hartford Accident & Indemnity Co., 178 Va. 501, 17 S.E.2d 413, 418, 137 A.L.R. 1054.

[7] The conclusion is unavoidable that Eva Holeman as life tenant held the corpus of the estate left to her by her husband as trustee for the benefit of Edna Grigsby. As such trustee it was her duty to take any steps necessary for the protection of the beneficiary of the trust. It follows therefore that the signature of Edna on the notice of default was not essential to its validity. The foregoing principles and their pertinency are sufficient to dispose of all points raised by appellant against the competency of Mrs. Holeman's notice of default.

By the proof which was received on the trial of the action the court was not obliged to rely merely upon the implications arising from the trust relation of the life tenant to the remainderman. It was established by the evidence that Mrs. Grigsby made Mrs. Holeman her agent in forwarding the notice of default and ratified her actions by adopting all that she had done in effecting a foreclosure sale. Not only was Mrs. Holeman the life tenant of the trust deed but she was the stepmother of Edna Grigsby. The latter's husband was trust officer of the bank and was also mutual advisor of both women. Not only did Mrs. Grigsby desire and advise the execution and delivery of the notice of default and intention to sell by Mrs. Holeman, but Edna became the actual purchaser at the trustee's sale. By thus purchasing she confirmed all that had been done by the life tenant towards effecting the foreclosure sale.

[8-10] Appellant contends that Mrs. Grigsby did not ratify the acts of Mrs. Holeman and argues that such ratification could have been made only in the manner necessary to confer an original authority for the act ratified. Also, she argues that an authority to enter into a contract required to be in writing can be given only by a written instrument, citing section 2309, Civil Code. But the fact of entering into a contract is not involved in the procedure of Mrs. Holeman in requesting the trustee to sell. Mrs. Holeman's part in bringing on the trustee's sale consisted of doing nothing more than giving a notice of a breach of the contract which had been left to her and Edna by Mr. Holeman. She merely elected to proceed as that contract provided. An oral authorization to give notice of a trustor's breach is sufficient. Civil Code, sec. 2309. Where a notice is necessary to be served upon a party who has breached his obligations it is sufficient to prove at the trial that the person who signed the notice was authorized to do so, and written authorization is not necessary in the absence of a statute requiring such writing. Merchants National Bank of San Francisco v. Weston, 34 Cal.App. 693, 694, 168 P. 587; Wayland v. Latham, 89 Cal. App. 55, 67, 264 P. 766; Rest., Agency, sec. 30. The fact that the notice of a breach of one's obligation purports to come from the obligee is sufficient. Felton v. Millard, 81 Cal. 540, 541, 21 P. 533, 22 P. 750. Of

course the notice of Mrs. Holeman did not purport to come from Edna, but the trustee knew the duties of the life tenant to Edna and that the notice was therefore competent to authorize the sale. It follows that not only was it proved that Edna orally authorized Mrs. Holeman to sign the notice of default, but by becoming the purchaser at the sale which was required by the notice she confirmed all of the acts of Mrs. Holeman by accepting the benefits of such acts with notice thereof. Civil Code, sec. 2310.

Is it conceivable that Mrs. Grigsby could at any time after her purchase have rescinded it for want of authority on the part of the trustee? As remainderman she is the only person who might have attacked the sale, since appellant was in default and therefore could not have upset the sale. Appellant argues that in order for a ratification to be valid it also must have been in writing. It is suggested that her acceptance and recording of the trustee's deed is the equivalent of a writing. The vice of the contention that Edna Grigsby should also have signed the notice of default will appear more emphatic on realizing that she held a vested remainder with contingent remaindermen who might have succeeded to the estate in the event of Mrs. Grigsby's predeceasing Mrs. Holeman. Had that occurred, under the theory of appellant Mrs. Holeman could not properly have given notice of default and election to sell until such contingent remainderman had joined in the written notice of default.

[11-13] But the judgment of the justice's court of Glendale township is itself sufficient answer to this appeal. After having purchased the property at the trustee's sale Mrs. Grigsby was forced to institute her unlawful detainer action to gain possession of the property which appellant and her husband insisted upon holding after title had become vested in Mrs. Grigsby. Their answer to the Grigsby complaint created the issue of ownership which at the trial was established to be in Mrs. Grigsby. The doctrine of res judicata is applicable. That doctrine is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is in all subsequent actions conclusive of the rights of the parties thereto and of their privies on all material issues which were, or might have been, determined. Seidell v. Anglo-California Trust Co., 55 Cal.App.2d 913, 918, 132 P.2d 12. A person who has acquired ownership of a piece of property under the provision of a deed of trust may prove that such property was sold to him in accordance with section 2924 of the Civil Code. That section provides for the proceedings on the sale of real property under trust deeds for breach of covenant including the time, manner and contents of the notices of breach and sale. Under section 1161a, Code Civil Procedure, a purchaser who has acquired the title at such trustee's sale must prove that the property was sold in accordance with section 2924 of the Civil Code under a power of sale and that title under the sale has been duly perfected. Under such unlawful detainer statutes title to the extent required by section 1161a not only may but must be tried. In such actions the provisions of the statutes extending the remedy beyond the cases where the conventional relation of landlord and tenant exists are not to be judicially nullified. Seidell v. Anglo-California Trust Co., supra; Nineteenth Realty Co. v. Diggs, 134 Cal.App. 278, 289, 25 P.2d 522; Mortgage Guarantee Co. v. Smith, 9 Cal.App.2d 618, 619, 50 P.2d 835; Hewitt v. Justice's Court, 131 Cal.App. 439, 21 P.2d 641. The bleak language of the judgment which merely restored possession to Mrs. Grigsby is a sufficient adjudication of her ownership in view of the issues tendered.

[14, 15] Appellant contends that the court's denial of her motion for a new trial was prejudicial error. She based her motion upon the discovery of evidence of two facts, namely, (1) evidence of the mental incompetency of Mrs. Holeman and her incompetency to transact business at the time when she gave the notice of default; (2) evidence that the note secured by the trust deed was not in default in that she had found among the effects of her deceased husband promissory notes which had been given to Mrs. Holeman in payment of interest on the trust deed note and subsequently paid, showing that all interest had been paid on the trust deed note up to August 18, 1941. She says in her affidavit that the evidence of the unsoundness of

Mrs. Holeman could not have been discovered before the trial "as it was only by chance and good fortune that your affiant discovered the name of the doctor that attended the said Eva Holeman before her death and only by the exercise of the greatest diligence and work was she able to discover the said notes in payment of interest on the trust deed note." It cannot be held that the trial court abused its discretion in denying the motion. Whether newly discovered evidence could with reasonable diligence have been discovered and produced at the trial and whether, if produced, a different conclusion might have resulted are questions addressed to the sound legal discretion of the trial court, and its action will not be disturbed unless it is clear that such discretion has been manifestly abused. Baule v. Drobatz, 6 Cal.App. 594, 596, 92 P. 666.

[16-18] The claim of newly discovered evidence as ground for a new trial is universally regarded with distrust and disfavor for obvious good reasons. A sound public policy requires every litigant to exhaust all diligence and reasonable efforts to produce at the trial of his cause all existing evidence in his behalf. Furthermore, the decision by the trial court of the question whether newly discovered evidence would effectuate a different result when rejected by the trial court cannot be disturbed on appeal in the absence of a clear showing of an abuse of discretion. Before such evidence will receive consideration from the reviewing court it must be of such character as would make it reasonably certain that upon a new trial a different judgment would result. Shivers v. Palmer, 59 Cal.App.2d 572, 581, 139 P.2d 952; Atherley v. Market Street Ry. Co., 42 Cal.App.2d 354, 363, 108 P.2d 927; Berkowitz v. Kiener Co., 37 Cal.App.2d 419, 99 P.2d 578.

A hasty glance at the record herein will disclose that the discovery of the evidence is too belated to justify a court's reversal of its judgment. The note was made by Mr. and Mrs. Bliss in 1930. The notice of default was forwarded to Mrs. Bliss in August, 1941. While the property was sold by the trustee on December 26, 1941, appellant and her husband resisted her gaining possession of the property in the spring of 1942 only to witness the triumph of Mrs. Grigsby in June of that year. Three years later appellant instituted this action which was tried on March 22, 1946. There is no showing of diligence in any chapter of the entire story. In addition to the foregoing facts, Mrs. Bliss testified at the trial that the note was in default on July 14, 1941, and that the taxes were unpaid. Thereupon her attorney stipulated that there was a default in the note on the principal and interest. As to the affidavit of the physician who deposed that Mrs. Holeman was old, weak, senile, mentally incompetent and continuously unsound, with lucid intervals about the date of giving the notice of default, such proof upon a second trial would be merely contradictory of that of the Grigsbys who testified concerning conferences and correspondence with her at that time. The showing is not sufficient to warrant an interference by this court with the exercise of discretion by the Superior Court.

The judgment is affirmed and the purported appeal from the order denying a new trial is dismissed.

McCOMB and WILSON, JJ., concur.

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80 Cal.App.2d 911

SHOEMAKER v. FRIEDBERG.

Civ. 3658.

District Court of Appeal, Fourth District, California.

July 21, 1947.

Rehearing Denied Aug. 20, 1947.

Hearing Denied Sept. 18, 1947.

1. Libel and slander 🔑45(1)

Physician's letter addressed to patient and truthfully conveying to patient information given physician by reputable laboratory that patient was suffering from venereal disease, which information physician believed to be true was privileged as to patient. Civ.Code, §§ 47, subd. 3, 48.

2. Libel and slander ⚷25

A physician's writing of letter to patient truthfully conveying to patient information given physician by reputable laboratory that patient was suffering from venereal disease which information physician believed to be true, did not constitute a "publication" of its contents, and physician could not be held responsible of its publication by patient when patient disclosed its contents to others. Civ.Code, §§ 47, subd. 3, 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Publication".

3. Libel and slander ⚷112(2)

In action against physician for slander for publishing a statement to effect that plaintiff was suffering from a venereal disease, evidence that plaintiff was living with her mother and landlady in family relationship warranted inference that the landlady and mother were persons interested in her as to afford reasonable grounds for supposing that motive for communication made by physician was innocent but communication was qualifiedly privileged as to them and not actionable in absence of proof of express malice. Civ.Code, §§ 47, subd. 3, 48.

4. Libel and slander ⚷45(1)

Where physician's statements regarding fact that patient was suffering from venereal disease were qualifiedly privileged as far as patient, her mother and landlady were concerned and were overheard by neighbor who was merely a casual bystander for whose presence physician was not responsible, patient could not recover damages for slander without proof of actual or express malice on part of physician. Civ.Code, §§ 47, subd. 3, 48; St.1937, p. 2248; Health and Safety Code, §§ 2571–2573.

5. Libel and slander ⚷101(4)

Where patient could not recover damages from physician for slander without proof of actual or express malice, patient had burden of proving such malice in patient's action against physician for damages for slander in publishing letter based on report from reputable laboratory that patient was suffering from venereal disease, and fact that laboratory report allegedly was a mistake, could not affect question of actual malice. St.1937, p. 2248; Health and Safety Code, §§ 2571–2573.

6. Libel and slander ⚷112(2)

In patient's action to recover damages from physician for slander in publishing statement that patient was suffering from venereal disease, evidence that physician received a report from reputable established laboratory that patient was suffering from venereal disease and that physician believed it to be true and was acting on that belief and was proceeding under venereal disease law to inform patient to such effect failed to establish actual or express malice so as to warrant recovery of damages. St.1937, p. 2248; Health and Safety Code, §§ 2571–2573.

* * *

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Macel Shoemaker against Irwin Friedberg to recover damages for slander. From an order granting defendant's motion for judgment notwithstanding the verdict and from the judgment thereafter entered in favor of defendant, plaintiff appeals.

Affirmed.

Whelan & Whelan, of San Diego, for appellant.

Monroe & McInnis and R. M. Switzler, all of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order granting defendant's motion for judgment notwithstanding the verdict and from the judgment thereafter entered in favor of defendant.

The action was brought for damages for slander alleged to have been published by defendant on August 25, 1945, consisting of a statement by him to the effect that plaintiff was suffering from a venereal disease. The answer denied malice and alleged qualified privilege under the provisions of subdivision 3 of section 47 and of section 48 of the Civil Code.

Plaintiff was a married woman whose husband was serving overseas in the Marine Corps at the times involved here. She lived in East San Diego and was employed in a drug store where food was served. She resided with Mrs. Rene Burke, her friend and landlady, and Mrs. Adelaide Bradley, her mother. Defendant was a physician duly licensed to practice medicine in California with offices in the city of La Mesa.

Except as to some details the evidence is not conflicting. Plaintiff called at the office of defendant on Monday, August 20, 1945, for treatment for injuries received in a fall down an embankment while on a picnic. Her condition was such that defendant deemed it necessary to give her a thorough physical examination including tests for venereal disease. A sample of urine and a smear were taken by defendant and sent to a reputable laboratory in San Diego for examination. On the following Wednesday he received a report from the laboratory to the effect that the microscopic examinations of both specimens indicated the existence of the venereal disease which defendant had suspected as a result of the physical examination.

On Tuesday evening, in response to a telephone message, defendant made a professional call on plaintiff at her home, and made an appointment for her to call at his office the following morning, which appointment she did not keep.

On receipt of the report from the laboratory, and plaintiff's failure to keep the appointment, defendant caused a letter, dated Aug. 23, 1945, to be sent to her which contained the following:

"Your laboratory report arrived this morning. It shows you are suffering from a venereal disease.

"Under the law, we are compelled to report this to the health authorities, and to advise you against working in any establishment handling foods.

"We are anxious to assist you, and we will hold up this report for 24 hours to give you a chance to step in and discuss your problem."

As plaintiff did not appear at defendant's office he had one of his nurses attempt to telephone her at the drugstore where she worked. This call was made either on Thursday or Friday. Plaintiff was not at the drugstore but her mother was there taking her place. According to the version of the nurse she merely requested Mrs. Bradley to urge plaintiff to call at defendant's office for further advice and did not mention the disease from which plaintiff was supposed to be suffering. Mrs. Bradley testified that the nurse told her that plaintiff was suffering from a venereal disease. Under the circumstances of this case we will have to accept this version as true.

On the afternoon of Saturday, August 25th, Mrs. Burke telephoned to defendant's office. She testified that she asked that the defendant stop bothering plaintiff as the phone calls created commotion at the drugstore. The secretary who took the message testified that she understood it to be a request for defendant to make a house call on plaintiff and so informed the doctor.

He called on plaintiff about twenty minutes later and the conversation occurred that forms the basis of this action. Plaintiff detailed the happenings at that time as follows: "He came into the living room and asked— came to the door and asked if I had called him, and I answered him, 'No', because I hadn't and didn't have any knowledge that he was even to be there. I was sitting at the dinette table and got up and came into the living room and sat down in the chair—in a chair, and the conversation between—Mrs. Burke went to the door, the lady that I was staying with, and she said that she had called him. And he wanted to know why. She said, 'You should know the reason why, because of the letter that Mrs. Shoemaker has received from you.' And he asked her, 'What letter?' And she said, 'Do you mean to say that a letter like that would come out of your office without your knowledge?' And he said, 'If you are talking about any letter, you will have to take that up with my office nurse.' And then he asked her, 'What letter?' and could he see the letter; and she said the letter was in a physician's hands and would be in a lawyer's hands. So he turned to me and asked what I was suing for and I said, 'Who said I was suing?' Then he shook his finger in my face and said very loud, 'Young lady, you are suffering from a severe case of gonorrhea.' And I said, 'Dr. Friedberg, I don't see how you can say that when I have negative reports from a laboratory saying that I don't have it.' And he said, 'I too have laboratory reports from a reliable laboratory that you have a positive smear and are suffering from a severe case of gonorrhea, and if you don't do something about it and come to my office I intend to make drastic charges against you.' He turned and walked out the door and said I would pay for the house call."

The testimony of other witnesses concerning this conversation did not differ materially from that of plaintiff except in minor details and except that defendant testified that plaintiff did not participate in it and that it was between Mrs. Burke and himself.

Plaintiff testified that she received the letter we have quoted on the morning of August 24th; that a neighbor, Mrs. Burgomaster, was helping care for her and received the letter from the postman; that she told Mrs. Burgomaster the contents of the letter and that perhaps she read it; that she disclosed the contents of the letter to Mrs. Burke and Mrs. Bradley prior to August 25, 1945.

Plaintiff consulted another physician who sent her to another laboratory in San Diego for further examination on August 25, 1945. A slide smear was made and examined microscopically and a culture was made, both with negative results. There is evidence in the record that when an examination and tests show the existence of a venereal disease more than one negative test should be made before error in a prior positive test is demonstrated; that such tests should be made from smears taken at different times. However, it is not now affirmatively contended that plaintiff was actually suffering from such a disease.

During the conversation of August 25th, which we have detailed, plaintiff and Mrs. Burke were in the living room of the home. A dinette is next to this living room and connected with it by an arched opening about five feet wide. Mrs. Bradley was seated at a table in the dinette. A neighbor, Mrs. Rice, entered the back door of the house during the early part of the conversation and stood by the chair occupied by Mrs. Bradley during the statements made by defendant to plaintiff to the effect that she had a venereal disease. Both Mrs. Rice and Mrs. Bradley heard those statements. Defendant testified that he did not see either Mrs. Rice or Mrs. Bradley and did not know that either woman was in the dinette, and did not know that any one, other than Mrs. Burke and plaintiff, was within hearing distance during the conversation. We must conclude that Mrs. Rice did not know, prior to hearing the statements of defendant, that the tests made by the first laboratory showed plaintiff was suffering from a venereal disease. Plaintiff knew of the presence of Mrs. Rice and Mrs. Bradley in the dinette. She made no effort to check or adjourn the conversation concerning the letter and its contents, which conversation was opened and seemingly invited by Mrs. Burke. The statements of defendant conveyed no new knowledge to either Mrs. Burke or Mrs. Bradley as plaintiff had already told them of the letter and its contents. We must conclude that it was news to Mrs. Rice although plaintiff testified in a deposition that she had told Mrs. Rice of the laboratory report before August 25th.

Plaintiff maintains that the foregoing constituted sufficient publication of the slander to be actionable. The jury returned a verdict in favor of plaintiff for $3,000 and apparently agreed with this theory. However, after extended arguments the trial judge concluded that defendant was entitled to the protection of a qualified privilege in making the statements in so far as plaintiff, Mrs. Burke and Mrs. Bradley were concerned (Subd. 3, Sec. 47, Civil Code) so that no implication of malice arose from them (Sec. 48, Civil Code); that there was no evidence of actual malice; that Mrs. Rice was a casual bystander so that, lacking proof of actual malice, there was no sufficient proof of publication to support the action for slander. The affirmance of the order and judgment rests on the soundness of these conclusions of the trial judge.

We must first examine the question of qualified privilege. One privileged communication is defined by subdivision 3 of section 47 of the Civil Code, as follows: "In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

Section 48 of the same code, in effect in August, 1945, provided: "In the cases provided for in subdivisions three, four, and five, of the preceding section, malice is not inferred from the communication or publication."

[1, 2] Plaintiff and defendant occupied the relation of physician and patient. It was the duty of defendant, as her physician, to treat plaintiff and to inform her of the ills from which he verily believed she was suffering. The letter written by him was addressed to plaintiff and truthfully conveyed to her the information given him by a reputable laboratory, which information he believed to be true. That the subject matter of this letter concerned a subject in which both parties were interested cannot be questioned. Therefore it was privileged as to plaintiff. Further, the writing of this letter to the plaintiff was not a publication of its contents under the slander laws of this State. Its original publication was by plaintiff herself when she disclosed its contents to Mrs. Bradley, Mrs. Burke and Mrs. Burgomaster. As defendant had no part in this publication to them by plaintiff, he cannot be held responsible for it. 36 C.J. 1230. However, this does not apply to the publication to Mrs. Rice, and we must further consider the question of qualified privilege.

[3] The plaintiff was living in a small house with Mrs. Burke and Mrs. Bradley. The evidence indicates that the relationship between the three women resembled that of a family more than anything else. Certainly this was true of plaintiff and Mrs. Bradley, her mother. It is evident that plaintiff believed both women sufficiently interested in her condition so that she disclosed the contents of the letter to them. We believe that the only reasonable inference to be drawn from the evidence of plaintiff and her witnesses amply supports the conclusion that Mrs. Burke and Mrs. Bradley stood in such relation to plaintiff, and were persons interested in her, as to afford a reasonable ground for supposing that the motive for the communication made by defendant on August 25, 1945, was innocent; that such communication was qualifiedly privileged as to them and not actionable in the absence of proof of express malice. Further, in Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831, 9 A.L.R. 1250, it was held that the communication by a physician to the manager of a lodging house where a patient resided, to the effect that the patient was suffering from a venereal disease that was communicable to others, was qualifiedly privileged.

It is clear from the record that the conversation with defendant to which plaintiff now objects was opened by Mrs. Burke in the immediate presence and hearing of plaintiff. It shows that Mrs. Burke was familiar with the contents of the letter and desired to discuss it with defendant. Defendant evaded the subject (he says with the object of protecting plaintiff) until suit was threatened when he made the statement concerning the venereal disease and the report he had received from the laboratory which he believed to be true. Plaintiff at no time made any objection to the conversation nor did she attempt to stop Mrs. Burke in the evident attempt to invite defendant to discuss the contents of the letter. This silence of plaintiff is significant and would support the inference, if drawn, that Mrs. Burke was speaking for plaintiff, at least with her tacit consent or approval, and with the intent of causing defendant to discuss the contents of the letter and to disclose the disease from which he believed she was suffering. This might be construed as an implied consent of the patient to the disclosure of the nature of the disease by the doctor.

What we have last said, possibly might be construed as more applicable to an order granting a motion for new trial because of the insufficiency of the evidence to support the verdict and judgment, which easily could have been affirmed, than to an order granting the motion for judgment notwithstanding the verdict.

Consideration must be had of the bearing on the case of the statement of defendant made in the hearing of Mrs. Rice whom the evidence fails to disclose bore any close relationship to plaintiff or to defendant so that those statements would be privileged as to her. The evidence discloses that Mrs. Rice was a neighbor of plaintiff and a tenant of Mrs. Burke, living in one of two houses on the same lot; that Mrs. Rice walked in the back door at about the same time, or a few minutes after defendant entered the front door of the house; that neither plaintiff, Mrs. Burke nor Mrs. Bradley had invited her to come or knew that she intended to do so, but that all of them knew of her arrival. Defendant was positive in his testimony to the effect that he did not know of the presence of Mrs. Rice. It appears that Mrs. Rice was merely a casual bystander who overheard the remarks of defendant without any connivance on his part.

The case of New York & Porto Rico S. S. Co. v. Garcia, 16 F.2d 734, 738, decided by the First Circuit Court of Appeals, involved an action for damages by Dolores Carmoega Garcia because of a statement made by a physician to her to the effect that she had a venereal disease, which statement was overheard by casual bystanders. In holding the statement not actionable because of its being heard by third persons, it was said: "From the foregoing authorities it appears that a communication of any matter in which the person making the communication has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, even though it contains matter which without this privilege would be actionable, and although the duty is a moral and not a legal one, and particularly where, as here, the communication arises out of and is incidental to a business relation between the parties; that an utterance, though false, may be thus privileged, and if made in the honest belief that it is true and from no malicious motive, is not actionable; that the occasion on which such a communication is made rebuts the presumption or inference of malice and casts the burden upon the plaintiff to prove that there was malice in fact; that it was not necessary in order to render the communication privileged, that it should have been in response to an inquiry made by the plaintiff; it is enough that it was made by one having a duty to perform to a person or persons having a like interest or duty in the subject-matter of the communication; and that the mere fact that third persons not legally interested in the communication are accidentally present and hear it, will not alone take the case out of the privilege if it were unavoidable or happened in the usual course of business affairs. Kruse v. Rabe, supra (80 N.J.L. 378, 79 A. 316, 33 L.R.A., N.S., 469, Ann. Cas.1912A, 477); Odgers on Libel & Slander, p. 245; 17 R.C.L. p. 344, § 90."

The case of Fahr v. Hayes, 50 N.J.L. 275, 13 A. 261, 263, is also of assistance. It was there said: "It is true there were hearers who are not shown to have been lawfully interested, and that the defendant had an opportunity in his own office of making the disclosure to Thoma without further publicity. But he was entitled not merely to warn, but to convince, Thoma of the danger of trusting the plaintiff, and for this purpose he had a right to confront the plaintiff, and there declare whatever was of itself within the privilege. The presence of bystanders at that meeting was a mere casual incident, not in any sense sought for by the defendant, and for which therefore he should not be held responsible." See also O'Donnell v. Nee, C. C., 86 F. 96; Heller v. Howard, 11 Ill.App. 554; Shinglemeyer v. Wright, 124 Mich. 230, 82 N.W. 887, 50 L.R.A. 129.

[4-6] We therefore conclude that as the statements of defendant were qualifiedly privileged as far as three of the hearers were concerned, and were overheard by Mrs. Rice who was merely a casual bystander for whose presence defendant was in no manner responsible, plaintiff cannot recover without proof of actual or express malice on the part of defendant. Under these circumstances the burden of proving such malice rests on the plaintiff. In Emde v. San Joaquin County Central Labor Council, 23 Cal.2d 146, at page 161, 143 P.2d 20, 28, 150 A.L.R. 916, it is said: "The communication being qualifiedly privileged, no right of action arose unless the publishers were actuated by malice, and malice 'is not inferred from the communication or publication.' Civ.Code Sec. 48." See also Davis v.

Hearst, 160 Cal. 143, 116 P. 530; Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1; Locke v. Mitchell, 7 Cal.2d 599, 61 P.2d 922.

The law places on a physician the duty of reporting the discovery of certain venereal diseases to the Health Department subject to penalties for failure or refusal to do so. See Venereal Disease Law, Stats.1937, p. 2248; Secs. 2571, 2572, 2573, Health & Safety Code. There is evidence to the effect that a physician is required by rules of the board of health to report a case of venereal disease within twenty-four hours of its discovery; that if the infected patient takes and continues treatment, only the initials need be placed on the report, otherwise the name must be given.

There is nothing in the record to support a finding of actual or express malice on the part of defendant. He actually received a report from a reputable, established laboratory that plaintiff was actually suffering from a venereal disease. He believed, relied and acted upon this report. The fact that this report from the laboratory was a mistake, if such be true, cannot affect the question of actual malice if defendant believed it to be true and was actually acting on that belief and was proceeding without malice within the provisions of the venereal disease law. In Snively v. Record Publishing Co., supra [185 Cal. 565, 198 P. 5], it was said: "The occasion and the relations between the one making the charge and those to whom it is made being such that the communication would be privileged, the right of the publisher to speak or write is complete and unqualified, under the Code, except that he must speak or write 'without malice.' When under these conditions he honestly believes that the person of whom he speaks or writes is guilty of a crime of a nature that makes the fact material to the interests of those whom he addresses, it is as much his right and duty to declare to them that fact as it would be to tell them any other fact pertinent to the occasion and material to their interests. If the publisher of a newspaper honestly believes that a public officer has committed crime of a nature which would indicate that he is unfit for the office he holds, we think he is not liable for damages under the Code in a civil action for libel when, without malice, and so believing, he publishes a statement to that effect to the community served by the officer."

In the letter of August 23rd, after informing plaintiff of the nature of her disease, defendant urged her to come to his office for further consultation. Mrs. Bradley received a similar request in the telephone message to the drug store. Defendant testified that these requests were made with the idea of inducing plaintiff to take treatments so as to save her the embarassment of having her name rather than her initials reported to the board of health. There is nothing in the record contradicting this testimony and the inferences from the entire record support it. Therefore the conclusion is clear that instead of being actuated by any malice against plaintiff, defendant was endeavoring to protect her as much as possible from the effects of any publicity concerning the disease from which he believed she was suffering.

As the statements made on August 25, 1945, were qualifiedly privileged and as there is no proof of actual or express malice, plaintiff has failed to meet the burden of proof resting on her in this respect, and the evidence fails to support the case of plaintiff.

The order and judgment are affirmed.

BARNARD, P. J., concurs.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

81 Cal.App.2d 70

DAULTON v. WILLIAMS.

Civ. 15916.

District Court of Appeal, Second District, Division 2, California.

July 28, 1947.

Rehearing Denied Aug. 13, 1947.

Hearing Denied Sept. 25, 1947.

1. Landlord and tenant 🔑169(6)

In action against landlord for injuries to tenant's hand from broken porcelain handle on 22 year old water faucet, the fact that other porcelain handles in flat building had broken was not proof that handle on tenant's faucet was defective.

2. Evidence 🔑7

It is common knowledge that some porcelain handles on water faucets are without defects after 25 or 30 years although others fail in less time.

3. Landlord and tenant 🔑150(5), 168(1)

A tenant receiving no response from letter to landlord concerning defective water faucet could have had a new handle substituted for old handle at landlord's expense and should not have made use of handle in its defective condition.

4. Landlord and tenant 🔑164(1)

A landlord not concealing defective condition from tenant or positively misrepresenting condition of tenement is not liable to tenant for injuries due to defective condition or faulty construction.

5. Landlord and tenant 🔑164(6)

A landlord is not liable to tenant for defective condition of tenement unless landlord actually knew of such defect.

6. Landlord and tenant 🔑164(7)

A landlord must disclose to tenant such concealed defects as are known to landlord at date of letting and then only if defects are such as would not be discoverable by reasonable inspection.

7. Landlord and tenant 🔑169(6)

In action against landlord for injuries to tenant's hand from broken porcelain handle on water faucet, evidence that landlord had made plumbing repairs in tenant's flat was insufficient to show that landlord negligently repaired the faucet.

8. Landlord and tenant 🔑164(2)

The failure of landlord to repair faucet after tenant's husband notified landlord of the defect in faucet did not make landlord liable for injuries to tenant's hand from faucet.

9. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit, evidence is construed most strongly in favor of plaintiff.

10. Trial 🔑139(1)

A nonsuit is proper where evidence is of such character as not to warrant a finding in plaintiff's favor.

11. Landlord and tenant 🔑164(6)

A landlord not having knowledge of latent dangerous defect in tenement prior to leasing is not liable for injuries resulting from such defect.

12. Landlord and tenant 🔑164(6, 7), 168(1)

A landlord is not insurer of premises against injuries to tenant unless he fails to disclose existence of hidden defects of which he had actual knowledge, and tenant must use reasonable care and diligence to inspect property in which he is to reside, and his failure to exercise such care defeats his claims for injuries based on alleged negligence of landlord.

13. Landlord and tenant 🔑164(6, 7)

A landlord is not liable to tenant because of presence of dangerous condition of tenement solely by reason of landlord's concealment of such condition.

14. Landlord and tenant 🔑164(2, 3)

In failing to make promised repairs, landlord is guilty of mere nonfeasance for which he is not liable to tenant, and misfeasance results only in making the repairs negligently.

15. Landlord and tenant 🔑164(6)

A landlord has no duty to inspect his tenement with the object of locating latent defects or of repairing them.

16. Landlord and tenant 🔑164(7)

Where no part of tenement is reserved for use of landlord or of other tenants, the rule of caveat emptor applies to the tenant.

17. Landlord and tenant ⚷168(1)

If tenant continues use of defective plumbing unit after discovery of defective condition, tenant cannot, after sustaining injuries, recover damages from landlord.

18. Landlord and tenant ⚷164(3, 6, 7), 168 (1)

A tenant could not recover from landlord for injuries to tenant's hand from broken porcelain handle on water faucet, where landlord did not know of defective handle at time of leasing to tenant, landlord did not so negligently repair handle during tenant's occupancy that handle was left in a defective condition, and tenant did not discover defect for over two years and did not repair defect or desist from using handle.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Eleanor Veronica Daulton against Frank O. Williams for injuries to hand from a broken handle on a hot water faucet. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Mitchell, Silberberg & Knupp, and Arthur Groman, all of Los Angeles, for appellant.

Reginald I. Bauder, Wayne Veatch and W. I. Gilbert, Jr., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether from the proof submitted an inference could reasonably have been drawn that the landlord was culpably negligent in not having warned his tenant against the danger of pressing a porcelaim plumbing fixture where it had been used by the tenant for over two years and its defect was patent to the tenant users.

After appellant, her husband and their child had as tenants occupied a furnished apartment of respondent for two and a half years the good lady broke a porcelain handle on a hot water faucet into many a fragment and thereby inflicted a deep cut in her hand. Having suffered some grievous injuries she sued her landlord for resulting damages. After she had submitted her evidence a nonsuit was granted on motion of the respondent. From the ensuing judgment of dismissal comes this appeal.

A resume of the evidence shows that respondent built the six-family-flat building in 1923 and operated it to the date of appellant's injury, to wit, October 24, 1945. At the time of the original construction all of the plumbing fixtures included standardized porcelain handles on the faucets. Through the years a porcelain handle broke now and then. While respondent replaced the broken ones with metal handles, the unbroken original porcelains continued in use. This was true as to appellant's flat prior to her occupancy. Her faucets were leaking at the date of her injury and had been since she first moved in. It was difficult to cut off the water by turning the handles. They were of ceramic material which when broken formed a sharp cutting edge. This fact was known to respondent when he leased the flat to appellant but at no time prior to her injury did appellant know of the glass-like material and thought the handles were iron. On two occasions after her occupancy and prior to the injury respondent had made repairs in her flat to stop the leaking of the faucets but was unsuccessful.

[1-3] Appellant contends that by giving full weight to the evidence, by indulging all favorable presumptions and drawing all favorable inferences, she has established a hidden defect in the rented premises; that since the porcelain handles had been in daily use for 22 years and many of the handles had broken since the house was built respondent knew that those which remained must be defective and that such defect was not patent to the tenant. But the fact that other units had broken is not proof that the handle on appellant's bathtub was defective. It is a matter of common knowledge that some porcelain handles on faucets are without defects after 25 or 30 years although others fail in less time. When installed in respondent's building they were standard equipment. The only proof that respondent had knowledge of the defective condition of the handle in question was the testimony of Mr. Daulton that he had written respondent a month before appellant received her

injury. If he considered the porcelain defective his knowledge must have been imparted to appellant who knew it prior to using it on October 24. She and her husband had then occupied the flat two and a half years to the exclusion of respondent. When they had no response from the letter it was their right to have a new handle substituted for the old one at the landlord's expense and their duty not to make use of the instrument in its defective condition.

[4-6] Not having concealed any defective condition from his tenants or positively misrepresented the condition of his tenement, a landlord is not liable to his tenant for injuries due to a defective condition or faulty construction. Colburn v. Shuravlev, 24 Cal.App.2d 298, 299, 74 P.2d 1060. Also, before a landlord can be liable for the existence of such defect it must be proved that he actually knew of it. Ellis v. McNeese, 109 Cal.App. 667, 670, 293 P. 854; Turner v. Lischner, 52 Cal.App.2d 273, 277, 126 P. 2d 156; Ayres v. Wright, 103 Cal.App. 610, 616, 284 P. 1077. There is nothing contrary to such holdings in Shotwell v. Bloom, 60 Cal.App.2d 303, 140 P.2d 728, as will later appear. The landlord is bound to disclose such concealed defects as are known to him at the date of the letting and then only if they are such as would not be discoverable by a reasonable inspection. Hassell v. Denning, 84 Cal.App. 479, 481, 258 P. 426; Zavalney v. Donovan, 70 Cal.App.2d 182, 184, 160 P.2d 558.

It is not true that appellant had no means of knowing the age of the porcelains in her flat or that others had broken. Having lived in the house two and a half years she learned its approximate age. Also, she observed that some metallic handles had been installed in the places of removed porcelains. Respondent had no more definite knowledge than appellant of a defect in the handle of appellant's bathtub faucet.

[7, 8] Error is assigned as to the holding that appellant failed to make proof that respondent did not exercise reasonable care in making repairs. She maintains that she was not required to prove that a defective condition was rendered worse by the landlord's efforts but merely that after his repairs a defect still existed, citing Janofsky v. Garland, 42 Cal.App.2d 655, 109 P.2d 750. But evidence of his having made repairs did not warrant the inference of respondent's negligence in repairing the faucet. His testimony is the only proof that approached the subject. He knew of no particular time when he repaired the bathtub faucet. While he had made such repairs as cleaning out clogged drain pipes and putting in washers he had no memory of having done any work on the offending handle or its faucet. Appellant knew that he had made two plumbing repairs in her flat in the period of her occupancy but such visits could not warrant a finding that he had negligently or purposefully hammered the porcelain handle or otherwise rendered it defective. In view of the want of evidence that the faucet handle had ever been touched by respondent, a jury could not have determined his negligence in repairing that particular faucet from the fact that all the faucets were leaking and that appellant was required to exert pressure on the handle to turn off the water. There is no relation between a leaking faucet and its handle. The leak results from either a worn washer or a scored seat. If all the faucets were leaking such defects had not recently been repaired. In any event appellant did not exert any more pressure on the handle of the bathtub faucet to turn off the water than she had applied to similar pieces of equipment. Even though appellant's husband did notify respondent of the impairment of the porcelain handle, respondent was not liable for her injuries because of his failure to make the repair. Dorswitt v. Wilson, 51 Cal.App.2d 623, 625, 125 P.2d 626; Priver v. Young, 62 Cal.App. 405, 216 P. 966; Sieber v. Blanc, 76 Cal. 173, 174, 18 P. 260.

[9, 10] Appellant seeks comfort in the affirmation that in considering a judgment of nonsuit the usual rules on appeal do not govern the reviewing court and that the presumption of the judgment's correctness is not to be indulged. It is of course the rule on such appeals that the evidence must be construed most strongly in favor of the plaintiff. Cain v. Marquez, 31 Cal.App.2d 430, 441, 88 P.2d 200. But a nonsuit is proper where the evidence is of such character as not to warrant a finding in plain-

tiff's favor. Curry v. Williams, 109 Cal. App. 649, 655, 293 P. 623; Pacific National Company v. Southwest Finance Company, 4 Cal.App.2d 326, 40 P.2d 862; In re Baird's Estate, 198 Ca 490, 246 P. 324.

[11] Appellant contends that the court below "did not give proper weight to the principles governing the determination of a motion for nonsuit," citing Kirk v. Los Angeles Railway Corporation, 26 Cal.2d 833, 837, 161 P.2d 673, 164 A.L.R. 1, and Bush v. Weed Lumber Co., 55 Cal.App. 588, 204 P. 24. Such contention is a gratuity. The cited cases hold nothing more than is commonly known to trial judges, and there is no proof that the judge who tried this action was not cognizant of the principles which control the decision of such a motion. If a lessor is not shown to have had knowledge of latent dangerous defects in his tenement prior to leasing he is not liable for injuries that result therefrom. If there had been any evidence of such knowledge on the part of respondent the "principles governing the determination" of respondent's motion would be applied exactly to the same extent in reversing the judgment as they are now applied in the affirmance.

[12-14] A landlord is not an insurer of his premises against injuries to his tenant unless he fails to disclose the existence of hidden defects of which he had actual knowledge. Moreover, the tenant must himself use reasonable care and diligence to inspect the property in which he is to reside. His failure to exercise such care defeats his claims for injuries based upon the alleged negligence of the landlord. Nelson v. Myers, 94 Cal.App. 66, 75, 270 P. 719. The landlord is not liable because of the presence of the dangerous condition, but solely by reason of his concealment thereof. Dorswitt v. Wilson, 51 Cal.App. 2d 623, 624, 125 P.2d 626. In failing to make promised repairs a landlord is guilty of mere nonfeasance for which he is not liable. Misfeasance results only in making them negligently. Janofsky v. Garland, 42 Cal.App.2d 655, 109 P.2d 750.

[15-17] There is no duty on the landlord to inspect his tenement with the object of locating latent defects or of repairing them. Shotwell v. Bloom, 60 Cal. App.2d 303, 309, 140 P.2d 728; Ellis v. McNeese, 109 Cal.App. 667, 672, 293 P. 854. Where no part of the tenement is reserved for the use of the landlord or of other tenants the rule of caveat emptor applies to the tenant. Toner v. Meussdorffer, 123 Cal. 462, 465, 56 P. 39. This case held that even though the landlord asserted positively and without qualification that the premises were entirely safe, yet since the defect was so latent that none of plaintiff's family discovered it during five months' occupation, the representation was not fraudulent unless before making his declaration he was called upon to make such examination as would have led to a discovery of the defect. Such holding leaves little to be said for the claim of appellant who found no defect in the handle for more than two years. Such discovery by her husband is evidence that it was visible to appellant. Neither of them exercised any care either to repair it or to avoid the use of it. If a lessee continues the use of a defective plumbing unit after his discovery of its defective condition he may not after sustaining injuries therefrom recover damages from his lessor. Zavalney v. Donovan, 70 Cal.App.2d 182, 184, 160 P.2d 558.

[18] Because there was no evidence that respondent knew of the defective handle at the time of leasing to appellant and her husband, or that he so negligently repaired the handle during their occupancy that it was left in a defective condition and because the defect was not discovered by appellant for over two years and she did not repair it or desist from using it, the motion for nonsuit was properly granted.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

81 Cal.App.2d 95

In re HOWE'S ESTATE.

Civ. 15769.

District Court of Appeal, Second District, Division 1, California.

July 29, 1947.

Hearing Denied Sept. 25, 1947.

1. Homestead ⚷145

The quantum of evidence necessary to establish waiver by prenuptial agreement of right to probate homestead is not different from that required to establish proof of any other fact, and waiver need not appear in instrument in any particular language, but if it appears from language used that waiver is included necessarily it must be held to have been intended.

2. Homestead ⚷145

A prenuptial agreement providing that neither party should at "any time" claim "any interest" in separate property of the other constituted a waiver of widow's right to probate homestead since "any time" includes all time, and "any interest" includes every interest.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Interest" and "Any Time".

3. Appeal and error ⚷909(4)

Where husband and wife were married about 13 years before husband died, and record on appeal was silent as to whether there was community property from which widow's allowance could be paid, it would be assumed that there was evidence to support trial court's order granting a family allowance.

◆

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Proceeding in the matter of the estate of George Edward Howe, also known as George Ed. Howe, and as George E. Howe, wherein Myra B. Howe, decedent's widow, filed a petition for family allowance and for homestead which was opposed by Alvin Langdon Coburn. John C. Netz also filed a petition. From an order granting a family allowance and homestead, Alvin Langdon Coburn appeals.

Affirmed in part and reversed in part.

S. T. Hankey, of Los Angeles, for appellant.

Hugh Gordon, of Los Angeles, Sanford A. Waugh, of San Francisco, Powers & Bernard and W. A. Strong, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order granting a family allowance and homestead in probate proceedings.

The record reveals the following as correctly recited in appellant's brief:

"In January, 1946 the Court made an Order granting Mrs. Myra Howe, the widow of decedent, a family allowance of $400.00 per month. Appellant, who is one of the legatees of the estate, opposed the granting of this allowance but at the time of such opposition he had no knowledge of the existence of the pre-nuptial contract which only came to light sometime later, when he immediately took steps to obtain the cancellation of the Order granting the family allowance and repayment of the moneys paid under the Order. In March, 1946, the said widow Myra B. Howe petitioned the Court for a probate homestead and appellant opposed the granting of the probate homestead on the ground that she had waived her right thereto in the pre-nuptial agreement.

"These two matters came on for trial before the Court at the same time and after hearing the evidence of Mrs. Myra Howe, who was the only witness, the Court granted the probate homestead and denied the Petition for Termination of the Family Allowance and re-payment of the moneys paid under the Order of January 17th, 1946."

The pertinent portion of the prenuptial agreement is as follows:

"That neither party shall at any time claim any interest in the separate property of the other, except that in the event of the death of either party hereto, the survivor shall be entitled to any devises or bequests, if any, in favor of such survivor made in the Last Will and Testament of the said deceased party. And this agreement shall in no wise be construed as a waiver of the right of either party hereto in or to any provision in favor of the survivor as to any devise or bequest made in such Will of such deceased one in favor of the other."

In deciding in favor of respondent, the court commented as follows at the conclusion of the trial:

"There was only one question presented to the Court. That is whether or not there was a waiver, which is not free from difficulty. It is the policy of the law, as we all know, that a family allowance and setting apart of homestead are looked upon with favor under the law. A waiver of that right must appear in clear language. Because of those two rules I am constrained to believe that the agreement presented here does not waive that right.

"The agreement is evidently drawn by a skilled attorney, and if it were designed to cut off the widow from the family allowance, homestead, a few words added there would have placed the question beyond a doubt. Those words do not appear and, therefore, it is my opinion, my ruling that the petition for termination of the family allowance which appears to have been made advisedly by the Court is denied. The petition for confirmation of the sale of the property presented is likewise denied. The petition for the setting apart as a homestead is granted for and during the pendency of the administration of the estate.

"Good arguments can be made both ways on it. Where there is any doubt about the question, reasonable or otherwise, I think that under the authorities that doubt should be made in favor of the right rather than a waiver of the right.

"I believe that's all we can do for you now."

The court found as a fact that "it is true that the language of said pre-nuptial agreement does not show that said parties thereto intended that said Myra B. Howe thereby waived her right to claim a probate homestead and a widow's allowance; and it is true that said Myra B. Howe did not, by or through said pre-nuptial agreement waive her right either to a probate homestead or to a widow's allowance." Also that the property described as the homestead was the separate property of the deceased.

It is contended by appellant that "The only question presented by this Appeal, as it was the only question presented to the Court below, is whether or not by the pre-nuptial agreement Myra B. Howe waived her right to a probate homestead and to a family allowance."

The prenuptial agreement also contains the following language:

"That Whereas, the parties hereto are of full age and each is capable of entering into the marriage relation, and

"Whereas, the party of the first part is owned and possessed of a great deal of property and is engaged in a very lucrative business, and the party of the second part has very little property, and

"Whereas, the parties hereto are about to enter into the marriage relation, but each realizes that the intrusion of relatives sometimes wrecks a home and that controversies over property frequently work the same havoc, all of which the parties hereto desire to avoid, * * *." And in that connection respondent argues, "So it is reasonable to suppose that Mr. and Mrs. Howe were desirous of preventing those undue intrusions of relatives and controversies over property which 'sometimes wrecks a *home,*' (emphasis supplied) rather than that they intended that Mrs. Howe surrender rights, such as probate homestead and family allowance, which could only arise upon the death of one of the parties."

The argument is without merit; there is no logical relation between the two subjects and the conclusion that the parties were more interested in the one than the other is unwarranted.

[1] It is contended by respondent that the waiver of the rights involved herein, "must appear in clear language", and that such language is lacking in the agreement. Numerous cases are cited wherein such language as "clear and convincing evidence", "clear and decisive proof" and "clear and explicit language", appears. Although such expressions may be appropriate as used in the cases cited or in any case where an agreement becomes the subject of construction for the purpose of de-

termining the intent of the parties, it does not follow that the quantum of evidence necessary to establish a waiver is any different than that required to establish proof of any other fact. Nor is it necessary that the so-called waiver must appear in the instrument in any particular language or precisely and affirmatively. If it appears from the language used that a waiver is included then necessarily it must be held to have been intended. In this connection it must be assumed from the very nature of things that the parties contemplated the existence of rights, obligations and liabilities that result by operation of law from the marriage and marital status. And this is especially true of homesteads and widow's allowances for neither exists in the absence of marriage. Obviously, the respondent could have no claim to either except as a widow. Nevertheless the parties deliberately entered into an agreement to prevent them so far as the separate property of each is concerned.

[2] The agreement declares that neither party should at *"any time"* claim "any interest" in the separate property of the other. It would be difficult, if indeed possible, to select simpler and more comprehensive words. They require no amplification; anytime includes all time and any interest includes every interest. There is no need to be specific for the law never has demanded emphasis. The respondent's efforts to obtain the homestead therefor asserts a "claim" clearly foreclosed by the terms of the agreement. And the agreement being valid in every respect it must be upheld. See Estate of Yoell, 164 Cal. 540, 550, 129 P. 999; Estate of Schwartz, 79 Cal.App.2d 308, 179 P.2d 868.

[3] With regard to the widow's allowance the record on appeal is silent as to whether there was community property from which it could be paid. The parties were married about thirteen years before the husband died and it therefore must be assumed that there was evidence to support the court's order to this extent.

For the foregoing reasons, the order awarding the probate homestead is reversed but affirmed as to the widow's allowance.

YORK, P. J., and WHITE, J., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

KAUFFMAN et al. v. DE MUTIIS. *

Civ. 7357.

District Court of Appeal, Third District, California.

July 28, 1947.

Hearing Granted Sept. 25, 1947.

1. Appeal and error ⚿977(1)
New trial ⚿6

A motion for a new trial on ground of surprise is, to a large extent, addressed to discretion of court to which application is made, and its action will not be disturbed on appeal in absence of clear and affirmative showing of a gross, manifest, or unmistakable abuse of discretion. Code Civ. Proc. § 657, subd. 3.

2. Appeal and error ⚿980

Where there appears to be a reasonable or even fairly debatable justification therefor, an order granting a new trial on ground of surprise will not be set aside, although contrary order might not be disapproved or appellate court might be inclined to take a different view. Code Civ. Proc. § 657, subd. 3.

3. New trial ⚿97

Generally, a party surprised on a trial must apply for relief at earliest practical moment, and in such a method as to produce least vexation, expense, and delay, and he will not be allowed to speculate on chances of a favorable decision on other points and, if he fails on such other points, fall back on his motion for new trial on ground of surprise. Code Civ.Proc. § 657, subd. 3.

4. New trial ⚿97

Granting plaintiff a new trial, in action arising out of automobile collision, on ground of surprise caused by nonappearance of a witness subpoenaed and relied upon by plaintiffs as rebuttal witness, was not an abuse of discretion under circumstances, even though plaintiffs failed to request a continuance upon learning that witness would not appear. Code Civ.Proc. § 657, subd. 3.

THOMPSON, J., dissenting.

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* Subsequent opinion 189 P.2d 271

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Action by Mabel B. Kauffman and Frederick Kauffman, her husband, against Joseph E. De Mutiis, for injuries sustained by plaintiff wife in automobile collision. From order granting plaintiffs a new trial, the defendant appeals.

Affirmed.

Van Dyke & Harris, of Sacramento, for respondents.

Yale S. Kroloff and Charles Koler, both of Stockton, for appellant.

ADAMS, Presiding Justice.

This is an appeal from an order granting plaintiffs a new trial under the provisions of subdivision 3 of section 657 of the Code of Civil Procedure, to wit, accident or surprise which ordinary prudence could not have guarded against, caused by the non-appearance of a witness subpoenaed and relied upon by plaintiffs as a rebuttal witness. In support of their motion for a new trial plaintiffs filed five affidavits, while defendant filed two. From these affidavits and from the record in the case it appears that the trial was commenced on the 25th day of June, 1946, and a verdict in favor of defendant returned on June 27th.

Plaintiffs sought damages for severe injuries sustained by Mrs. Kauffman in a collision between an automobile operated by her, and an automobile owned and operated by defendant, which collision occurred on the streets of Auburn on January 4, 1946, and was alleged to have been caused by the negligence of defendant. In preparation for the trial, and prior to June 23rd, defendant subpœnaed as a witness one Rudolph Erends, a resident of Truckee, who was employed by the Southern Pacific Company as a locomotive engineer, and had witnessed the accident. On June 22nd Erends was also served with a subpœna to appear as a witness for plaintiffs. On June 24th one of defendant's attorneys telephoned to Truckee for the purpose of informing Erends that he would not have to respond to the subpœna served on him in behalf of defendant, but failing to reach the witness left word with someone at the Truckee Roundhouse. The message as received by Erends was that he would not have to respond to the subpœnas. He then so advised his employer, with whom he had previously made arrangements to be absent from his work, and was thereupon ordered to leave on a scheduled run.

At noon on the second day of the trial, at the conclusion of defendant's evidence, plaintiffs' attorney, who had expected to use Erends as a rebuttal witness that afternoon, seeing that the witness was not in court, asked plaintiff Frederick Kauffman to telephone him. Kauffman did so and was advised by Erends that he would not be able to appear as he was leaving immediately on a scheduled run as a locomotive engineer. On receiving this information plaintiffs' counsel did not request a continuance of the trial, but proceeded therewith when Erends failed to answer to the call of the bailiff made during the afternoon.

After a hearing on the motion for a new trial the trial court stated in a written opinion that the non-appearance of the witness was not due to any negligence or lack of diligence on the part of plaintiffs, that his testimony was material in that it would have contradicted that of defendant on important matters such as the speed at which defendant's car had entered the intersection and was traveling at the time of the impact, and it was not cumulative; and that for said reasons a new trial should be granted.

Appellant urges that the affidavits show that plaintiffs' counsel knew at noon on June 26th that Erends was not present, and that he would not respond to plaintiffs' subpœna; and that defendant's attorney Kroloff at that time advised plaintiffs' attorney that he should ask for a continuance; but that plaintiffs' attorney refused to do so; and that, because of such failure to ask for a continuance the motion for a new trial should have been denied.

Erends, in an affidavit in support of plaintiffs' motion, averred that he saw the accident, and that defendant's automobile entered the intersection at a speed of from 35 to 40 miles per hour and was so traveling when it struck plaintiffs' car; and that he would have so testified at the trial. He also deposed that the message received by him from defendant's counsel was that he would not have to appear in response to either of the subpœnas served upon him; and that when plaintiff Kauffman telephoned him at noon on June 26th he told Kauffman that he had been advised that his presence was not required, and that he could not appear because he had been assigned to immediate duty by his employer.

Appellant urges here that the trial court abused its discretion in granting a new trial, in view of the allegations of the affidavits, and that this court should reverse its order.

[1, 2] It is settled that a motion for a new trial is, to a large extent, addressed to the sound legal discretion of the court to which the application is made; and it has often been said that its action will not be disturbed on appeal in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion. See Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 544, 76 P.2d 104; Mazzotta v. Los Angeles Railway Corp., 25 Cal.2d 165, 169, 153 P.2d 338; Prescott v. City of Orange, 56 Cal.App.2d 144, 150, 132 P.2d 523; Whitfield v. Debrincat, 18 Cal.App.2d 730, 733, 64 P.2d 960. In the latter case it was said that where there appears to be reasonable or even fairly debatable justification therefor, an order granting a new trial will not be set aside, although a contrary order might not be disapproved or the appellate court might be inclined to take a different view. And this rule is applicable where the ground for the motion is surprise. 20 Cal.Jur. 67.

[3] Appellant urges, however, that in this case the motion for a new trial should not have been granted because, though plaintiffs' counsel knew that Erends was not present and would not appear, they made no request for a continuance. While this might have justified the refusal of the motion had the trial court been satisfied that plaintiffs had not used reasonable diligence to procure the attendance of the witness, nevertheless it was within the province of that court to determine from the affidavits on file and the record in the case not only the question of diligence but whether the absence of the witness resulted in injury to plaintiffs.

Appellants rely upon Baker v. Berreman, 61 Cal.App.2d 235, 142 P.2d 448, but there the facts were quite different. The absent witness had never been subpœnaed nor had any attempt been made to secure his deposition; also it was known two days before the trial date that the witness would not be able to attend. In the case before us plaintiffs had duly subpœnaed the witness and did not know until noon of the second day that he would not appear, and by that time the taking of evidence was largely completed, and it was concluded that afternoon, though the case was not submitted to the jury until the 27th. Also, Erends' nonappearance was apparently due to the acts of defendant's counsel because of the manner in which they had advised Erends that they did not desire his testimony. In Baker v. Berreman it is recognized that the general rule requiring the presentation of a motion for a continuance when a party is taken by surprise is not inflexible but is to be given a reasonable application. It was so held in Delmas v. Martin, 39 Cal. 555, 557, 558, where a motion for a new trial had been denied, but the supreme court reversed the order, stating:

"The general rule undoubtedly is, that a party surprised on a trial must apply for relief at the earliest practicable moment, and in such method as to produce the least vexation, expense and delay. He will not be allowed to speculate on the chances of a favorable decision on other points, and if he fails on these, fall back on his motion for new trial on the ground of surprise. (Schellhous v. Ball, 29 Cal. 605, 609.) But while this is the general rule, cases may and do frequently arise in which it ought not to be enforced. In Rodriguez v. Comstock, 24 Cal. 85, it was considerably relaxed in favor of a party who was deceived by his own witness in respect to the facts to which he would testify, and who failed to move for a continuance. But, in relaxing the rule, it should be done only where the surprise is clearly established, and the consequences of it can be avoided on another trial; and it must also be apparent that the party has not been guilty of *laches,* and has acted in good faith in omitting to apply for relief at an earlier stage in the proceedings.

In this case, the deed from Black to the plaintiff was the last evidence offered in the cause, and the Court immediately proceeded to charge the jury. It may well be, that in the last stage of a jury trial, at the conclusion of the evidence, sufficient opportunity may not have occurred to enable the defendants and their counsel to decide, deliberately and discreetly, what course it was proper to pursue in respect to the last item of proof which was offered in the cause. We perceive nothing in the record to justify the belief that the defendants and their counsel were not acting in good faith in omitting to apply for a continuance, and are satisfied that they were guilty of no *laches;* that they were surprised, in the sense of the statute, by the deed from Black to the plaintiff, and that they can probably overcome the effect of that deed, if allowed an opportunity to do so. We think this is a proper case in which to relax somewhat the rule to which we have reverted."

Also see Whitfield v. Debrincat, supra.

[4] In the case before us the wisest course for plaintiffs to pursue may have been to ask for a continuance when it was learned that Erends would not be present. But the trial court's opinion indicates that it believed that plaintiffs were taken by surprise when Erends failed to appear in answer to their subpœna; that sufficient opportunity was not afforded them and their counsel to decide, deliberately and discreetly, what course it was proper to pursue, that they acted in good faith and were not guilty of laches, that the testimony of Erends was important in view of the fact that defendant had testified that his automobile was practically stopped at the time of the impact, and that in view of the whole situation presented and the importance of the testimony of Erends the ends of justice would be best met by granting the new trial as requested. That court was in a better position than we are to decide those questions; and we cannot say that in so doing its conduct constituted such an abuse of discretion as necessitates a reversal.

The order is affirmed.

PEEK, J., concurs.

THOMPSON, Justice (dissenting).

I dissent.

I believe the trial court abused its discretion, under the undisputed facts of this case, in granting a new trial for alleged surprise resulting from the absence of a material witness. Suit for damages for personal injuries resulting from an automobile collision was commenced. Each party subpœnaed Rudolph Erends as a witness. He was employed as a trainman with the railroad company, and resided at Truckee. The day before the trial was commenced the defendant excused the witness. The trial lasted three days. On the second day of trial plaintiff learned that defendant had excused the witness. Plaintiffs' attorney telephoned the witness about noon on the second day of trial. The attorney was informed by the witness that he thought both parties had excused him, and that he had to leave with his train immediately and could not attend the trial at that time. Plaintiffs' attorney promptly informed counsel for the defendant that he wanted to call that witness to rebut evidence adduced by the defendant. Defendant's attorney told him he should then move for a continuance. Plaintiffs' attorney neglected to call the court's attention to his failure to obtain the presence of the witness, and he failed to move for a continuance. He permitted the completion of the evidence, argument and submission of the case to the jury, without notice of the absence of the witness, and without a motion for continuance. He evidently speculated on a favorable verdict. The jury returned a verdict for the defendant. For the first time plaintiff urged his alleged surprise on his motion for new trial. The court found that the evidence of the witness was material and not cumulative, and thereupon granted the motion for new trial. Plaintiffs' failure to call the court's attention to the absence of the witness, and their failure to move for a continuance constituted a waiver of the presence of the witness on that account, in spite of the fact that he had been previously subpœnaed. Plaintiffs' attorney had full knowledge of the inability of the witness to attend the trial at least one day before the cause was submitted to the jury, and failed to show diligence, by a motion for continuance, or otherwise. Under such circumstances there appears to be no room for discretion of the court in granting the new trial on that ground.

The rule is uniform to the effect that when a litigant has full knowledge of the inability of a material witness to attend before or during the trial, and fails to avail himself of his remedy by timely notice to the court or motion for a continuance, he thereby waives his right to complain on that account. Baker v. Berreman, 61 Cal.App. 2d 235, 243, 142 P.2d 448; Schellhous v. Ball, 29 Cal. 605; Denvir v. Judson Freight Forwarding Co., 86 Cal.App. 369, 372, 260 P. 846; 20 Cal.Jur. 74, sec. 53. In the Baker case, supra, quoting with approval from the Schellhous case, supra, it is said, 61 Cal. App.2d at page 242, 142 P.2d at page 452, that:

" 'Upon this ground [surprise] new trials should be granted with great caution, for in many cases it is used as a pretext and a cover for carelessness and inattention rather than as a meritorious ground for relief. A party claiming to have been injured must show that the surprise has not resulted in any degree from his own fault or negligence, and must in addition claim his relief at the earliest opportunity. If he can relieve himself from his embarrassment in any mode, either by a nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief.' "

With reference to the foregoing uniform rule, the court in the Baker case further said:

"So far as our attention has been called, there has been no repudiation of such general rule."

In the Denvir case, supra [86 Cal.App. 369, 260 P. 846] it is likewise said:

"Appellant made no effort to secure a continuance in order to meet this contingency of adverse testimony secured from her own witness on cross-examination. It is the general rule that a party who claims to have been surprised by the evidence adduced by his adversary must move for a continuance, or he will not be permitted to avail himself of that point on appeal. * * * A party should not be allowed to speculate on the chances of a favorable decision, and after he has lost his cause, move for a new trial on the ground that he was surprised by the introduction of certain testimony by his adversary."

A trial court ordinarily has a sound discretion in granting or denying a new trial. But it may not be said to be the exercise of *sound* discretion when the granting of a new trial necessarily conflicts with the uncontradicted evidence, and results in a disregard of the foregoing uniform rule with respect to diligence. Such a ruling would furnish a precedent for the utter destruction of a wise and just rule of law.

The order granting a new trial should be reversed.

VAUGHN v. JONAS. *

Civ. 13312.

District Court of Appeal, First District, Division 1, California.

July 21, 1947.

Hearing Granted Sept. 18, 1947.

1. Trial 🔑260(8)

In action for injuries from bullet wound admittedly inflicted by defendant asserting that he acted in self-defense, failure to instruct that defendant was entitled to use amount of repelling force as "appeared" to him necessary, rather than the amount that "was reasonably necessary", was not prejudicial, in view of instruction given.

2. Evidence 🔑207(4)

A guilty plea, where relevant, is admissible as an admission in a civil case growing out of the same matter, not as a plea of guilty, but as a form of declaration against interest.

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* Subsequent opinion 191 P.2d 432.

3. Evidence ⚷207(4)

In action for injuries from bullet wound admittedly inflicted by defendant, defendant's plea of guilty to misdemeanor charge of assault arising out of the shooting was admissible as declaration against interest, notwithstanding that defendant had taken proper steps to have record expunged, and that statute provided that after the expunging, the accused was released from all penalties and disabilities resulting from the conviction. Pen.Code, § 1203.4.

4. Trial ⚷255(13)

In action for injuries from bullet wound admittedly inflicted by defendant, failure to define word "malice" in instruction on issue of punitive damages, was not error, where defendant failed to request any instruction as to the meaning of the word, and the word was not technical but was a generally understood word of general usage. Civ. Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

5. Trial ⚷255(13)

While it is proper for trial court to define meaning of legal or technical terms in instructions, failure to do so does not constitute error, where complaining party has not requested such an instruction, at least where term is one of general use and common understanding.

6. Damages ⚷208(8)

The issue of punitive damages may properly be submitted to jury, notwithstanding failure of complaint to expressly request award of punitive damages, if the issue can be spelled out of the facts alleged in the complaint, and if such an award is supported by the evidence.

7. Appeal and error ⚷930(1)

On appeal from judgment on verdict for plaintiff, evidence must be viewed in the light most favorable to plaintiff.

8. Assault and battery ⚷42

In action for injuries from bullet wound admittedly inflicted by defendant, complaint alleging that defendant committed unlawful, wrongful and violent act on plaintiff by shooting him, pleaded sufficient facts, in absence of demurrer directed at such allegations, to raise issue of malice implied in law, and hence issue of punitive damages was properly submitted to jury, where evidence would support a finding of malice.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Civil action by John J. Vaughn against William Jonas for injuries from a bullet wound. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

W. H. Morrissey, of Redwood City, and John J. Taheny, of San Francisco, for appellant.

F. E. Hoffman, of San Mateo, for respondent.

PETERS, Presiding Justice.

Plaintiff, John J. Vaughn, brought this civil action against defendant, William Jonas, for injuries from a bullet wound admittedly inflicted by defendant on March 16, 1942. The jury brought in a verdict of $5,500 compensatory damages, and $4,500 exemplary damages. From the judgment entered on this verdict the defendant appeals.

It is an admitted fact that at about 2 a. m. on March 16, 1942, defendant shot plaintiff in the stomach and that as a result plaintiff suffered most serious and permanent injuries. The hospital bill incurred by plaintiff as a result of the injuries amounted to over $1,300, while his doctor bill was about $1,600. On the date in question defendant and his wife owned and operated a bar and restaurant in Brisbane, San Mateo County, California. Some time after 1 a. m. on that night plaintiff and two companions entered this bar and each ordered a bottle of beer. They had had four or five beers at other taverns earlier in the evening, but had had no hard liquor. There is no evidence that they were drunk. Plaintiff started to play a pin ball machine located in the tavern. This machine had one or two small signs on it: "For amusement only, no pay-off." There is substantial evidence, however, that there was in the establishment at least one slot machine which paid off in cash. The pin ball machine is so constructed that if the player should make a certain score he wins the right to one or more free games. Plaintiff played for 15 or 20 minutes, and at that time the machine registered 74 or 75 free games. Whether this was the result of the machine getting out of order and automatically running up free games, or whether it was the result of plaintiff's skill, is disputed. At any rate, plaintiff demanded to be paid in cash for these "free" games, and defendant told him that the house did not pay off on the pin ball machine, and called attention to the sign. An argument resulted. As to what was said and done by plaintiff and defendant there is a dispute. Plaintiff admitted demanding to be paid off in cash and that he argued with defendant. He denied making any threats or that he called defendant vile names. Defendant testified that, among other things, plaintiff threatened to "break up the place * * * called it a cheap joint * * * and told me they would get me too." In addition, according to this witness, plaintiff was most profane and abusive.

Some time during the dispute defendant took a pistol out of a drawer behind the bar and placed it in his belt. Whether or not plaintiff saw this is not clear. Defendant and his wife testified that during the argument plaintiff pulled the pin ball machine from the wall and threw it to the floor. This was denied by plaintiff. A police officer who arrested defendant several hours later testified that the pin ball machine was then in its proper position, that the glass cover was not broken, and that the machine was then in good working condition, because he played it. Towards the end of the dispute the wife of defendant started to telephone the sheriff, but desisted when plaintiff and his companions started to leave. Defendant and his wife testified that all three left together. Plaintiff testified that his two companions left, but that he went to the men's toilet, and then left.

Plaintiff testified that when he left the bar his companions were already in the automobile and had backed out and were proceeding toward the entrance to pick him up; that he reached the automobile when it was about 30 feet from the entrance; that just as he was about to step into the car the defendant called to him from the doorway of the tavern; that he turned around and saw defendant on the top step with a pistol in his hand; that defendant asked him if he "wanted to get paid"; that defendant then stated: "Here's your pay you son-of-a-bitch"; that defendant then shot him in the stomach. He staggered to the car and was taken by his companions to the hospital.

Defendant's story is much different. He testified that plaintiff and his two companions left the tavern together by the front door, the plaintiff making threats as he left; that defendant waited for several minutes until he heard their car start and then prepared to close the tavern, it then being after 2 a. m.; that as he was attempting to close the front door he looked out and plaintiff was approaching the door carrying a concrete block at shoulder height; that he called out: "Stop, put down that rock I have a gun," but plaintiff kept advancing; that his wife screamed at him to look out; that he was very excited; that he pulled out his gun and "thought I would stop him by firing at his feet"; that he shot, intending to hit the ground in front of plaintiff; that plaintiff stopped, dropped the rock, and ran back to the car in a crouching position; that plaintiff was but three or four feet from the entrance steps when he, the defendant, shot; that he did not then know or think he had hit the plaintiff; that after the automobile had driven away he walked out and picked up the piece of concrete and brought it into the tavern; that he did this to use as evidence if he decided later to swear out a warrant against plaintiff for attacking him. The rock was introduced into evidence. Defendant's wife corroborated most of defendant's story.

Part of this story was contradicted by the police officer who arrested defendant several hours after the shooting. He testified that when he told defendant the plaintiff had been shot the defendant replied: "I intended to hit him," and that when he shot, the plaintiff was "out front by the car." He also testified that defendant stated that the three men had left together by the side door, and that he, the witness, thought one of the machines in the tavern was a slot machine, and that he played the pin ball machine that defendant told him plaintiff had played, and that it was then in good working order. Most of plaintiff's story was corroborated by one of his companions on the night in question, the other not being available at the time of trial.

Defendant does not challenge the sufficiency of the evidence to sustain the award of compensatory damages. He contends, however, that the trial court committed three prejudicial errors which require a reversal.

The first of these has to do with the instructions. Inasmuch as defendant admitted the shooting, his defense at the trial was predicated on the theory that he had acted in self-defense. On this issue the court instructed as follows:

"The burden of proof to establish self-defense is always with the defendant, and he must show that he used no greater force than was necessary to repel the alleged attack of the plaintiff, if you so find that plaintiff did attack the defendant."

"You are instructed that the right of the defendant to use force upon the plaintiff at the time and place in question did not depend upon the question whether the plaintiff actually intended or attempted to inflict serious injury upon the defendant or his wife. If the circumstances as they appeared to the defendant were such that a reasonable person in the position of the defendant would be justified in believing that the plaintiff had the present ability to inflict serious injury upon him or his wife and that the plaintiff intended to do so, then you are instructed that the defendant was justified in using such force as was reasonably necessary to defend the person of the defendant, his wife, or his property."

"You are instructed that if you find from the evidence that the plaintiff was advancing toward the defendant with a large stone or piece of concrete in his hand and if you further find from the evidence that the defendant was in or upon his own premises and that the circumstances were such as to justify a reasonable man in the position of the defendant in believing that the plaintiff had the present ability and intention to inflict serious injury upon the defendant or his wife, then, the defendant was entitled to remain standing where he was and was entitled to use such force as was reasonably necessary to protect himself and his wife from injury, and under such circumstances, there was no duty on the part of the defendant to retreat."

The defendant requested the following instruction: "The plaintiff seeks to recover from the defendant for an alleged assault by the use of a gun. *You are instructed that acts done in self-defense alone are not assaults. A person cannot assault another in self-defense; and any acts done in self-defense cannot be an assault.* Therefore, if you find from the evidence that the plaintiff was advancing toward the defendant with a piece of concrete in his hands at the time of the shooting under such circumstances that a reasonable person in the situation of the defendant would have reasonable grounds for believing that the plaintiff intended to attack and injure the defendant with said piece of concrete, and if you further find from the evidence that the defendant at said time was acting in defense of his person at the time he fired the gun and that there was reasonable grounds for believing that the firing of said gun was reasonably necessary for his defense, then, if you so find, your verdict shall be in favor of the defendant and against the plaintiff." (Italics added.)

The trial court gave only that portion of the instruction above italicized.

The following requested instruction was refused by the court: "You are instructed that the question whether the defendant was justified in shooting the plaintiff does not depend on whether he intended to shoot at the plaintiff or at the ground, but on whether the circumstances, as they appeared to the defendant, were such that a reasonable person in the position of the defendant would have apprehended that he was in imminent danger of sustaining serious injury at the hands of the plaintiff. If you find from the evidence that the circumstances, as they appeared to the defendant, were such that a reasonable person in his position would have been justified in concluding that he was in such danger, then you are instructed that in using all the force reasonably necessary to prevent such injury, the defendant incurred no civil liability to the plaintiff; and if you further find from the evidence that a reasonable person in the position of the *plaintiff* [sic] would have been justified in concluding that it was reasonably necessary for his protection either to fire said gun at the ground or at the plaintiff, then you are instructed that under such circumstances the defendant is not liable in damages to the plaintiff for either aiming and firing said gun at the ground or at the plaintiff."

The defendant contends that the instructions given were incomplete in that, although the jury was properly told that the defendant would be justified in using force if the circumstances "as they appeared to the defendant were such that a reasonable person in the position of the defendant would be justified in believing that the plaintiff had the present ability to inflict serious injury upon him or his wife and that the plaintiff intended to do so" it was not told that the amount of force that might be used to repel the attack was not such as "was reasonably" necessary to repel the attack, but whatever force "appeared" reasonably necessary to repel the attack. The defendant sought to have this thought conveyed to the jury in the requested instructions above set forth, one of which was refused in toto, and the other modified. In support of his contention that the failure to so instruct the jury constituted prejudicial error defendant relies upon the case of Fraguglia v. Sala, 17 Cal.App.2d 738, 62 P.2d 783. There, too, the action was for an assault, and the defendant's main defense was self-defense. There, as here, the judgment was for plaintiff. There, as here, the contention was made that there was error in the giving and refusing instructions. The court first held that certain instructions given by the court at the request of plaintiff were prejudicially erroneous because the instructions stated facts not in the record and related to issues not involved. On the issue of self-defense the court instructed as follows (17 Cal.App.2d at page 744, 62 P.2d at page 786): "[1] Whenever a person is assaulted by another, he has a right to defend himself, and may use sufficient force to repel the assault in order to protect himself from bodily harm. And when necessary to protect himself from bodily harm at the hands of an assailant, the person assaulted may use sufficient force in repelling the assault, even before the assailant actually commits a battery upon him. But the resistance must be no more than is necessary to accomplish this. If it be greater than is required for such purpose, it becomes in law excessive and without excuse or justification, making the party an aggressor; (2) * * * (3) The fact, if you find it to be a fact, that plaintiff was not free from fault, will not prevent you from rendering a verdict in favor of the plaintiff, if you further find that the resulting assault and battery on plaintiff by defendant was accompanied by greater force than was reasonably necessary for the purpose of self defense."

With regard to the first part of this instruction the appellate court stated (17 Cal.App.2d at page 745, 62 P.2d at page 786): "Nearly all of the instruction comprised in division 1 was addressed to the right of the defendant to defend himself. It makes no reference to the facts as they appeared to him. On the contrary it hold the defendant bound by the actual facts without regard to appearances. The defendant's objection to that portion of the instruction is well founded. People v. Thomson, 145 Cal. 717, 79 P. 435."

This criticism cannot apply in the instant case because, so far as the apprehension of peril is concerned, the "appearances" test was clearly applied by the trial court in the instructions given.

As to subdivision three of the instruction given in the Sala case the court stated (17 Cal.App.2d at page 745, 62 P.2d at page 786): "The third division of the instruction is addressed to the subject of the use of excessive force. It fails to take into consideration 'all the circumstances of the case.' In 4 American Jurisprudence, page 152, the author says: 'Generally stated, the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.' "

The court then discusses what is meant by excessive force. In the instant case the court set up in its instructions the "appearances" test with respect to defendant's apprehension of peril from plaintiff, but when it instructed as to what repelling force the defendant could use, it stated that defendant might lawfully use such force as "was reasonably necessary" to defend himself, his wife and his property, and did not instruct that he might use such force which, under the circumstances, "appeared" reasonably necessary.

[1] Technically, the instruction may be subject to criticism in failing to thus more particularly state that defendant was entitled to use the amount of repelling force as "appeared" to him necessary, rather than the amount that "was reasonably necessary," but this omission cannot be held to have been prejudicial. This is so because in this case, unlike the Sala case, the jury was carefully informed on two separate occasions, that, in determining whether defendant was justified in using force to repel the attack, it was the circumstances as they appeared to defendant that controlled. Then, as part of the same instruction, and in fact as part of the same sentence in each instruction, the jury was told that the amount of force that could be used was that "as was reasonably necessary to defend [or protect]" himself. Obviously, if a jury is told that a defendant may use force if the circumstances as they appeared to him justified it, and then immediately told, as part of the same sentence, that the amount of force he might use is the amount that is reasonably necessary, the jury could not fail to apprehend that the "reasonable" amount of force permitted is the amount that "appeared" reasonable to him. In the Sala case the so-called "appearances" test was omitted entirely.

The second contention of defendant is that prejudicial error in the admission of evidence was committed when the trial court permitted plaintiff's counsel, on cross-examination, over objection, to elicit an admission that he, the defendant, had pleaded guilty to a misdemeanor charge of assault arising out of the shooting. In this connection the record shows that defendant was first charged with a felony as a result of the shooting; that he then pleaded guilty to a misdemeanor charge of assault; that he was granted probation; that he performed all acts required by the order of probation; and that he then took the proper steps to have the record expunged as permitted by § 1203.4 of the Penal Code. That section provides: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall *thereafter be released from all penalties and disabilities resulting from the offense or crime* of which he has been convicted. * * * provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." (Italics added.)

Defendant argues that the effect of completed action under the section is, under the language italicized above, and except as limited in the last clause of the section, to release a probationer from "all penalties and disabilities" resulting from the offense, and that to admit into evidence his plea in the criminal action as an admission in the civil suit is to subject him to a "penalty" or "disability." In this connection defendant places strong reliance upon the case of People v. Mackey, 58 Cal.App. 123, 208 P. 135. That case involved a prosecution for larceny. The principal witness for the prosecution had been previously charged with a felony, pleaded guilty, been admitted to probation, served his probationary period, and been discharged under § 1203 of the Penal Code. After this witness had testified for the prosecution the defense offered his plea of guilty for the purpose of impeachment under § 2051 of the Code of Civ. Procedure, which provides that a witness may be impeached by a showing of the record that he has been convicted of a felony. The trial court excluded this impeaching testimony and this was held proper. In so holding the court stated that the provisions of § 1203 of the Penal Code are "somewhat akin to the common-law rule under which one who has been pardoned through the exercise of executive clemency for the commission of a criminal offense is made a 'new man,' the effect of a pardon being, among other things, * * * 'to remove from the offender that disability to testify as a witness in a court of justice which, by the rule of the common law, was consequent upon his conviction of a felony.'" 58 Cal.App. at page 129, 208 P. at page 137.

At page 130 of 58 Cal.App., at page 138 of 208 P. the court stated: "We cannot avoid the conclusion, however, that the Legislature intended in a legal sense, by directing a dismissal under such circumstances, to wipe out absolutely the entire proceeding in question in a given case, and to place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him." And at page 131 of 58 Cal. App., at page 138 of 208 P. "* * * we conclude that the Legislature intended by the enactment of section 1203 that no convicted person discharged after probation thenceforth should be regarded as one possessed of the degree of turpitude likely to affect his credibility as a witness."

[2, 3] It will be noted that this case dealt exclusively with the right, as a matter of law, to impeach a witness because of his "conviction" of a felony after that "conviction" had been expunged. That is not the problem here involved. Here the evidence that he had pleaded guilty was not offered to impeach, but as an admission of a party against interest. The law is clear that a guilty plea, where relevant, is admissible as an admission in a civil case growing out of the same matter, not as a plea of guilty, but as a form of declaration against interest. Fawkes v. Reynolds, 190 Cal. 204, 211 P. 449. If the defendant had admitted that he committed an unprovoked assault on plaintiff to the arresting police officers or to any third person the fact that he had made such an admission would be admissible not as proof of guilt but as a declaration against interest. While the fact of *conviction* has been expunged from the records under § 1203.4, the fact that he admitted that he committed an unprovoked assault on plaintiff still exists, and should, as a matter of logic and of law, still exist, as an admission. It is that fact that was admitted here. To admit that fact is not to impose a "penalty" or "disability" upon defendant "resulting from the offense." There is nothing conclusive about the admission. The defendant should be permitted to explain, if any reason exists, other than an outright admission of guilt, why he pleaded guilty. It should be pointed out that in the instant case all that plaintiff elicited was the admission, and defendant was properly permitted on cross-examination to explain fully his plea. In fact, it was the counsel for defendant that brought out the fact that defendant had originally pleaded not guilty to a felony, and he then elicited the information from his client that the client had pleaded guilty to the misdemeanor on advice of counsel.

A case that goes much further than the instant case in using the fact of conviction adversely to the party invovled is In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, a case decided by a divided court. There, an attorney had been convicted of a crime involving moral turpitude, and, based on such conviction, was disbarred. The disbarred attorney was placed on probation and subsequently took advantage of the provisions of § 1203.4. He thereafter contended that his disbarment could no longer be continued, based as it was on the fact of his conviction. In disposing of this contention the majority of the Supreme Court stated (17 Cal.2d at page 61, 109 P. 2d at page 348, 132 A.L.R. 644): "But it cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime. * * * In brief, action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law.

* * * That final judgment of conviction is a fact; and its effect cannot be nullified for the purpose here involved, either by the order of probation or by the later order dismissing the action after judgment."

We need not go so far in the present case. Here the fact that defendant admitted that he committed an unprovoked assault on plaintiff is not conclusive, but was admitted as a declaration against interest. In our opinion the fact that such an admission was made was relevant, competent and admissible.

The last contention of defendant is that malice was not pleaded, and, therefore, that it was error to submit to the jury the issue of punitive damages. In this connection it is further urged that the court erred in the instructions given on this issue in that it failed to define the word "malice."

The only pertinent portion of the complaint is paragraph I in which it is alleged: "That on the 16th day of March, 1942, in the Town of Brisbane, County of San Mateo, State of California, in the front of the premises known as 'Dick's Tavern' the defendant wrongfully, unlawfully and violently assaulted the plaintiff by firing at plaintiff a loaded revolver, the bullets from which passed through plaintiff's abdomen and other parts of his body, causing serious and severe wounds to plaintiff."

The court, at the request of the plaintiff, gave the following instructions:

"I instruct you that Section 3294 of the Civil Code of the State of California provides as follows: 'In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.'"

"Under the provisions of this code section it is the rule that a jury may allow punitive damages if they believe from the evidence that a malicious intent exists. Evidence of the language used, if any, at the time of the assault, may be considered by the jury in determining the issue as to whether or not the defendant acted maliciously."

"In the event that you find that the defendant shot the plaintiff maliciously then the amount of exemplary damages you may award plaintiff is in your discretion."

[4, 5] The argument that prejudicial error was committed in failing to define the term "malice" is without merit. The record shows that defendant failed to request any instruction as to the meaning of the word in question. There is nothing technical about that term, it being a word of general usage that is generally understood, and its employment and the concept conveyed by it cannot be said to be restricted to the legal profession. While it is, of course, proper for a trial court to define the meaning of legal or technical terms in its instructions, a failure to do so does not constitute error where the complaining party has not requested such an instruction, at least where the term is one of general use and of common understanding. See cases collected 24 Cal.Jur. p. 824, § 90; 24 Cal.Jur. p. 796, § 74.

[6, 7] The only debatable question presented on the issue of exemplary damages is whether or not there was included in the complaint sufficient allegations to raise that issue so as to justify instructions on the issue. The pleading is certainly not a model in this respect. It failed to expressly request an award of punitive damages. But this failure is not necessarily fatal. If the issue can be spelled out of the facts alleged in the complaint, and if such an award is supported by the evidence, the issue of punitive damages may properly be submitted to the jury. Turner v. Whittel, 2 Cal.App.2d 585, 38 P.2d 835; Waite v. San Fernando Pub. Co., 178 Cal. 303, 173 P. 591. In the present case it is quite clear that, if the evidence be viewed in the light most favorable to plaintiff—as must necessarily be done—the implied finding of the jury that defendant was actuated by malice is amply supported by the record. The evidence on behalf of plaintiff supports the implied finding that plaintiff did not threaten to assault defendant with a piece of cement, but that defendant deliberately followed plaintiff out of the door and wantonly shot him as he was about to enter his automobile. That evidence supports the implied finding of malice.

Defendant urges that: "It is well-settled that punitive damages may not be awarded to one who by his own conduct has brought on the assault" (App.Op.Br. p. 42), and cites in support of that proposition Livesey v. Stock, 208 Cal. 315, 281 P. 70. In that case the court stated (208 Cal. at page 318, 281 P. at page 71): "It may also be conceded that there is little, if any, reason for awarding exemplary damages in favor of a trespasser upon the property of another, who by reason of his own wrong is in part responsible for the force used. [Citing a case.] But these principles of law are applicable solely upon the assumption that the plaintiff was a trespasser upon the property of the defendant. In this case the necessary finding of the jury was to the effect that plaintiff was not a trespasser upon the property of defendant at the time and place of the assault."

In the present case the plaintiff was not a trespasser, and the jury has found that the assault committed was unprovoked and malicious. That being so, the limitation implied in the first part of the above quotation is not applicable. If defendant desired more explicit instructions on the issue he should have offered them. This he did not do.

Defendant likewise cites the case of Lorenz v. Hunt, 89 Cal.App. 6, 264 P. 336, a case in which the court disallowed an award of exemplary damages. In that case the complaint was entirely silent as to oppression, fraud or malice. In the instant case the complaint alleged that defendant "wrongfully, unlawfully and violently assaulted the plaintiff by firing at plaintiff a loaded revolver." No demurrer was directed against these allegations. In Avakian v. Noble, 121 Cal. 216, 53 P. 559, the complaint alleged that defendants "unlawfully, oppressively, and with force and arms" took plaintiff's property. It was held that in the absence of a demurrer such allegations warranted instructions on the issue of punitive damages. It is our opinion that the complaint here involved alleged sufficient facts to plead malice, and thus raise the issue of punitive damages. Malice sufficient to allow the recovery of exemplary damages may be express or implied. (§ 3294, Civ.Code.) A malicious intent will be implied from the intentional commission of a wrongful act. (See many cases collected 34 Am.Jur. p. 685, § 6.) The general rule, supported by many authorities, is stated as follows in 34 Am.Jur. p. 683, § 3: "Express malice does not mean, necessarily, malice expressed in words; it is said to exist where a wrongful act is done with a sedate and deliberate mind and formed design * * * Implied malice is defined as that which the law infers from or imputes to certain acts * * * This form of malice is also sometimes referred to as malice in law, or legal malice. The presumption or implication of malice, from a wrongful and injurious act wilfully done * * * is the result of a mode of legal reasoning which is of general application, and has been said to be a natural inference drawn by a fair course of reasoning, * * *"

In the present case, by alleging that the defendant committed an "unlawful," "wrongful" and "violent" attack upon plaintiff by shooting him, the plaintiff pleaded sufficient facts, in the absence of a demurrer directed at such allegations, to raise the issue of malice implied in law.

The case of Morgan v. French, 70 Cal. App.2d 785, 161 P.2d 800, although differing on its facts, and involving some issues not here involved, contains language helpful in the present case. After quoting § 3294 of the Civil Code the Court stated (70 Cal.App.2d at page 789, 161 P.2d at page 802): "Malice is not only 'implied' but it is conclusively presumed 'from the deliberate commission of an unlawful act, for the purpose of injuring another.' Section 1962, Code Civ.Proc. This conclusive presumption precedes all rebuttable presumptions, implications and inferences which may be drawn from facts proved. Where a complaint pleads the deliberate commission of an unlawful act for the purpose of injuring another, it pleads the only facts necessary to put in play the conclusive presumption of a malicious and guilty intent."

At page 790 of 70 Cal.App., at page 803 of 161 P.2d the court stated: "Hence legal malice means no more than the wrongful intention to do harm which the law always presumes as accompanying a wrongful act, without any proof of malice in fact."

[8] It is quite clear that the allegations here involved sufficiently pleaded, in the absence of a demurrer directed at them, the elements of "legal malice" and "malice implied in law." This being so, the issue was properly submitted to the jury.

The judgment appealed from is affirmed.

BRAY, and WARD, JJ., concur.

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PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13421.

District Court of Appeal, First District, Division 1, California.

July 28, 1947.

Hearing Denied Sept. 25, 1947.

1. Workmen's compensation 🔑29

The statute respecting presumed dependency of child under 18 on deceased employee, is not arbitrary and unreasonable merely because a child was not actually receiving support from the deceased employee during the period of the child's minority if, during that time, the child could have been declared legally entitled to support. Labor Code, § 3501.

2. Workmen's compensation 🔑462

Deceased employee's son, under 18 years of age, was entitled under statute to compensation for the death of the employee, though at time of employee's death the child was self-supporting, and though the child's mother, who was also self-supporting, may have been legally responsible for the child's support. Labor Code, § 3501.

Proceeding by the Pacific Employers Insurers Company, a corporation, petitioner, to review an award of the Industrial Accident Commission of the State of California under the Labor Code to Robert Wayne Humphreys, a minor, by his guardian ad litem and trustee, Grace E. Humphreys, for the death of his father.

Order of the commission affirmed.

W. N. Mullen, of San Francisco, for petitioner.

R. C. McKellips and E. B. Connolly, both of San Francisco, for respondents.

Donald E. Wachhorst, of Sacramento, for Robert Wayne Humphreys.

WARD, Justice.

The main question presented by this writ of review is the constitutionality of Labor Code, section 3501, under which a death benefit was awarded the decedent's minor son, Robert Wayne Humphreys. The minor is now represented by his mother, the wife of the decedent. There is no dispute that the petitioner in the present proceeding was the insurance carrier of the decedent's employer, and that both the employer and the employee at the time of the accident were subject to the provisions of the Workmen's Compensation Act. Labor Code, § 3201 et seq. All parties entered into a compromise which was disapproved by the commission.

The minor's birth certificate shows that he was born February 6, 1928. There is evidence that the mother separated voluntarily from the decedent in 1933, and that since 1935 she never received nor requested support from him. She is self supporting and supported the minor until three years before his father's death when he became a wage earner and supported himself. The decedent, while unloading a tractor, on January 15, 1946, sustained an injury occurring in the course of and arising out of his employment which resulted in his death the same day.

Petitioner contends: "1. An award based on section 3501 of the Labor Code was arbitrary and unreasonable, for the undisputed and admitted facts established that the respondent minor was neither wholly nor at all dependent for support upon the decedent. 2. If the presumption specified in said section 3501 be regarded as applicable and irrebuttable, then the said section must be held unconstitutional and the said award annulled."

Labor Code, section 3501, provides in part that "The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * * (b) A child under the age of eighteen years * * * for whose maintenance the parent was legally liable at the time of injury, there being no surviving dependent parent." The referee's finding that the mother was not dependent upon the decedent is not contested.

[1, 2] Labor Code, section 3501, should not be declared arbitrary and unreasonable merely because a child was not actually receiving support from the decedent during the period of minority if, during that time, the child could have been declared legally entitled to support. Douglas Aircraft Co. v. Industrial Accident Commission, 24 Cal.2d 340, 149 P.2d 702; Fireman's Fund Indemnity Co. v. Industrial Accident Commission, 24 Cal.2d 942, 149 P.2d 705. The decedent was legally responsible for the support of his son. Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, 195 Cal. 283, 233 P. 335; McKendrick v. Southern California Edison Company, 15 Indus. Acc. Com. 164. The fact that the minor was admittedly self-supporting did not remove the responsibility for his support from the decedent's shoulders. Pacific Gold Dredging Co. v. Industrial Accident Commission, 184 Cal. 462, 194 P. 1, 13 A.L.R. 725. Similarly, the fact that under Civil Code, section 196, the mother may also be legally responsible for the minor is immaterial. Pacific Gold Dredging Co. v. Industrial Accident Commission, supra.

Petitioner cites several United States Supreme Court decisions as authority that presumptions of the character here involved are violative of due process of law. Many of the cases deal with disputable presumptions. One of the cases involving a conclusive presumption is Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772. Petitioner relies upon the following statement made therein at page 329 of 285 U.S., at page 362 of 52 S.Ct., 76 L.Ed. 772: "A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof, [citing cases] and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. * * * However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the Schlesinger case [Schlesinger v. Wisconsin, 270 U.S. 230, 240, 46 S.Ct. 260, 70 L.Ed. 557, 43 A.L.R. 1224], as we are not; for that case dealt with a conclusive presumption, and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. [Citing cases, which involve rebuttable, not conclusive, presumptions.] If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."

That the petitioner is mistaken in his belief that the foregoing statement expresses the view of the United States Supreme Court that presumptions of the character here involved are unconstitutional, is seen from the following quotation from Ferry v. Ramsey, 277 U.S. 88, 96, 48 S.Ct. 443, 444, 72 L.Ed. 796: "Of course, the state may provide that proof of one fact shall be prima facie evidence of another; but this can be done consistently with the due process of law clause of the Fourteenth Amendment only where there is a rational relation between the two facts." See, also, Manley v. Georgia, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575; Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519. City of New Port Richey v. Fidelity & Deposit Co., 5 Cir., 105 F.2d 348, 123 A.L.R. 1352, concerning a conclusive presumption of a valid delivery where a negotiable instrument is in the hands of a holder in due course, refers to the rational connection rule as being applicable to a conclusive presumption. "We recognize that the legislature cannot make certain facts conclusive proof of another ultimate fact when there is no logical connection or probability in experience to connect them. But the real legislative intent may not be to make a rule of evidence, but a rule of substantive law, and if the legislature may constitutionally do the latter, the form of words used will not defeat the intent." IX Wigmore on Evidence, 3rd Ed., sec. 2492.

Provisions similar to Labor Code, section 3501, have been upheld in other jurisdictions. In State ex rel. London & Lancashire Indemnity Co. v. District Court, 139 Minn. 409, 166 N.W. 772, the statute provided that the surviving wife was conclusively presumed to be wholly dependent unless it was shown that she was voluntarily living apart from her husband at the time of his injury or death. It was contended that the Legislature could not make the presumption of dependence conclusive, and that the plaintiff was not in fact dependent upon her husband for the reason that she had supported herself for years without assistance from him. In 139 Minn. 409, 166 N.W. on page 773, the court said: "* * * we are satisfied that the Legislature had power to provide that for the purposes of the compensation law the wife 'shall be conclusively presumed to be wholly dependent' upon her husband regardless of whether she had or had not been supported by him in his lifetime. The duty to support her rested upon him as a continuing obligation which could have been enforced at any time. The Legislature could recognize the existence of this obligation, and in the plenitude of its power could make such reasonable provision for the wife under the compensation law as it deemed just and proper."

In Wilson v. La Porte Gas & Electric Co., 107 Ind.App. 21, 22 N.E.2d 882, the validity of a conclusive presumption as to the dependency of a minor child was upheld when the awards were made to two stepchildren of a deceased employee who stood in loco parte although the minors were in fact receiving some financial aid from their natural father. The section in the Wilson case was substantially the same as that in California. The court stated, 107 Ind.App. 21, 22 N.E.2d at page 885: "It is our opinion that the above statute does not deprive the appellees of any constitutional right. All the benefits which they seek to hold under this award are conferred by statute. These benefits may be increased or lessened at the will of the Legislature and the declaration to the effect that certain persons shall be entitled to compensation, in all events, is a benefit clearly within the power of the Legislature to bestow. Such a provision is not unconstitutional."

Thomas v. American Cast Iron Pipe Co., 209 Ala. 276, 96 So. 233, likewise held that the Legislature may declare the presumption of dependency of a wife or child on the husband to be conclusive, under provisions of a Workmen's Compensation Act, without offending either the state or federal constitutions, citing State ex rel. London & Lancashire Ind. Co. v. District Court, supra, and Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191.

In view of the foregoing it must be held herein that the conclusive presumption set forth in Labor Code, section 3501 is constitutional upon the theory that there is a rational connection between minority, coupled with a parent's legal liability for maintenance, and dependency upon said parent for support. See Woodward Iron Co. v. Jones, 217 Ala. 361, 116 So. 425; 1 Workmen's Compensation, Campbell, 774, sec. 872. The father's duty to support the minor might have been enforced at any time. At the time of the accident the deceased parent was legally liable for the support of the child. The employment of the minor did not render the father free from the legal right of the minor to demand support from his father. Irrespective of the presumptions mentioned in Labor Code, section 3501, the first duty of a father is to support his legitimate children. Civil Code, sections 193, 196, 197, 198, 205; Penal Code, section 270; Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, 195 Cal. 283, 233 P. 335; Fox v. Industrial Accident Com., 194 Cal. 173, 228 P. 38.

The order of respondent commission is affirmed.

PETERS, P. J., and BRAY, J., concur.

80 Cal.App.2d 927

ROSE v. TANDOWSKY.

Civ. 15667, 15779.

District Court of Appeal, Second District, Division 1, California.

July 22, 1947.

Hearing Denied Sept. 18, 1947.

1. Bastards 🔑71

In action by woman to establish paternity of child, instruction that the "mere possibility" that some person other than defendant might be the father of the child would not support a verdict for defendant, and that if jury believed from a preponderance of all evidence that defendant was the father of the child, jury must return a verdict for plaintiff, was not erroneous on ground that it removed from jury's consideration the issues of plaintiff's relations, if any, with other men.

2. Bastards 🔑71

In action to establish paternity, instruction that mere possibility that some person other than defendant might be father of child, would not support a verdict for defendant, and instruction that burden remained on plaintiff throughout trial, to prove that defendant was child's father, and that jury would not find that defendant was the child's father unless jury was satisfied by a preponderance of the evidence that only defendant had sexual intercourse with plaintiff at time when, according to usual laws of nature, child was begotten, were not in conflict.

3. Bastards 🔑54

In action to establish paternity, though burden did not rest on defendant to prove that he was not the child's father, nevertheless, in his attempt to show that plaintiff had illicit relations with other men, it was incumbent on him to show that such relations were had at or about the time when, in the ordinary course of nature, the child must have been conceived.

4. Bastards 🔑73

Verdict could not be impeached by affidavits of jurors that they misunderstood instruction, since an attempt at impeachment of a verdict by affidavits or statements of jurors cannot be considered except where the purpose is to show that the verdict was arrived at by chance. Code Civ.Proc. § 657, subd. 2.

5. Bastards 🔑71

In action to established paternity of child, instruction that if jury found from a preponderance of the evidence that defendant was the father of the child, jury would so find by its verdict, and that it was not necessary for plaintiff to establish such fact beyond all reasonable doubt or to a moral certainty, but only by such evidence as, when weighed with that opposed to it, had more convincing force and from which it resulted that the greater probability of the truth lay therein, was not reversibly erroneous on ground that it was in part surplusage because covered by previous instructions, and on ground that it gave undue prominence to plaintiff's contention that defendant was the father of the child.

6. Appeal and error 🔑1064(1)

A mere repetition of instructions, alone, is not reversibile error.

7. Bastards 🔑71

In action to establish paternity of child, defendant's requested instruction on the unreliability of evidence of physical resemblance was properly refused, since proof of resemblance is a circumstance to be considered in connection with other facts in establishing paternity.

8. Bastards 🔑71

In action to establish paternity of child, defendant's requested instruction that enmity between defendant and plaintiff's "surprise" witness who claimed to have seen plaintiff and defendant in act of sexual intercourse, affected the credibility of such witness, was properly refused, where jury was properly instructed in other instructions on the credibility of witnesses, since neither party was entitled to have instructions as to the credibility of particular witnesses.

9. Bastards ⚿71

In action to establish paternity of child, defendant's requested instruction that the charge made by plaintiff was one easy to make and difficult to disprove, and that plaintiff's testimony ought to be received with great care and caution, and that evidence should be weighed with the utmost care without bias or prejudice was properly refused.

10. Continuance ⚿24

A continuance is properly refused if the testimony of the absent witness will only tend to impeach a witness of the adverse party.

11. Bastards ⚿67

In action to establish paternity of child, wherein plaintiff's "surprise" witness testified that he had seen defendant in act of sexual intercourse with plaintiff, court did not abuse its discretion in refusing defendant's request for a continuance in order to secure from military authorities records to show that the witness had allegedly suffered a court-martial conviction, and to show that witness was allegedly afflicted mentally, and that he was allegedly addicted to the use of morphine.

12. Bastards ⚿92

In action to establish paternity of child born May 21, 1940, wherein plaintiff testified that she had not had sexual intercourse with any other man but defendant after she commenced such relations with defendant in 1936, the striking of defendant's testimony concerning a pregnancy test made of plaintiff in 1936 at the request of another man, if error, was so unsubstantial as to afford no ground for reversal.

13. Bastards ⚿73, 92

In action to establish paternity of child, conduct of plaintiff's counsel in asking her who was the father of her child and whether defendant gave her any money for the support of the child, in implying that money paid to plaintiff by defendant was for support of the child, and in referring to defendant's substantial income, was not such misconduct as to warrant a reversal or a new trial.

14. Bastards ⚿94

In an action to establish paternity of a child, the measure by which attorney's fees are to be gauged is the defendant's financial ability to pay, and the character and amount of services rendered.

15. Bastards ⚿94

Where net income of defendant in action to establish paternity of child was $800 a month after payment of income taxes, and he possessed $14,000 in bonds, allowance of $750 counsel fees to successful plaintiff for appeal was not excessive, though she had been allowed only $750 counsel fees for the four-day trial of the case, and though defendant was paying $100 a month for the support of a son and was contributing to the support of his parents.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Betty Rose against Ralph M. Tandowsky to establish paternity of a child of the plaintiff. From a judgment decreeing defendant to be the father of the child and ordering him to pay $100 a month for the child's support, and from an order allowing plaintiff additional counsel fees on the appeal, the defendant appeals.

Judgment and order affirmed.

Zagon, Aaron & Sandler, of Los Angeles (Jacob Paull, of Los Angeles, of counsel), for appellant.

Hahn, Ross & Goldstone, of Los Angeles (Saul Ross, of Los Angeles, of counsel), for respondent.

WHITE, Justice.

This is an appeal by defendant from a judgment decreeing him to be the father of the minor child of plaintiff and ordering him to pay $100 per month for the child's support. Defendant also has appealed from an order allowing plaintiff additional counsel fees upon the appeal. The two appeals have been consolidated and presented upon a single set of briefs.

The action was commenced in November, 1945, to establish paternity of a child born May 21, 1940. Plaintiff testified that she first met the defendant, a physician practicing in Hollywood, in 1934; that in the year 1936 she commenced having sexual relations with the defendant at his office after business hours, and that their relations continued up to the time of the conception of the child in August, 1939; that she had no relations with any other man during this period.

According to plaintiff's testimony, upon discovering her pregnancy, it was decided by plaintiff and defendant that she should go to San Francisco. The defendant visited her in San Francisco, was with her for three days, and gave her some money. Plaintiff returned to Los Angeles and the child was born in a Los Angeles hospital. At defendant's suggestion plaintiff went under the name of the husband who had divorced her some years before and stated for the birth certificate that such divorced husband was the father of the child. Defendant visited her in Los Angeles before the birth, and at the hospital, gave her money for her rent and money for her hospital bills. After the birth of the child defendant continued to visit plaintiff at her home several times a week, on Saturday afternoons, Wednesday afternoons, and sometimes in the evening. Defendant gave plaintiff $10 per week in cash until some time in 1942, when he commenced paying her by check. In May of 1945 plaintiff asked defendant for more money and the defendant offered to pay her $3,000 cash and $20 per week. In July of 1945 defendant stopped all payments.

The defendant denied that he ever had sexual intercourse with the plaintiff. He testified that until 1936 he saw the plaintiff only in the company of a Mr. Lippman. The first visit of plaintiff to defendant's office was in 1936, in the company of Mr. Lippman, for the purpose of determining whether plaintiff was pregnant. From 1936 to 1939 defendant saw the plaintiff only when making professional visits to her home to treat her mother, or when plaintiff was in the company of Mr. Lippman. In the summer of 1939 plaintiff came to him for a pregnancy test, which was "positive", but she did not name the father. Defendant denied that he spent three days in San Francisco with plaintiff, stating that he went there on business, and met her there only once for lunch, in order to tell her about her mother's condition. He denied ever giving plaintiff any cash whatsoever; denied that he visited her at the hospital or paid her hospital bills, and testified that he did not see her after the San Francisco visit until April, 1941, when he was separated from his wife, and about that time he gave plaintiff a check for $10 to help her out on her rent; that in September of the same year he gave her a check for $60 to help finance a trip to New York. During the period from April to September, 1941, he visited her at her home and sometimes she visited at his home in company with others. Plaintiff worked in the defendant's office for a short period in the summer of 1941 and again in the summer of 1942, for which she was paid by check. That about January, 1943, in response to plaintiff's demands, and in order to avoid a scandal, he commenced sending her $10 per week by check. In 1945, upon advice of counsel, he stopped the payments.

There was testimony corroborative of the plaintiff as to frequent visits by defendant at her home from August, 1940, to September, 1941 (the defendant denied seeing plaintiff after the San Francisco visit until April, 1941), and testimony by a "surprise" witness to an act of sexual intercourse between plaintiff and defendant, at the home of the witness, in 1938. The defendant introduced evidence supporting his testimony that the San Francisco trip was primarily a business trip; records of the building in which he had his office in contradiction of plaintiff's testimony that they met there after business hours; testimony by an employee of Mr. Lippman to the effect that plaintiff continued her association with Lippman until the early part of 1938; and evidence of a pharmacist that Lippman and plaintiff consulted with him in reference to a pregnancy test in 1938.

The first assignment of error is that the trial court gave misleading and improper instructions. It is contended that the two following instructions were conflicting and led to confusion on the part of the jury:

"You are instructed that the mere possibility that some person other than Ralph M. Tandowsky might be the father of Robert Rose will not support a verdict for the defendant, and if you believe from a preponderance of all the evidence, the defendant, Ralph M. Tandowsky, is the father of the child, you must return a verdict in favor of Betty Rose, the plaintiff."

"You are instructed that the burden of proof has remained on the plaintiff throughout this trial, to prove that the defendant is the father of Robert Rose. Therefore, you will not find that the defendant is the father of Robert Rose unless you are satisfied by a preponderance of the evidence that the defendant had sexual intercourse with the plaintiff at the time when according to the usual laws of nature, the child was begotten, and that the plaintiff, Betty Rose, did not have sexual intercourse with any other man at the time when according to the usual laws of nature, the child was begotten."

[1-3] It is urged that the first instruction above quoted had the effect of removing from the jury's consideration the issues of plaintiff's relations, if any, with Mr. Lippman or with her former husband. This contention cannot be sustained. The two instructions, which followed one another, were not in conflict. By then the jury was advised to decide the case in accordance with the preponderance of the evidence. If the jury, from a preponderance of the evidence believed that the defendant had sexual intercourse with the plaintiff at or about the time the child was begotten and did not have sexual intercourse with any other man, then it was to find that defendant was the father. The use of the words "mere possibility" certainly did not exclude from the jury's consideration either defendant's denial of intercourse or his contention that plaintiff continued to associate with Mr. Lippman. By excluding "mere possibility" the court did no more than direct the jury to confine its consideration to the evidence adduced and to avoid conjecture and speculation. While the burden of proof did not rest on defendant to prove that he was not the father, nevertheless, in his attempt to show that plaintiff had illicit relations with other men it was incumbent upon him to show that such relations were had at or about the time when, in the ordinary course of nature, the child must have been conceived. Berry v. Chaplin, 74 Cal.App.2d 652, 662, 169 P.2d 442, and cases cited. A "mere possibility" that some other man was the father could be said to exist in almost any conceivable case.

[4] Although it would not appear at all likely that a jury could be confused or misled by the instructions quoted, appellant has presented the affidavits of three of the jurors in an attempt to show that at least two of them (two who voted for plaintiff) misunderstood the effect of the first instruction, in that, after hearing the instructions twice and obtaining permission to take the written instructions into the jury room, these two jurors concluded that by the first instruction above-quoted they were foreclosed from all consideration of the alleged association of plaintiff with Mr. Lippman. Such an attempt at impeachment of the verdict by affidavits or statments of jurors cannot be considered except where the purpose is to show that the verdict was arrived at by chance. Code Civ.Proc., sec. 657, subd. 2; Phipps v. Patterson, 27 Cal.App.2d 545, 546, 81 P.2d 437, and cases there cited.

[5, 6] The court also instructed the jury that "if you find from a preponderance of the evidence that the defendant * * * is the father * * * you will so find by your verdict. This means that it is not necessary for the plaintiff to establish this fact beyond all reasonable doubt or to a moral certainty, but only by such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probability of truth lies therein." Appellant urges that this is a "formula" instruction, that it is in part surplusage because covered by previ-

ous instructions, and that it gave "undue prominence" to the plaintiff's contention that defendant was the father of the child. These contentions afford no ground for reversal. Mere repetition of instructions, alone, is not reversible error. Grillich v. Weinshenk, 64 Cal.App. 474, 222 P. 160. The instruction merely stated the issue and defined, in approved language, the difference between a "preponderance of the evidence", as required in a civil case, and "reasonable doubt," as applied to a criminal action.

[7] Appellant requested an instruction on the unreliability of evidence of physical resemblance. This instruction was refused. In re Jessup's Estate, 81 Cal. 408, 21 P. 976, 22 P. 742, 744, 1028, 6 L.R.A. 594, cited by appellant, involved a question of photographs, and the court merely said, in the course of its decision that "profert of the persons themselves * * * would not go far towards establishing relationship." In People v. Burke, 18 Cal.App 72, 122 P. 435, 446, it was said that while proof of resemblance alone would be insufficient to establish paternity, "it would be clearly a circumstance to be considered in connection with other facts. * * * The jury are the best judges on the question of similarity, and, unless it exists, a production of the offspring would be in the defendant's favor * * *."

[8, 9] The defendant requested the court to instruct the jury specifically with reference to the enmity between the "surprise" witness and defendant as affecting the credibility of such witness, and also the giving of an instruction to the effect that the charge made by plaintiff "is one which is easy to make and difficult to disprove" and that plaintiff's testimony "ought to be received with great care and caution, and the evidence in this case should be weighed with the utmost care without bias or prejudice." These two instructions were properly refused, because the jury was properly instructed in other instructions upon the credibility of witnesses and neither party is entitled to have instructions as to the credibility of particular witnesses. The refusal of other instructions requested by defendant, relating to a definition of adultery, legal penalties for offering false instruments for recording, and presumptions of innocence, cannot be considered as prejudicial error, under the circumstances here presented, and in view of the instructions actually given. A review of the entire charge convinces this court that while the jury was given a minimum of instructions, those given were clear and adequate for a proper determination of the issues presented.

[10, 11] Appellant next seeks to ground prejudicial error upon the court's refusal to grant a continuance for the purpose of allowing defendant to secure and introduce evidence to impeach the witness who testified to an act of intercourse between the parties in 1938, and whose testimony, it was claimed, came as a surprise to defendant and his attorney. In an effort to impeach this witness, the defendant was permitted to introduce testimony of the ill-will existing between himself and the witness, the existence of which state of mind on his part was admitted by the witness. As grounds for a continuance defendant urged that he desired to secure from the military authorities at Washington records to show that the witness had suffered a court-martial conviction, the record of which, he claimed, would show that the witness was mentally afflicted and that his addiction to the use of morphine was indicated. However, the manifest purpose for the requested continuance was not to secure evidence in contradiction of the testimony given by the "surprise" witness, but merely to secure cumulative evidence of an impeaching character. "It is the rule that a continuance is properly refused if the testimony of the absent witness would only tend to impeach a witness of the adverse party." 12 Am.Jur. 468. See also 13 C.J. 154; 17 C.J.S., Continuances, § 53, p. 229. Moreover, the admissibility of such impeaching evidence was, to say the least, extremely doubtful. Defendant sought to prove, not the conviction of a felony, but the conviction of a military offense for which the witness was sentenced to 12 months' imprisonment, but placed on probation. In such circumstances, no abuse of discretion on the part of the trial court appears.

The next question presented is whether the court committed prejudicial error in limiting the scope and degree of the cross-examination of plaintiff. Appellant urges that the scope of plaintiff's direct testimony largely determined the proper scope of cross-examination, and in this connection directs attention to the testimony of plaintiff that she met defendant in 1934 while attending a party at defendant's home, and met him under similar circumstances frequently thereafter; that their sexual relations commenced in 1936 and continued until 1942, and that she had no relations with any other man after commencing relations with the defendant; that on cross-examination it was brought out that at these first meetings with defendant prior to 1936 she was escorted by Mr. Lippman, but that she last saw Mr. Lippman in 1935. The defendant asserted that they first met in 1932; that she continued to associate with Lippman until 1939 and that in 1936 and in 1938 pregnancy tests were performed on plaintiff at Lippman's request. The court struck the testimony as to the pregnancy tests. Defendant, while cross-examining plaintiff, offered to prove that from 1932 to 1939 or 1940 plaintiff was Lippman's mistress and that "a continuous series of sexual indulgences took place between the plaintiff and Lippman over this entire period of years, so that it may be presumed, unless rebutted by competent evidence, that those things having been shown to exist may be presumed to have continued to exist into the period of gestation," upon which the court ruled: "The offer is rejected and testimony is restricted to within one year of the period of May 21, 1940." However, the court then said: "I will amend the previous ruling of 1936 by way of cross-examining, by way of cross-examination, the witness having testified to the fact she had no relations with anyone but the doctor. It is purely cross-examination, but as to the paternity of the child, the court will permit only from May 21, 1939.

"Mr. Zagon (Counsel for defendant): And may we go into the testimony of the plaintiff on her direct that there was no other man in her life but Dr. Tandowsky since 1936 on?

"The Court: 1936, yes."

[12] From the foregoing it is plain, and it appears from a reading of the transcript, that the cross-examination of plaintiff was not unduly restricted, but that on the contrary, the defendant was permitted to go into all matters testified to by plaintiff from the time, according to her testimony, she first commenced relations with defendant in 1936, up to and after the birth of the child. Appellant, however, assigns error in the striking of testimony given by defendant as to a pregnancy test made in 1936 at the request of Mr. Lippman. This error, if it was an error, was so unsubstantial as to afford no ground for reversal. The defendant was permitted to testify, in contradiction of plaintiff, that her first visit to him in 1936 was not for treatment of a cold. Testimony by a pharmacist was admitted on behalf of defendant in support of defendant's contention that plaintiff's visits to him in 1937 and 1938 were in the company of her mother or Mr. Lippman, and that he, the pharmacist, had a conversation with Lippman, relative to "fixing up" the plaintiff. Aside from this one restriction, the defendant was allowed the widest possible latitude in his testimony concerning the entire period covered by the testimony of plaintiff.

[13] It is next asserted that the conduct of plaintiff's counsel during the trial "was highly improper and prejudicial to the defendant." Excerpts from the reporter's transcript indicate that on several occasions plaintiff's counsel asked her questions such as, "Who is the father of the child? Did he give you any money for the support of the child?" and other questions implying that the money paid by defendant was for the support of the child, to which objections were made that such questions assumed facts not in evidence. Under the same heading appellant asserts that counsel sought to influence the jury, which was to try the issue of paternity only, by references to the substantial income of the defendant. The alleged misconduct was not such as to warrant a reversal or new trial.

[14, 15] The second appeal with which we are here concerned relates to the allowance of counsel fees to plaintiff and respondent in connection with defendant's ap-

peal from the judgment. It was stipulated that the sum of $750 was a proper allowance for fees and costs in connection with the trial of the cause. It is contended by appellant that the sum of $750 allowed for services in representing respondent upon this appeal is excessive; that if $750 is adequate for the work involved in preparing for trial, taking depositions, and engaging in a four-day trial, then a similar amount for defending upon appeal is excessive, as the amount of work and time involved on appeal is "substantially less" than that consumed prior to the appeal. No authorities are cited by appellant as to what would be a reasonable fee for work upon an appeal in circumstances similar to those here presented. The measure by which attorney's fees are to be gauged in cases such as the one before us is (1) defendant's financial ability to pay, and (2) the character and amount of services rendered. Andrade v. Newhouse, 54 Cal.App.2d 339, 346, 128 P.2d 927; Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806. It was shown that defendant's income was $800 per month net after payment of income taxes, and that he possessed $14,000 in bonds. It also appeared that he was paying $100 per month for the support of his son and was contributing to the support of his parents. It cannot be held, under the circumstances presented, that the allowance of fees on appeal is excessive. If the allowance is reasonable, considering the work to be done and the defendant's ability to pay, it may not be set aside solely because it equals or exceeds the amount awarded for preparation and trial of the action. In view of the lengthy trial, the questions raised on appeal, and the work involved in the preparation and presentation of respondent's case, we cannot hold that in making the award of attorney's fees here in question the court abused the wide latitude and discretion vested in it as to matters of this character. Andrade v. Newhouse, supra.

The judgment and the order allowing attorney's fees on appeal are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

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81 Cal.App.2d 100

WATTS v. HOLLYWOOD BOULEVARD TRAVEL SERVICE, Inc., et al.

Civ. 15841.

District Court of Appeal, Second District, Division 1, California.

July 30, 1947.

Trade-marks and trade-names and unfair competition 🔑95(3)

In suit by one doing business under the name of "Boulevard Travel Service" against defendants who subsequently established in the same neighborhood a similar business operated as the "Hollywood Boulevard Travel Service" to enjoin defendants from using such name in their business because of its similarity to the name under which plaintiff did business, order denying issuance of preliminary injunction pending trial on the merits was not an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by Charles H. Watts, doing business under the fictitious firm name and style of Boulevard Travel Service, against Hollywood Boulevard Travel Service, Inc., a corporation, and others to enjoin the use by defendants of the name "Hollywood Boulevard Travel Service" in connection with their business. From an order denying issuance of a preliminary injunction pending trial on the merits, the plaintiff appeals.

Order affirmed.

Mindlin & Levy, of Los Angeles, for appellant.

Tudor Gairdner, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from an order denying issuance of a preliminary injunction pending trial on the merits.

The complaint alleges that plaintiff had been doing business under the name of Boulevard Travel Service since July 2, 1945, with its principal place of business located at 6634 Hollywood Boulevard; other incidental and material facts are also alleged. It is further alleged that, "on or about October 1, 1946, defendants, other than the corporate defendants, having full knowledge of the foregoing facts, undertook and commenced a travel service business similar in all respects to the business heretofore conducted and now conducted by plaintiff, except as to the theatre and amusement admission and ticket phase of plaintiff's business; that said defendants adopted the name 'Hollywood Boulevard Travel Service' and opened a place of business under said name at 6735 Hollywood Boulevard, Hollywood 28, California; that immediately upon commencement of said business by said defendants, plaintiff notified said defendants that by reason of his prior adoption of said trade name of 'Boulevard Travel Service' and his prior use of said name in his business, plaintiff had acquired the right to the use of said name and requested said defendants to refrain from the use of the name 'Hollywood Boulevard Travel Service' in connection with their business for the reason that the similarity of names had, and would in the future, lead to confusion; that said individual defendants refused to refrain from the use of said trade name * * *". The action seeks to enjoin the use of the name adopted by defendants. The foregoing is a brief outline of the pleadings.

It is contended on appeal that the court's refusal to grant a preliminary injunction following the hearing on an order to show cause constituted an abuse of discretion. It should be emphasized at the outset that a trial on the merits is still pending. The trial court merely denied the injunction pendente lite. Although at the time of the hearing defendant's answer had not been filed, the motion was resisted and so far as the record discloses the action will be tried on the merits.

Of the cases relied on by appellant, most of them are concerned with appeals following a trial on the issues and not, as in the within appeal, from an order refusing to grant an injunction pendente lite. Carolina Pines, Inc., v. Catalina Pines, 128 Cal.App. 84, 89, 16 P.2d 781, 783, differs in this regard. In the latter case the court noted that, "A temporary injunction is proper where 'it appears from positive averments that respondent was first in time in business and first in the selection of a combination of words as a designation of a business which he had established and conducted some six or seven years before appellants entered the field, and which business was extensive, and to the development of which respondent had expended much time and devoted energy and doubtless some skill.'" But it does not follow that if the court even in that case had denied the petition for a preliminary injunction, such denial would have amounted to an abuse of discretion. It cannot be assumed, nor should it be assumed, that the court's action in the first instance, in such circumstances suggests the ultimate outcome of a trial on the merits. On the contrary in that regard it is of no significance. In the final analysis the record reveals one of those cases where the court's action one way or the other would not have constituted an abuse of discretion. In such circumstances appellant's contention cannot be upheld.

For the foregoing reasons the order is affirmed.

YORK, P. J., and WHITE, J., concur.

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80 Cal.App.2d 915

PEOPLE v. HAWKER.

Cr. 4109.

District Court of Appeal, Second District,
Division 1, California.
July 22, 1947.

Rehearing Denied Aug. 5, 1947.
Hearing Denied Aug. 21, 1947.

1. Criminal law 🔑741(1), 742(1)

The weight of evidence and credibility of witnesses are for the jury.

2. Criminal law 🔑1159(2)

A question of law is presented which authorizes an appellate court in setting aside a rape conviction, if the testimony relied on by the prosecution is apparently so improbable or false as to be incredible and to amount to no evidence at all, but the improbability must appear very plainly.

3. Criminal law ⚷1159(2)

A rape conviction will be set aside by an appellate court only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave no recourse, without self-stultification, except to reverse the judgment.

4. Rape ⚷51(7)

Prosecutrix' testimony identifying defendant as her assailant was sufficient to sustain rape conviction.

5. Criminal law ⚷553

In rape prosecution, evidence was insufficient to establish a bias and prejudice on part of the prosecution witnesses against defendant and in favor of prosecutrix.

6. Criminal law ⚷899

Statement of defendant's counsel, after court overruled counsel's objection to line of testimony, and explained the reason for the overruling of the objection, that counsel supposed that he might as well withdraw the objection and let the attorney for the state pursue such line of testimony as far as he wished, amounted to a waiver of the objection.

7. Witnesses ⚷269(2)

In rape prosecution, wherein defendant's landlady as a witness for the defense testified that defendant was home every night with the exception of two nights while he lived at her home other than nights when he was in jail, it was not improper to permit prosecution to cross-examine landlady with respect to the irregularity of the hours kept by defendant during period in question.

8. Criminal law ⚷1170½(5)

Alleged error of trial court, in permitting prosecution to cross-examine defense witness along a certain line, was cured by the subsequent interrogation of the witness along the same line by defendant's counsel on re-direct examination.

9. Criminal law ⚷1170(1)

Where defendant's evidence excluded in rape prosecution had reference to immaterial matters, defendant suffered no prejudice as result of the exclusion.

10. Criminal law ⚷829(1)

Refusal of certain instructions requested by defendant in rape prosecution was not prejudicial error, where jury was fully and fairly instructed in the various aspects of the case, and the substance of the refused instructions was included in the instructions given to the jury.

11. Rape ⚷57(2)

In rape prosecution, question of defendant's identity was for the jury.

12. Criminal law ⚷739(2)

In rape prosecution, question of the soundness of defendant's alibi and the weight to be given the evidence adduced in support thereof were for jury.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Clarence Lester Hawker was convicted of rape, and he appeals from the judgment of conviction and from the order denying his motion for a new trial.

Judgment and order affirmed.

Chase, Rotchford, Downen & Chase, Donn B. Downen, Jr., and Robert E. Moore, Jr., all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant was charged with the crime of rape and was found guilty thereof by a jury. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is here contended (1) that the testimony of the prosecutrix, in so far as it attempts to identify the appellant as her assailant, is so inherently improbable as to suggest that the verdict of the jury based thereon was the result of passion and prejudice; (2) that the testimony of other prosecution witnesses indicates a bias and prejudice on the part of each against the appellant and in favor of the prosecutrix; (3) that the trial court erred with respect to the admission and exclusion of evidence and in refusing to give certain instructions to the jury.

The prosecutrix, a college student of the age of 20 years and a resident of La Crescenta, testified that she was working as a waitress in Glendale on the night of May 17, 1946; that she finished her work at 12:30 a. m. of May 18th and boarded the last bus which left Glendale at 1:05 a. m.; that she alighted at the corner of Pennsylvania Avenue and Foothill Boulevard in La Crescenta, at which point Foothill runs approximately east and west and Pennsylvania, north and south, and walked in a northerly direction on Pennsylvania Avenue toward her home situated about a mile away. When she had walked about a city block a black two-door sedan passed her traveling in the same direction; that shortly after passing her, the automobile backed into a driveway on the east side of Pennsylvania; that said prosecutrix continued to walk up the hill past the sedan parked in the driveway; that when she passed the car, the lights thereof "were off," but she "noticed a man standing beside the car. I thought he lived there and was just going home so I continued walking up the hill." When the prosecutrix had proceeded about a quarter of a block or so, a man came up quietly behind her, "put a gun in my back and told me to go over to the side of the road or he would shoot"; that prosecutrix turned around "when he spoke to me and he still had the gun pointed at me. * * * He had a gun in his hand. * * * It was a pistol. * * * he told me to hurry up or he would shoot me. * * * I told him, you know, leave me alone, and he just kept telling me to shut up. * * * then he led me over to the side of the road, kind of pushed me along, he was behind me and had the gun in my back. * * * forced me into a lying position * * * then, he committed an act of sexual intercourse. * * * Well, he said, 'Don't move for five minutes,' and then he backed away holding the gun and then I left and went to the nearest place, the nearest house * * * A young couple were there. They let me in to use it (the telephone) so I phoned up the Sheriff's office," and some officers responded to the call shortly thereafter.

Prosecutrix further testified that there was "a big street light at the corner of Foothill and Pennsylvania; that Pennsylvania was being repaired and there were "red lanterns up and down the street," and that there was sufficient light for her to see the face of her assailant. At this point she indicated appellant Hawker as such assailant. Further testifying, she stated "his face to me is a face of horror and I could tell it very well. * * * He has a rather peculiar twitch about his face, I don't know just what he does but his face twitches"; that he was wearing a dark suit and a workman's cap with a visor. A cap of similar appearance was admitted in evidence. In response to the question, "Was there any other means of identification that you recall?" prosecutrix stated: "Well, besides his face I noticed his build, his walk, and also I noticed the lines in his cap. Q. Was there light so that you could distinguish his features? A. Yes, I noticed even the lines in his cap. I noticed his features."

On cross-examination, prosecutrix testified that there was no moonlight and with the exception of the street lanterns it was "pretty dark," but that there were overhanging clouds, which were quite low and therefore there "was a light out, and you could see things very clearly" and it was not too dark for her to distinguish the features of her assailant; that his face was very close to hers at times when she was lying on the ground; that she observed appellant when he walked away from her "until he got beyond the trees and then the view was obstructed * * * He had rather a stumbling walk"; that she identified appellant as her assailant at the Sheriff's office in Montrose a few days after the attack.

Deputy Sheriff Ward Agan, who with Officer Garrick responded to the prosecutrix' telephone call on the night of the attack, testified that at the scene of the crime the visibility was good and he was able to distinguish features at a distance of 8 or 9 feet; that there was a moon but the sky was overcast, a sort of haze; that he and officer Garrick picked up a belt belonging to prosecutrix which could be plainly seen without a flashlight. These officers both testified as to the appearance of the prosecutrix at the home of Mrs. Verna where they went in response to a telephone call on May 18, 1946, at about 1:45 or 1:55 a. m. The record discloses that said officers arrested appellant on May 23rd in front of a cafe at 3645 Foothill Boulevard, La Crescenta; at which time he was wearing the cap with a visor introduced in evidence; that after appellant left the cafe, he walked to his black two-door Ford sedan and got into the car where the arrest was made.

Appellant's main defense was an alibi for the night of May 17 and the early morning of May 18, 1946. He testified that he spent the afternoon of May 17th, accompanied by his sister-in-law, at Forest Lawn Cemetery looking for a crypt in which to place his wife's remains. In this connection Defendant's Exhibit A was introduced in evidence, i. e., a receipt from a salesman employed by Forest Lawn for money paid on account of said crypt dated May 17, 1947. Appellant further testified that he took his sister-in-law home, had dinner with some friends and returned to his room at the Sperling residence about nine o'clock in the evening and went to bed; that about 12:30 he awakened Mrs. Sperling and she joined him in the kitchen for a midnight snack at which time they discussed Forest Lawn and other matters until about 3:00 a. m. when he retired.

Mrs. Florence Sperling testified that she lived at a certain address in Tujunga which is two or three miles distant from Pennsylvania Avenue and Foothill Boulevard; that appellant was living at her house in May of 1946; that on or about May 23rd some police officers came to the witness' house with appellant and searched the latter's room; that when appellant was released from jail he returned to Mrs. Sperling's house and told her, Mrs. Lobato and other persons rooming there that he had been accused of rape and that "he had to have an alibi as to what he did that night or where he was that night." A few days later, appellant told Mrs. Sperling that he had thought it over and he knew what he had done on the night the rape occurred, and he then called her attention to an incident where another roomer had locked the bumpers of his car with the car of appellant while the latter car was parked outside of Mrs. Sperling's house and appellant had gotten out of bed and helped to disengage the bumpers of the two cars. Appellant stated to the witness that this incident occurred on the night of May 17th. The next day Mrs. Sperling discussed this with Mary Lobato and thereafter told appellant that the car incident occurred on the night of May 9th and not May 17th; that appellant then told the witness that on the night of May 17th he had returned home rather late from being at Forest Lawn Cemetery all day, and around 2:00 on the morning of May 18th he had asked the witness if he could make some coffee in her kitchen, to which she had acquiesced, "so he said that would verify the time he was at home that particular night."

Mrs. Sperling, after detailing the conversation and midnight snack with appellant in her kitchen, testified that she could not fix the date of the early morning conversation that was held between 12:30 and 2:30 as May 17th; that she could not remember whether it took place on the 17th, 18th, 13th or 23rd or what date exactly. Upon recross examination by the prosecution, Mrs. Sperling testified that her conversation with appellant with respect to Forest Lawn did not take place on May 17th; that she did not "remember when it was * * * I had a very bad headache, a migraine headache and I had to go to a doctor and that is how I checked to find out what date it was that the conversation occurred because the doctor gave me a shot of pantopon for the headache and it was not on the 17th. That is why I know."

In connection with his first point, appellant urges that "the conditions on the night of the attack with respect to lighting were conducive to error in the identifying or another person, and the circumstances of the attack were such as to militate against an accurate, calm and well-considered identification."

[1-4] Both the weight of evidence and the credibility of witnesses are matters entirely within the province of the triers of fact. As stated in 8 Cal.Jur. 590, section 582: "A question of law is presented which authorizes an appellate court in setting aside a verdict, if the testimony relied upon by the prosecution is apparently so improbable or false as to be incredible and to amount to no evidence at all. If it is of this character, the court is justified in assuming that the verdict obtained was the result of passion or prejudice rather than of a calm and dispassionate consideration of the evidence. To authorize a reversal under this rule, the improbability must appear very plainly. It has been said that the conclusions of the jury will be overruled only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave no recourse, without self-stultification, except to reverse the judgment." See, also, People v. Coley, 61 Cal.App.2d 810, 813, 143 P.2d 755, 757, in which it was stated that "It is not necessary for a witness to observe the features of a person charged with crime in order to identify him. There may well be other physical characteristics that are sufficient for identification such as detailed by Spencer who said he could identify appellant by his general build, his shoulders, the way he moved and by the tattoo mark between the thumb and index finger of his left hand." The evidence in the instant case clearly establishes that the night was not too dark to distinguish features at a distance of eight or ten feet. The testimony of the prosecutrix relating to the identification of appellant as her assailant which is recited in the foregoing resume is not inherently improbable. To the contrary, her testimony corroborated by that of other witnesses is legally sufficient to connect appellant with the crime charged against him and thereby to sustain the judgment of conviction.

[5] Appellant calls attention to the fact that the prosecutrix was the daughter of a Los Angeles County Probation Officer, and urges that it was more than mere coincidence that the chief witnesses against him were respectively (a) the officers who received the complaint and made the arrest; (b) Mrs. Lobato, who disliked the appellant and had preconceived ideas of his guilt or lack of sanity and was also a former policewoman; (c) Mrs. Sperling, whose husband (a former police officer) did not like appellant and advised her to turn over to the Sheriff's office the written statement of appellant with respect to the Forest Lawn and midnight snack incidents. He further urges that these witnesses were biased and prejudiced by reason of their current or former association, directly or indirectly, with police departments or other organizations sworn to the upholding and enforcement of the law.

The record herein does not sustain this contention of appellant. The arresting officers were necessary witnesses for the prosecution; Mrs. Sperling and Mrs. Lobato were associates of appellant's own selection; Mr. Sperling was not a witness at the trial, and Mrs. Sperling who did testify kept appellant in her home for several weeks after her husband disapproved of appellant's habit of entering the kitchen of the Sperling home in the early hours of the morning and disturbing other tenants.

[6] Appellant contends that the prosecutor persisted at the trial in asking questions relative to the report made to the sheriff's office by Mrs. Sperling, and the difficulties that appellant had with Mr. Sperling, assigning as error the testimony elicited from Mrs. Sperling in this regard. Reference to that portion of the transcript to which appellant directs attention discloses that at that time Mrs. Sperling had been called as a witness for the appellant and was under cross examination by the prosecution. In overruling appellant's objection to this line of testimony, the court pointed out that bias, interest or prejudice could always be shown on such cross-examination, with which statement appellant's

counsel agreed, and shortly thereafter stated: "I suppose I might just as well withdraw the objection and let counsel pursue it as far as he wants." This amounted to a waiver of the objection.

Appellant next assigns as error the admission of the testimony of Mrs. Sperling that appellant "never came in before one o'clock, as a rule," contending that such comment did not prove that appellant was keeping late hours and was not in the Sperling residence until after one o'clock on the morning of May 18, 1946, but that the admission of the statement was highly prejudicial because it undoubtedly left in the minds of the jury an inference to that effect.

[7] This was also brought out while Mrs. Sperling was a witness for the defense and was under cross-examination by the prosecution. On direct examination this witness testified that she saw appellant every day and that he was in her home every night with the exception of two nights while he lived there other than the nights he was in jail; and that ever since he lived in her home, appellant had been very nervous, did not sleep and kept irregular hours. Having so testified, it was not improper to permit the prosecution to interrogate the witness with respect to the irregularity of the hours kept by appellant during the period in question.

[8] Appellant also urges error in that the trial court "permitted the prosecution to re-examine Mrs. Sperling on the subject of her recollection of the exact date" of her conversation with appellant "concerning Forest Lawn and to elicit from her an assumption based upon hearsay information obtained from her doctor who treated her for migraine headache * * * in that it constituted a reversal of previous testimony of Mrs. Sperling to the general effect that *she did not recall* whether said conversation did occur on the night of May 17, 1946, or not." It will be noted that Mrs. Sperling was still on cross-examination, and also that after appellant's objection had been overruled, the prosecution was permitted to further cross-examine the witness along the same line without any objection from appellant, whose counsel then pursued the matter further by eliciting from said witness that the date of her conversation with appellant regarding Forest Lawn was on May 26, 1946, instead of May 17th. If any error occurred in this respect, it was cured by the interrogation of the witness by appellant upon redirect examination.

[9] Appellant complains that the court erred in certain of its rulings with respect to the exclusion of evidence. In each of the instances adverted to by appellant in his brief the excluded evidence had reference to immaterial matters, hence appellant suffered no prejudice as a result of the trial court's rulings thereon.

[10] Appellant finally contends that the court committed prejudicial error in refusing to give to the jury certain instructions requested by him. An examination of the record discloses that the jury was fully and fairly instructed in the various aspects of the case, and that the substance of the refused instructions was included in the instructions given to the jury. In addition the court gave the following cautionary instruction: "By reason of the fact that charges of the nature involved in this case can easily be made and are often difficult to disprove, I instruct you that it is your duty to examine with caution the testimony of the prosecuting witness. The fact that the charge here made, however, is one difficult to disprove should not deter you from rendering a verdict of guilty in the event that you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty as charged."

Throughout this appeal, appellant has maintained that he was not sufficiently identified as the perpetrator of the crime of which he stands convicted, and that he was not present at the time and place of its commission, but was at home in the company of Mrs. Sperling.

[11, 12] The question of appellant's identity was one for the jury to determine, as was also the question of the soundness of his alibi and the weight to be given to the evidence adduced in support thereof. An examination of the entire record discloses that appellant was afforded a fair and impartial trial and that the verdict

of the jury has not resulted in a miscarriage of justice.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

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81 Cal.App.2d 126

Ex parte ROSEGARTEN.

Cr. 4115.

District Court of Appeal, Second District, Division 3, California.

July 30, 1947.

1. **Habeas corpus 🔑113(3)**

Where writ of habeas corpus was issued by superior court discharging a parolee whose parole had been revoked, the questions involved on appeal by People became moot and the appeal would not be considered on the merits, where parolee voluntarily surrendered himself to the custody of the Bureau of Paroles pursuant to the order revoking his parole and waived all rights regarding custody by virtue of the writ of habeas corpus.

2. **Habeas corpus 🔑113(10, 13)**

Where writ of habeas corpus was issued by superior court discharging parolee whose parole had been revoked, and pending appeal by People, through voluntary action of parolee in surrendering himself to custody of Bureau of Paroles pursuant to order revoking parole and waiving all rights regarding custody by virtue of the writ of habeas corpus, the questions involved on appeal became moot, but where dismissal of appeal would unjustly either release parolee from custody or could unjustly be used as a possible basis for claim of res judicata as to legality of order revoking parole and parolee's subsequent detention, the order would be reversed to restore matter to superior court with directions to vacate the order and dismiss proceeding without prejudice.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding in the matter of the application of Emanuel Rosegarten for a writ of habeas corpus. From an order releasing Emanuel Rosegarten from the custody of the Sheriff of Los Angeles County and the Adult Authority, Department of Corrections, the People appeal.

Order reversed with directions.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellant.

Morris Lavine, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

The People have taken an appeal from an order of the Superior Court of Los Angeles County made on September 3, 1946, releasing Emanuel Rosegarten from the custody of the Sheriff of Los Angeles County and the Adult Authority, Department of Corrections, after hearing upon a Writ of Habeas Corpus.

Rosegarten was a parolee from the State Prison at San Quentin; he was arrested in Los Angeles County upon charges of receiving stolen property and violation of the Deadly Weapons Act, Gen.Laws, Act 1968; thereafter, the Adult Authority made an order suspending his parole pending disposition of said criminal charges; thereafter, upon the report of the Chief State Parole Officer the Adult Authority revoked respondent's parole and ordered him into the custody of the warden of the State Prison at Folsom; thereafter, respondent pleaded guilty to the offenses of receiving stolen property and violation of the Deadly Weapons Act and was sentenced to imprisonment in the County Jail; after the expiration of said sentence respondent was held in custody by virtue of a warrant theretofore issued by the Adult Authority pursuant to the revocation of his parole; a Writ of Habeas Corpus was issued upon respondent's petition and he was discharged from custody by order of the Superior Court of Los Angeles County, following which order the People took the present appeal. When the matter was called for hearing the Attorney General presented to the court and there were ordered filed a statement purporting to be in the handwriting of respondent and an affidavit of respondent transmitted with a letter from the Adult Authority, by which statement and affidavit respondent declared that he was surrendering himself to the custody of the Bureau of Paroles, Department of Corrections, pursuant to the order of the Adult Authority revoking his parole and that he thereby waived all rights regarding his custody by virtue of the Writ of Habeas Corpus theretofore granted. The matter was continued at the request of respondent's attorney for sufficient time to allow him to communicate with respondent; thereafter, there was submitted to the court a written statement of the attorney informing the court that he had been directed by respondent from the State Prison at Folsom to abandon all proceedings for respondent's release from custody.

[1] The questions involved on the appeal have become moot and the appeal should not be considered on the merits.

The order would become final if the appeal should be dismissed and would direct the Adult Authority to release respondent from custody to which he has voluntarily submitted. This absurd result, which respondent, himself, does not seek, should be avoided. The order should be vacated. In a practical sense it has been nullified by respondent's resubmitting himself to custody. Moreover, due to changed conditions, brought about by respondent's voluntary act, the order cannot serve as a determination as to the lawfulness of respondent's confinement as of the date the order would become effective. It could, therefore, operate to bring about only an unjust result either by accomplishing respondent's release from custody or as a possible basis for a claim of res judicata as to the legality of the order revoking the parole and respondent's subsequent detention. 39 C.J.S., Habeas Corpus, § 103, page 695, et seq.; 25 Am.Jur. p. 251, et seq.

We, therefore, have a situation in which the People have suffered an adverse judgment, have taken an appeal, and pending the appeal, through the voluntary action of respondent the questions involved have become moot and the People have been thereby deprived of the opportunity to have the appeal considered on the merits. Moreover, the situation in which the order was intended to operate no longer exists and the legality of respondent's present confinement is not involved or questioned by him.

[2] While the situation is one for which we have found no precise precedent a satisfactory guide for our action is found in the practice of the Supreme Court of the United States in similar circumstances. In Brownlow v. Schwartz, 261 U.S. 216, 218, 43 S.Ct. 263, 264, 67 L.Ed. 620, the court said: "The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance of the mandamus in force—at least apparently so—notwithstanding the basis therefor has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint, or petition. [Citing authorities.]" The practice was followed in United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, 239 U.S. 466, 36 S.Ct. 212, 60 L.Ed. 387. In considering what course would be "most consonant to justice" in view of the conditions and circumstances of the particular case the court said at page 478 of 239 U.S., at page 217 of 36 S. Ct., 60 L.Ed. 387: "Coming to consider the question in that light, and in view of the nature and character of the conditions which have caused the case to become moot, [the advent of a state of war] we are of opinion that the ends of justice exact that the judgment below should not be permitted

to stand when, without any fault of the government, there is no power to review it upon the merits, but that it should be reversed and the case be remanded to the court below with directions to dismiss the bill without prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the anti-trust act."

The order is reversed for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to vacate the order and dismiss the proceeding without prejudice.

WOOD, J., and KINCAID, Justice pro tem., concur.

80 Cal.App.2d 853

BUSICK v. MANDEVILLE et al.

Civ. 7333.

District Court of Appeal, Third District, California.

July 15, 1947.

1. Bankruptcy 🔑303(5)

Evidence justified judgment setting aside, at request of trustee in bankruptcy, conveyance of realty for constructive fraud upon bankrupts' creditors, where bankrupts after conveyance were insolvent, and antecedent debt which was either satisfied or merely secured by transfer did not constitute a fair consideration as being disproportionately small, in that value of realty at time of transfer was $10,250 and antecedent debt amounted only to $6,346.73, notwithstanding grantee did not intend to defraud creditors. Civ.Code, §§ 3439.03, 3439.04.

2. Appeal and error 🔑173(10)

In action by trustee in bankruptcy to set aside conveyance for alleged fraud, defendant could not for first time claim on appeal that cause of action was barred by laches. Civ.Code, §§ 3439.03, 3439.04.

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Action by Charles O. Busick, Jr., as trustee in bankruptcy, against Fred Mandeville and others, and Gertrude D. Lloyd to set aside realty conveyance for alleged fraud. From an adverse judgment, second named defendant appeals.

Affirmed.

F. H. Bowers, of Roseville, for appellant.

Charles O. Busick, of Sacramento, for respondent.

PEEK, Justice.

This is an action by the plaintiff trustee in bankruptcy to set aside two conveyances of the same parcel of real property, the first by defendants Fred and Velma Mandeville, husband and wife, to defendant Tony Rava, and the second, alleged to be a part of the same transaction, from Tony and Birdie Rava, husband and wife, to the defendant and appellant Lloyd on the grounds that both transfers were without consideration and made with the intent to hinder, delay and defraud the creditors of the Mandevilles. From the judgment in favor of the plaintiff on all the material issues the defendant Lloyd has appealed.

The evidence introduced at the trial established the following facts as found by the court. The transfer of the property from the Mandevilles to Tony Rava was without actual intent to defraud creditors although it rendered the Mandevilles insolvent and was made without consideration. Rava, who received the property merely as trustee for the benefit of the defendant Lloyd, then, together with his wife, transferred it without consideration to the said Lloyd pursuant to an agreement with the Mandevilles. Prior to these transfers the defendant Lloyd had advanced to the Mandevilles the sum of $6,346.73 for the purpose of improving the property, relying upon their legal right to transfer to her a valid title to the premises. The court found that this sum was disproportionately small as compared with the true value of the property at the time of the conveyance which it found to be $10,250, that it was less than a fair consideration and that therefore the transfer was a constructive fraud upon the Mandeville creditors. The defendant Lloyd was adjudged to be entitled to a preferred lien against the premises for the amount of the money so advanced, and for the repayment of which the conveyance was made as security. In lieu of voiding the deeds the court found as a conclusion of law that the defendant Lloyd should deposit in court within fifteen days the sum of $1,600, being the amount of creditors' claims, and in the event such deposit were not made the property to be available to plaintiff for the satisfaction of creditors' claims upon the payment to defendant of the sum of $6,346.73, thereby extinguishing her lien upon and title to the property. Judgment was entered accordingly.

Appellant now contends: 1. That in the absence of actual fraud, and having purchased the property in good faith for a fair consideration she thereby became the owner thereof to the exclusion of the creditors of the Mandevilles, and 2, that plaintiff's acquiescence in the transfer of the property for a period of twenty-two months constituted laches.

[1] Upon the record it must be conceded that after the conveyance of the property the Mandevilles were insolvent, having nothing out of which their creditors could satisfy their claims. It necessarily follows that said defendants thereby placed themselves squarely within the provisions of Section 3439.04 of the Civil Code, enacted in 1939 as a part of the Uniform Fraudulent Conveyances Act. Said section provides that: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

Having placed themselves in such position it remains to be determined whether the conveyance was made "without a fair consideration" as found by the trial court.

Section 3439.03 of the Civil Code defines fair consideration as follows:

"(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

"(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

In view of the specific wording of the last section it is wholly immaterial whether the conveyance was an outright sale of the property to appellant in consideration of the money previously advanced as she now contends or was transferred to her as security for the repayment of these sums as the trial court found. It is uncontradicted there was an antecedent debt which by the transfer either was satisfied as provided in subsection (a) or which was secured as provided in subsection (b).

The remaining question to be determined is whether or not the amount of the antecedent debt was disproportionately small as compared with the value of the property at the time of the transfer. The record discloses testimony by Thomas G. Maple, an appraiser of twenty years' experience, that in his opinion said property at the time it was transferred was worth $11,000. A second witness, H. S. Clegg, a State Inheritance Tax Appraiser, also called by plaintiff, testified that in his opinion the property was worth $10,250 at the time in question. On behalf of the defendants, Alvin W. Musso, who at the date of the transfer was an appraiser for a bank in Placer county but was presently engaged in farming, testified the property had a reasonable market value of $5,990. It therefore appears that the findings of the trial court that the value of the property at the time of the transfer was $10,250 and that the sum of $6,346.73 advanced by appellant was so disproportionately small as to amount to a constructive fraud upon the Mandeville creditors are amply sustained by the evidence. Carter v. Turner, 90 Cal.App. 193, 265 P. 870.

[2] Appellant's second contention, that of laches on the part of plaintiff, is raised for the first time on appeal. This defense was neither raised nor suggested in the trial court. Whether plaintiff should be barred from prosecuting his remedy for the alleged wrong done on the ground he has

been guilty of laches is a question which cannot be raised for the first time on appeal, but is one which should have been presented to the trial court in some manner in order that plaintiff might have had an opportunity to meet it. See 10 Cal.Jur. 556; 5 Cal.Jur. 10 year Supp. 557, and cases cited.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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81 Cal.App.2d 86

PORTER v. BESELER.

Civ. 3651.

District Court of Appeal, Fourth District, California.

July 28, 1947.

1. Evidence 🔑354(13)
Trial 🔑46(2)

In Price Administrator's action for damages for selling articles above ceiling prices, exclusion of books of account allegedly disclosing the cost of articles to defendant was not error, where evidence rejected consisted of accounts which were not original entries, most of offered evidence was cumulative at best, and no offer of proof was made to indicate that evidence was material. Emergency Price Control Act of 1942, § 205, as amended, 50 U.S.C.A.Appendix, § 925.

2. War 🔑4

In Price Administrator's action for damages for selling articles above ceiling prices, books of account allegedly disclosing small profits made by defendant were properly excluded as immaterial. Emergency Price Control Act of 1942, § 205, as amended, 50 U.S.C.A.Appendix, § 925.

3. Trial 🔑🔑194(9)

In Price Administrator's action for damages for selling articles above ceiling prices, instruction that it appeared from testimony that a certain sum had been paid which was less than full purchase price which purchaser had agreed to pay was not erroneous as telling jury that certain things were established as facts, where court clearly told jury that it should find certain things only in event it found certain other things to be true. Emergency Price Control Act of 1942, § 205, as amended, 50 U.S.C.A.Appendix, § 925.

4. War 🔑4

In Price Administrator's action for damages for selling a motorcycle above ceiling price, conflicting evidence supported jury's implied finding that ceiling price of motorcycle involved was $308 and not $332. Emergency Price Control Act of 1942, § 205, as amended, 50 U.S.C.A.Appendix, § 925.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Paul A. Porter, Administrator, Office of Price Administration, against George Beseler for an injunction and for recovery of damages under the Emergency Price Control Act for violating the act by selling certain used motorcycles and a motor scooter at prices in excess of those permitted by the Maximum Price Regulations issued pursuant to the act. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ray Miller, of San Diego, for appellant.

David London, of Washington, D. C., Austin Clapp, William B. Wetherall, and Cecil F. Poole, all of San Francisco, for respondent.

BARNARD, Presiding Justice.

This action was one for an injunction and for the recovery of damages pursuant to section 205 of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A.Appendix, § 925. The complaint alleged that the defendant violated the provisions of this act by selling certain used motorcycles and a motor scooter at prices in excess of those permitted by the Maximum Price Regulations issued pursuant to the act.

The cause was tried before a jury and, so far as material here, verdicts were returned in favor of the plaintiff on five of the causes of action set up in the complaint, assessing damages with respect to each cause within the range provided by the act. In connection with a motion for a new trial the court approved the respective amounts of damage fixed by the jury, and the defendant has appealed from the judgment which followed.

It is first contended that the court erred in refusing to permit the appellant to introduce in evidence certain of his books of account. It is argued that the records thus excluded would have disclosed the cost to the appellant of the various articles which he sold at an excessive price. It is further argued that this evidence, while not material as tending to prove or disprove a violation of the terms of the act, was material because the jury might have been inclined to fix smaller damages in instances where the appellant had made a smaller profit.

[1, 2] In each instance the court admitted the appellant's book of original entry and it appears from the testimony of a witness for the appellant that the evidence which was rejected consisted of accounts which were not original entries. Most of the offered evidence was cumulative, at best, and no offer of proof was made to indicate that the evidence was material, its materiality not being obvious at the time an objection was made to its introduction. Moreover, the evidence was not material for the purpose suggested by the appellant. The illegality of appellant's acts consisted in selling above the established prices and not in whether or not he made any profit on the transactions. There was ample evidence that in each instance he purposely kept accounts which reflected a selling price considerably below the price at which the property was sold. The excess of the actual selling price over the established price clearly appears in each instance. The intentional violation of the law, and the amounts of the excess prices collected were the proper elements to guide the jury in determining the amounts of damages that should be allowed, and any questions as to whether the appellant made a profit on the transaction, or the amount of any such profit, was immaterial. No error appears in this connection.

[3] It is next contended that the trial court, as to one transaction, invaded the province of the jury by an instruction which told them that certain things were established as facts. This contention is without merit. In the instruction in question the jury was told that under the terms of the act the overcharge on the price of a commodity related to the purchase price which the purchaser had agreed to pay, and was not controlled by the fact that the full purchase price had not yet been paid. In the criticized portion of the instruction the court stated that it appeared from the testimony that a certain sum had been paid on account of the purchase price of this motorcycle and that this sum was less than the full purchase price which the purchaser had agreed to pay. This was in accordance with the record and was merely preliminary to the matter with which the instruction was concerned. In the pertinent and material part of the instruction the court clearly told the jury that it should find certain things only in the event it found certain other things to be true.

[4] The only other point raised is that the evidence does not support the verdict and judgment with respect to one of the causes of action, being the sale of a certain motorcycle. In this connection, it is argued that the ceiling price of this motorcycle was $332 and not $308, as impliedly found by the jury. The matter giving rise to this contention relates to a conflict in the evidence with respect to the identity of the motorcycle which was sold in this instance, that is, as to whether it was one of a certain model or one of a different model with a more powerful engine. Not only is there a conflict in the evidence on this matter but a conflict appears in this regard in the testimony of the appellant's own witness, a part of which sustains the implied finding of the jury. The evidence, while conflicting, is sufficient to support the verdict and judgment on this cause of action.

The judgment is affirmed.

MARKS, J., concurs.

80 Cal.App.2d 954

LOS ANGELES RY. CORPORATION et al. v. DEPARTMENT OF EMPLOYMENT et al. (four cases).

Civ. 14879.

District Court of Appeal, Second District, Division 3, California.

July 23, 1947.

1. Taxation ⟹219

Employment of individuals working for motor coach system operated in and around Los Angeles by a railroad, which was subject to Federal Railroad Unemployment Insurance Act, and another, to extent of one-half of wages paid therefor by railroad company, was employment with respect to which unemployment compensation was payable under a federal act, and, to that extent, was exempt from California Unemployment Insurance Act. Gen.Laws, Act 8780d, § 7.5; Social Security Act, § 901 et seq., 42 U.S.C.A. § 1101 et seq; Railroad Unemployment Insurance Act, §§ 1–17, 45 U.S.C.A. §§ 351–367; 29 U.S.C.A. § 45b.

2. Master and servant ⟹78

Where individuals working for motor coach system operated in and around Los Angeles by a railroad, which was subject to Federal Railroad Unemployment Insurance Act, and another, were held to be one-half under the railroad system of unemployment insurance and one-half under California Act, the California Employment Commission and the Railroad Retirement Board, as the responsible administrative agencies, would have power to avert the dual status by an agreement between them for unitary administration of account of motor coach system by one of them. Gen. Laws, Act 8780d, §§ 7.5, 52.5, 56.5(b), 57.5; Social Security Act § 901 et seq., 42 U.S.C.A. § 1101 et seq; Railroad Unemployment Insurance Act, § 4(a) (v), 12 (f, g), 45 U.S.C.A. §§ 354(a) (v), 362(f, g); 29 U.S.C.A. § 45b.

◆

Appeal from Superior Court, Los Angeles County; **Frank C. Collier, Judge.**

Consolidated actions by the Los Angeles Railway Corporation and another against the Department of Employment and others to recover contributions paid under protest pursuant to provisions of California Unemployment Insurance Act of 1935, Gen.Laws, Act 8780d. From a judgment for defendant, the plaintiffs appeal.

Reversed with directions.

Prior opinion 166 P.2d 602.

Frank Karr, C. W. Cornell and E. L. H. Bissinger, all of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Charles W. Johnson, Deputy Atty. Gen., for respondents.

SHINN, Acting Presiding Justice.

This is an appeal by plaintiffs Los Angeles Railway Corporation, hereafter called Corporation, and Pacific Electric Company, hereafter called Company, from a judgment in favor of defendant and cross-complainant California Employment Commission and others in four actions consolidated for trial. These actions were brought to recover certain employer and employee contributions together with certain penalty and interest thereon, all of which were paid, under protest, pursuant to the provisions of the California Unemployment Insurance Act of 1935 (Stats. 1935, ch. 352, Deering's Gen.Laws, Act 8780d), hereafter called California Act, upon wages paid in the operation of certain motor coach lines, now designated as Los Angeles Motor Coach Lines but hereafter called Lines.

In 1923 the Corporation and the Company pursuant to a written agreement commenced the joint operation of the Lines as supplemental to their several street car services in and about Los Angeles. In 1935 the California Act was enacted as a part of the national unemployment insurance system contemplated by Title IX of the Social Security Act, 49 Stat. 620, 42 U.S.C.A. § 1101 et seq., 29 U.S.C.A. § 45b. Thereafter employer and employee contributions under the California Act based upon the wages paid those working for the Lines were paid by the Corporation and the Company. Each paid one-half of the wages paid such employees and each paid contributions based upon its one-half of such wages. On July 1, 1939, the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U.S.C.A. §§ 351–367, hereafter called Railroad Act, became effective. Just prior thereto and in anticipation thereof the Legislature passed Chapter 169 of Stats. 1939, effective immediately, which made various amendments to the California Act. Among those made was section 7.5 which, so far as here pertinent, reads as follows: "The term employment does not include service performed after June 30, 1939, with respect to which unemployment compensation is payable under the Railroad Unemployment Insurance Act * * *."

On July 1, 1939, the Company, which is a carrier and employer under various federal railroad statutes, in response to demands made under the Railroad Act, began making the appropriate payments under that Act upon its share of wages paid to those working for the Lines and, claiming the quoted exemption of section 7.5 of the California Act, ceased its payments of contributions to respondent commission. The Corporation continued to pay under the California Act. In June, 1942, respondent commission first took the position that the Lines constituted an employing entity distinct from the Corporation and the Company, and set up a separate account for the Lines. Therefore, it denied that the Company, to the extent of the wages paid by it to workers for the Lines, came under the Railroad Act, as an employer of those workers, and thereafter demanded that the Company pay the delinquency, consisting of unpaid contributions to March 31, 1942, together with penalty and interest, alleged to exist since July 1, 1939. This demand was complied with by payments under protest. Such payments were likewise made by the Corporation and the Company to the new separate account of the Lines for the second and third quarters of 1942. This litigation was then initiated to recover the sums paid under protest and for other appropriate relief. We note that counsel for the Corporation and the Company stated in the trial court that the Corporation was not seeking to recover its half of the two 1942 quarterly payments, the prayers of the two complaints to the contrary notwithstanding. It is our understanding from this statement (which is not found in the briefs) that the Corporation is no longer contesting its liability for contributions under the California Act for those working for the Lines, based upon the one-half of their wages paid by the Corporation. That liability would appear to have been satisfied.

The Company, in a further effort to resolve the question as to where its unemployment insurance liability for the wage earners working for the Lines lay, instituted suit in the local federal district court to recover the payments made by it upon such wage earners under the Carriers Taxing Act of 1937, 50 Stat. 435, 45 U.S.C.A. §§ 261–273, subch. B, ch. 9, Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, §§ 1500–1537. For reasons which will hereinafter appear we have withheld our final determination of this appeal pending the outcome of this federal litigation. We have always been of the opinion that the decisive question presented in both the state and federal litigation is whether the Company is required to contribute under the Railroad Act for its share of wages paid to those working for the Lines.

[1] In the action instituted by the Company in the federal court, the United States Circuit Court of Appeals for the Ninth Circuit rendered judgment holding that so far as the one-half of the wages paid by the Company is concerned, the employment of those working for the Lines comes under the Carriers Taxing Act. United States v. Pacific Electric Ry. Co., Cir., 1946, 157 F.2d 902; cf. Pacific Electric Ry. Co. v. United States, D.C.Cal. 1945, 64 F.Supp. 796. On April 7, 1947, the United States Supreme Court declined to review this decision. 67 S.Ct. 1094, 91 L.Ed. 1293. This conclusion was arrived at from a consideration of the nature of the operation of the Lines by the Corporation and the Company, the question being whether the Lines was an "employer" within the meaning of that term as used in the Carriers Taxing Act. It was held that it was not such employer, and that the Company was an employer under that federal act to the extent of its payment of wages to workers for the Lines. If we consider this holding to be a construction of a federal statute, rather than a mere interpretation of the contract between

the Corporation and the Company, it is controlling here for the reason that the definition of "employer" in the Carriers Taxing Act and the Railroad Act is identical. See Magruder v. Baltimore Steam Packet Co., 4 Cir., 1944, 144 F.2d 130. But whether or not the holding is binding upon us we should follow it in order to avoid the inevitable confusion which would result from the assertion of liability of the Company under both the Railroad Act and the California Act. We therefore hold that the employment of those working for the Lines, to the extent of one-half of the wages paid therefor by the Company, is employment with respect to which unemployment compensation is payable under the Railroad Act. By virtue of the plain language of section 7.5 of the California Act which we have heretofore quoted, such employment, to that extent, is therefore exempt from the California Act. The unemployment insurance liability of the Company in regard to such employees is limited to payments under the Railroad Act.

[2] Respondent commission argues that to hold those working for the Lines to be one-half under the railroad system of unemployment insurance and one-half under the California Act as a part of national system of unemployment insurance is inequitable to those employees because under sections 52.5 and 57.5 of the California Act, and section 354(a)(v) of the Railroad Act, their joint status adversely affects both their eligibility to benefits and the amount of benefits payable to them. Assuming that the dual status presents an administrative problem, this is a consequence which the responsible administrative agencies, respondent commission and the Railroad Retirement Board have the power to avert by an agreement between them for unitary administration of the Lines account by one of them pursuant to section 56.5(b) of the California Act and section 362 (f and g) of the Railroad Act.

The judgment is reversed for such further proceedings as may be necessary to a disposition of the issues, in accordance with the views herein stated.

WOOD, J., and KINCAID, Justice pro tem., concur.

81 Cal.App.2d 18

PEOPLE v. ONE 1941 CHRYSLER 6 TOUR SEDAN.

Civ. 13281.

District Court of Appeal, First District, Division 1, California.

July 28, 1947.

Rehearing Denied Aug. 27, 1947.

Hearing Denied Sept. 25, 1947.

1. Judgment 🔑386(3)

A court of record possesses inherent power to set aside on noticed motion a void judgment not void on its face if motion is made within one year of entry of the void judgment. Code Civ.Proc. §§ 473, 473a.

2. Judgment 🔑153(1)

Where motion to set aside default judgment which was not void on its face was made within one year from date of entry of such judgment, trial court's action in setting aside such judgment would be sustained notwithstanding court and counsel mistakenly believed that statute authorizing defense within one year after judgment in which summons was not personally served was controlling. Code Civ. Proc. §§ 473, 473a.

3. Appeal and error 🔑1056(1)

In proceeding to vacate default judgment forfeiting automobile allegedly used in narcotic offense, exclusion of driver's license showing automobile owner's changes of address long before he had lived at address to which notice of the forfeiture proceeding was sent was not prejudicial to the state.

4. Judgment 🔑142

A proceeding for forfeiture of automobile used in narcotic offense does not involve issuance of "summons" so as to be within statute authorizing defense within one year after rendition of judgment, where "summons" has not been personally served. Code Civ.Proc. § 473a; Health and Safety Code, §§ 11610 et seq., 11613.

See Words and Phrases, Permanent Edition, for all other definitions of "Summons".

5. Forfeitures 🔑5

A forfeiture proceeding is not an "action" but a special "in rem proceeding", equitable in nature, against the offending property. Health and Safety Code, § 11610 et seq.; Code Civ.Proc. §§ 22, 23, 363, 407, 473, 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Action" and "In Rem Proceeding".

6. Judgment 🔑142

A statutory proceeding for forfeiture of automobile used in narcotic offense is not within statute authorizing defense within one year after rendition of judgment in "action" wherein summons has not been personally served, but is a "special proceeding". Health and Safety Code, § 11610 et seq.; Code Civ.Proc. §§ 22, 23, 363, 407, 473, 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding".

7. Forfeitures 🔑5
Judgment 🔑142

The automobile, not its owner, is "defendant" in a proceeding for forfeiture of automobile used in narcotic offense, and hence the proceeding is not within statute authorizing defense within one year after judgment in which summons has not been personally served on "defendant", but the time within which court may act is by analogy the one-year limit fixed in the statute. Code Civ.Proc. § 473a; Health and Safety Code, § 11610 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Defendant".

8. Judgment 🔑142, 415

The statute authorizing defense within one year after judgment in which summons was not personally served applies primarily where service was constructive, constructive service is permitted, and valid judgment is secured, but where service is invalid court never acquires jurisdiction, and judgment based thereon is void and may be attacked by motion if seasonably made or by suit in equity. Code Civ.Proc. § 473a.

9. Constitutional law 🔑319

Even though action of forfeiture is one in rem against vehicle, owner of vehicle must be given notice of proceedings and opportunity to be heard, under due process clause. Code Civ.Proc. § 473; Health and Safety Code, § 11610 et seq.

10. Constitutional law 🔑309(2)

Where proceeding is in rem and in some other situations, statute may provide for substituted or constructive service, under due process clause.

11. Constitutional law 🔑309(1)

"Due process" requires that statutory notice make it reasonably probable that party proceeded against will be apprised of the proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

12. Constitutional law 🔑309(1)
Process 🔑77

Generally and under due process clause, a statute providing alternative methods of substituted service does not empower complainant to select arbitrarily any one of the alternatives regardless of facts or regardless of his knowledge that selected method will be ineffectual, where he knows that one of the other permitted alternatives would give notice to the party proceeded against.

13. Forfeitures 🔑5

Under statute authorizing alternative methods of giving notice of proceeding to forfeit automobile used in narcotic offense, the alternative of sending notice to address on file with motor vehicle department is normally adequate; but where the state knows that owner's address as given on registration certificate is not his present address, and knows his present address, the alternative of notice to his last-known address should be used. Health and Safety Code, § 11613.

14. Constitutional law 🔑309(1)

"Due process" is a variable concept, and whether it has been violated depends upon facts, but where alternatives are given, it requires use of the alternative reasonably calculated to notify the person affected.

15. Appeal and error 🔑931(1)

Reviewing court must consider as true the evidence most favorable to respondent.

16. Judgment ⚿162(4)

Evidence authorized setting aside default judgment of forfeiture of automobile allegedly used in narcotic offense, on ground that in following statutory alternative method of giving notice, by mailing notice to address given on registration certificate, state officers knew that automobile owner had moved and knew his present address so that they should have followed statutory alternative of sending to last-known address. Code Civ.Proc. § 473; Health and Safety Code, § 11613.

17. Judgment ⚿162(4)

Evidence did not establish that owner had actual knowledge of proceedings to forfeit automobile for alleged use in narcotic offense, and hence he was not barred by laches from vacating default judgment of forfeiture. Code Civ.Proc. § 473; Health and Safety Code, § 11613.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Proceeding by the People of the State of California against one 1941 Chrysler 6 Tour Sedan, license No. 1 N 974, engine No. C34-9458, for forfeiture of automobile allegedly used in a narcotic offense, wherein default judgment was secured and John B. Treadwell, claimant, moved to vacate the judgment. From an order vacating the judgment, the People appeal.

Affirmed.

Prior opinion, 180 P.2d 780.

Fred N. Howser, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for appellant.

Alfred J. Hennessy, of San Francisco, for respondent.

PETERS, Presiding Justice.

A rehearing was granted in this case because of the contention of the attorney general, made for the first time on rehearing, that, even if the judgment here involved is void, since it is not void on its face, and since § 473a of the Code of Civil Procedure is not applicable, the sole remedy of the party adversely affected is an independent suit in equity unless such party moves to set the judgment aside within six months of its entry as provided in § 473 of the Code of Civil Procedure. Here the motion to set the judgment aside was made 363 days after the judgment of forfeiture by default was entered. After further study of this problem we are convinced that the contention made is without merit.

The contention fails to consider all of the various paragraphs of § 473, assumes that the six-month limitation found in paragraph 3 of that section is applicable to the entire section, and assumes that, unless § 473a applies, there is no power in a trial court to allow such relief after six months. This confusion arises because of the fact that prior to 1933 the provisions of § 473 and of § 473a were contained in one section, so that there was both a six-month and a one-year limitation found in the section, applicable, of course, to different situations. In that year the original § 473 was split into two parts. Old paragraph 3 of § 473 remained in that section. That paragraph refers to judgments taken against a party through his "mistake, inadvertence, surprise or excusable neglect," and requires the motion to be made within six months. The paragraph has no direct reference to void judgments. Section 473a (formerly and until 1933 a part of § 473) provides for a particular situation—where summons has not been personally served (even though constructive service is permitted) the court may allow the aggrieved party within one year to answer on the merits. Both the third paragraph of § 473 and § 473a are primarily directed to setting aside valid judgments. Prior to 1933, § 473 contained no express provision relating to the power of courts to set aside void judgments. But prior to that time the law was settled that courts of record possessed inherent power to set aside a void judgment, whether or not it was void on its face, provided that, as to a void judgment not void on its face, the motion was made within a reasonable time. If the motion was not made within a reasonable time the party was relegated to an action in equity. In determining whether the motion was made within a reasonable time the courts applied by analogy the one-year provision of old § 473, now § 473a. Thus when these old cases referred to the time limits of § 473 they were referring to the one-year limitation, not the six-month limitation. When the legislature revamped § 473 in 1933, and broke it down into two sections, they added to § 473 paragraph 4. This paragraph was formerly § 900a of the Code of Civil Procedure, applying to courts not of record. So far as pertinent here that paragraph now reads: "The court may * * * on motion of either party after notice to the other party, set aside any void judgment or order." For a discussion of the 1933 amendments to § 473 see In re Estate of Estrem, 16 Cal.2d 563, 572, 107 P.2d 36; F. E. Young Co. v. Fernstrom, 31 Cal.App.Supp.2d 763, 764 et seq., 79 P.2d 1117.

The addition of paragraph 4 to § 473 in no way changed the then existing law. It merely gave express statutory recognition to an inherent power of the court. It in no way changed the period within which a motion to set aside the void judgment must be made. That period remained a reasonable time, which, by analogy, is the one-year period now contained in § 473a. Any other conclusion would lead to an absurdity. Thus, under § 473a a person against whom a valid judgment has been secured on constructive service may be relieved on motion any time within one year, but, if the contention of appellant were sound, a court could not, on motion, relieve a party from a void judgment not void on its face where there was no personal service, after the passage of six months.

[1] The conclusion that a court possesses inherent power to set aside on noticed motion a void judgment not void on its face if the motion is made within a reasonable time and that such "reasonable" time is one year and not six months, is abundantly supported by the cases decided before and after 1933. A few of the cases decided prior to 1933 are Smith v. Jones, 174 Cal. 513, 163 P. 890; In re Dahnke's Estate & Guardianship, 64 Cal.App. 555, 222 P. 381; Vaughn v. Pine Creek Tungsten Co., 89 Cal.App. 759, 265 P. 491 and Barnett v. Reynolds, 124 Cal.App. 750, 13 P.2d 514; see, also, Richert v. Benson Lumber Co., 139 Cal.App. 671, 34 P.2d 840, decided in 1934 but discussing the old statute.

In 1938 the appellate department of the Superior Court of San Diego County wrote a most interesting and informative opinion on these matters in F. E. Young Co. v. Fernstrom, 31 Cal.App.Supp.2d 763, 79 P.2d 1117. There the trial court attempted on motion to set aside a judgment four years after its entry. The order setting aside the judgment was reversed solely because more than *one year* had elapsed from the entry of judgment. The court, after referring to the 1933 amendments to § 473 and calling attention to and quoting paragraph four of the amended section, stated (at page 765 of 31 Cal.App.Supp.2d, at page 1119 of 79 P.2d):

"This amendment made explicit a power which Superior Courts had always had independently of Section 473 or of any other statutory provisions. Richert v. Benson Lumber Co., 139 Cal.App. 671, 674, 34 P.2d 840, and many cases cited. The only reason that we can think of, therefore, for writing it expressly into Section 473, is the probability that the legislature, which must be presumed to have known that the power to set aside void judgments was inherent in courts of record, had some fear lest if it were not, after the repeal of Sections 859 and 900a, Code of Civil Procedure, placed in some statute, courts not of record might be held not to possess it at all.

"As applied to Superior Courts, however, is was unquestionably the law prior to 1933, that attacks by motion upon judgments void for want of jurisdiction but not appearing to be void on their faces, must be made within a reasonable time, and the courts were held to be limited in deciding which was a reasonable time, not under section 473, Code of Civil Procedure, but by analogy to it, to a maximum of one year after the entry of the judgment except in the single case of actual fraud on the part of the process server in making a false return. (See discussion in Richert v. Benson Lumber Co., supra.)

That having been the settled rule with respect to Superior Court proceedings had prior to the amendment to Section 473 in 1933, we see no reason to believe that the legislature intended to deal with the question of the time within which motions to set aside such judgments might be made, by the amendment. The new language inserted in the section contains nothing purporting to govern the matter. In these circumstances we think the former rule that a reasonable time only should be allowed ought to be held still to prevail, and that, by analogy, to the limit fixed by Section 473a in cases generally where personal service has not been made (as, e. g., in case of service by publication), that the motion must still be made within the year next following the entry of judgment (except in the case of bad faith on the part of the process server or person responsible for the actual making of the return of service)."

All of the cited cases and the rules announced therein were reaffirmed by the Supreme Court in 1940 in Re Estate of Estrem, 16 Cal.2d 563, at page 571, 107 P.2d 36, at page 40, where the court stated:

"We need not be concerned with the proper characterization of such proceedings as a direct or collateral attack. Long prior to this amendment [of 1933 to § 473] it was well established that the superior court had jurisdiction *at any time* to set aside a judgment or order *void on its face.* [Citing many cases.] It was further settled that it had the power *within a reasonable time,* which by analogy to Code of Civil Procedure section 473a was limited to one year, to set aside a *default* judgment or order void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings. [Citing the Richert, Smith, Dahnke, Barnett and Vaughn cases, *supra.*] In addition, a judgment could be attacked at any time either by motion or in an independent action in equity on the grounds that it was procured by extrinsic fraud. [Citing cases.]

"Prior to 1933 this particular subdivision of 473 was in section 900a of the Code of Civil Procedure, relating to justices' courts. In that year as part of extensive amendments made to the various Code sections relating to the jurisdiction and procedure of the courts, the special sections relating to the justices' courts were repealed and their contents incorporated in the general sections relating to pleadings in civil actions, Code Civ.Proc., secs. 420 to 475, which were at that time made applicable to all courts. Code Civ.Proc. sec. 34. Fear existed that unless the contents of former section 900a was placed in some statute, courts not of record might be held to be without those powers. [Citing the F. E. Young Co. case, supra.] Thus, the 1933 amendment to section 473 added nothing to the jurisdiction of the courts with respect to setting aside their judgments or orders. Independently of this provision a court may set aside at any time a judgment or order obtained by extrinsic fraud. A court may set aside at any time a judgment or order void on its face. It may set aside a default judgment or order issued without proper jurisdiction over the person of the defendant who at no time was before the court if motion for such relief is made within one year. And, of course, it may set aside a judgment or order inadvertently made upon motion within six months, under section 473." See, also, Thompson v. Cook, 20 Cal.2d 564, 127 P.2d 909.

All of the cases cited by appellant, including the case chiefly relied upon—People v. Davis, 143 Cal. 673, 77 P. 651—involve situations where the motion was made more than one year after entry of judgment—in the Davis case it was eight years. These cases hold that if the motion is made after one year it cannot be granted—the affected party must sue in equity. People ex. rel. Pollock v. Bogart, 58 Cal. App.2d 831, 138 P.2d 360, cited by appellant, involved a holding that the particular orders involved were not void as to the movent. While the court, by dicta, implies that another "fatal defect" to the motion may well be its lack of timeliness, the opinion does not show when the challenged orders were entered. There is no discussion of the point. If the motion was made within one year of the entry of the challenged order there was no "fatal defect" so far as timeliness was concerned under the rule announced in the very cases cited by the appellate court—the Davis, Richert and Smith cases, supra.

[2] The appellant also contends that the motion here involved was expressly made under § 473a, and urges that, since the court has held that that section is not applicable, respondent is entitled to no relief. It is true that the motion was made under § 473a and that the trial court may have thought it was acting under that section, but what appellant overlooks is that the court possesses inherent power to set aside void judgments on noticed motion provided, where the judgment is not void on its face, the motion is made within one year of the entry of the void judgment. Here it was so made. There is no contention made that, had the motion been directed to the inherent power of the court rather than to the statutory power conferred by § 473a, the appellant could have urged any other defense or offered any other evidence than it was permitted to make or offer in this proceeding. In fact, the power conferred by § 473a is much more limited than the inherent power existing in courts of record. Inasmuch as the inherent power exists, and inasmuch as the one-year limitation was satisfied, the action of the trial court should be sustained, even if it and counsel mistakenly believed that § 473a was the controlling section.

We are satisfied that, with a few minor deletions and additions, the opinion formerly filed by this court correctly disposes of all other questions on this appeal. We therefore adopt that former opinion, except for such deletions and additions, as the balance of the opinion of this court. Deletions from the former opinion are indicated by * * * and additions thereto are enclosed within [ ].

The State, based upon constructive service, secured a default judgment forfeiting the interests of the legal and registered owners in a certain automobile alleged to have been used by the registered owner in a narcotic offense. After that judgment became final the registered owner, Treadwell, purporting to act under § 473a of the Code of Civil Procedure, moved to vacate the judgment on the ground that he had not been personally served and had a good defense to the action on its merits. The lower court not only permitted the parties to file affidavits on the issues presented, but also held a hearing and witness testimony was introduced. Thereafter, the trial court vacated the default judgment of forfeiture. From the order vacating the judgment the State appeals.

The vehicle in question, of which Treadwell is the registered owner, was seized by inspectors of the division of narcotic enforcement on December 8, 1944. Thereafter, the State instituted forfeiture proceedings pursuant to § 11610 et seq. of the Health and Safety Code. A notice of seizure and intended forfeiture was filed in the Superior Court on January 9, 1945, and was served on the registered and legal owners by registered mail on the same day. So far as Treadwell is concerned, and he is the one who is involved in the present proceeding, the notice was mailed to him at 3152 San Fernando Road, Glendale, Los Angeles County. This address was the one that appeared as his home address on the certificate of registration of the vehicle in question. Neither owner appeared or contested the proceeding, and on February 20, 1945, their defaults were taken, and on the same date a judgment forfeiting the vehicle to the State was entered.

On February 18, 1946, Treadwell filed a notice of motion, purporting to act under § 473a of the Code of Civil Procedure, requesting the vacation of the default judgment and permission to file an answer in the original forfeiture proceedings. The motion was based on the ground that Treadwell had never been served with the notice of seizure and intended forfeiture as required by § 11613 of the Health and Safety Code, and on the further ground that he had a valid defense to the action on the merits. The verified motion alleges that Treadwell was arrested and jailed in San Francisco on December 8, 1944, and that he remained incarcerated until January 16, 1945; that although the state authorities knew these facts they mailed the notice of intended forfeiture on January 9, 1945, to the Glendale address; that subsequently the unopened letter was returned to the state authorities and they failed to deliver it to him in jail or otherwise.

[3] Affidavits and counter-affidavits were introduced by both sides in an effort to support their respective positions. A hearing was held at which most of the affiants were called as witnesses. F. J. O'Ferrall, chief of the division of narcotic enforcement, averred that Treadwell was informed at the time of his arrest on December 8, 1944, by affiant and inspectors Misterly and Fennell that the automobile would be the subject of forfeiture proceedings, and Treadwell was directed by the officers to remove all of his personal effects from the car. He also averred that he did not know when Treadwell was released from jail and that it was not his practice to keep informed as to the times when persons arrested for narcotic offenses are released. At the hearing O'Ferrall produced a butane permit which had been taken from Treadwell by the narcotic officers at the time of his arrest, and which had been retained by the officers. This document is dated July 5, 1944, and gives Treadwell's address as 747 Larch Street, San Francisco. O'Ferrall likewise produced Treadwell's driver's license which had been taken from the prisoner at the time of his arrest. It had been issued November 25, 1941, and gave Treadwell's address as 1401 South Hill Street, Los Angeles. There were two changes of address officially noted on the card, one, dated July 5, 1942, giving the address of 1022 South Hill Street, Los Angeles, and the last address, dated October 19, 1942, was listed as 1328 South Hope Street, Los Angeles. Treadwell's counsel refused to offer this document in evidence and when the State offered it, the trial court sustained an objection. While the State now objects to this ruling, and while the court might well have permitted the driver's license to be admitted, its exclusion could not have been prejudicial to the State. It was dated long before the butane permit and the certificate of registration and at most would have shown that Treadwell frequently changed his residence.

O'Ferrall testified that it was the duty of the attorney general's office to file and to serve the notice of seizure. He also testified that he did not take from Treadwell his two draft cards, and that he has no recollection of ever seeing them. Both cards gave Treadwell's then address as 747 Larch Street, San Francisco.

While O'Ferrall was on the stand the State introduced the certificate of registration and ownership of the automobile in question. It was dated June 23, 1944, showed Treadwell as the registered owner and gave his address as 3152 San Fernando Road, Glendale. That is the address to which the notice in question was sent. O'Ferrall testified that when Treadwell was arrested he told the prisoner that the officers intended to impound the car, awaiting confiscation proceedings; that he told Treadwell he would hear from the attorney general's office and be notified of the proceedings and that at that time he should take the matter up with his attorney. An envelope addressed to Treadwell dated March 23, 1944, and giving his address as 3152 San Fernando Road, Los Angeles (not Glendale), was then introduced into evidence after being identified as one of the papers taken from Treadwell at the time of his arrest. O'Ferrall stated that when arrested Treadwell told the arresting officers that the address on the certificate of registration was his.

By affidavit Marshall Burnett, a state narcotic inspector, averred that about October 1, 1945, Treadwell called on affiant and requested the return of certain documents including the butane permit, stating to affiant that, while he knew his car had been forfeited, he could make other use of the permit.

The two inspectors that arrested Treadwell, John Misterly and John Fennell, averred that they did not know when Treadwell had been released on bail; that they did not know his San Francisco address or that he was a resident of San Francisco; that at the time of his arrest Treadwell stated that he was a resident of Los Angeles and was enroute there when arrested. At the hearing Misterly testified that he told Treadwell at the time of his arrest that the automobile was going to be held until confiscation proceedings were instituted; that Treadwell told the witness that his address was Terrace Hotel, at 1200

West 6th Street, Los Angeles; that he, the witness, saw the butane permit with the Larch Street address but that Treadwell stated that that address was that of his brother; that he did not know how long Treadwell was in jail; that he did not know whether the butane permit had been turned over to the attorney general's office; that he had never called at the Larch Street address.

Ralph Scott, the deputy attorney general who handled the forfeiture proceeding, averred that the notice of intended forfeiture was mailed to Treadwell at 3152 San Fernando Road, Glendale, on January 9, 1945; that the notice, unopened, was returned to his office January 23, 1945, with a notation that the addressee had moved without leaving a forwarding address. The envelope was introduced into evidence and it shows no reason checked why it was returned to the sender. He testified that in June or early July, 1945, he informed the attorney for Treadwell that the automobile had been forfeited by a judgment in favor of the State.

Treadwell, by counter-affidavit, denied that O'Ferrall, Misterly or Fennell ever informed him that the automobile was subject to forfeiture, and denied the material portions of their affidavits and testimony. He averred that Misterly and Fennell were in court on January 14, 1945, when his motion to reduce bail was heard. He denied telling the officers at the time of his arrest, or at any other time, that he was a resident of Los Angeles, and also denied the averments in Burnett's affidavit.

Bernice Treadwell, sister-in-law of Treadwell, averred that since November, 1942, she had lived at 747 Larch Street, San Francisco, and was living there on February 1, 1945; that on February 1, 1945, Treadwell likewise resided at that address and continued to so reside until September, 1945, when the whole family moved to another San Francisco address; that during his residence at Larch Street, Treadwell received his mail at that address; that on February 1, 1945, and again a week later, officer Misterly called at the Larch Street address and inquired for Treadwell but he was not then at home. At the hearing she testified that Treadwell first came to live at her home on Larch Street in the fall of 1943 and thereafter lived there off and on; that some time during 1943 or 1944 Treadwell went to Los Angeles for four or five months, but still kept his room at the Larch Street home and received his mail there; that Treadwell continued to live with them on Larch Street until September, 1945; that he was living on Larch Street in December, 1944, when he was arrested; that Treadwell had told her that his car had been seized.

The attorney for Treadwell * * * [had no recollection of] having been told by Scott that the car had been seized, and averred that as Treadwell's attorney, on January 14, 1945, he moved for a reduction in amount of bail; that Misterly and Fennell were in the courtroom that day ready to prosecute Treadwell; that at that time Treadwell was in custody.

This fairly summarizes the evidence before the trial court. That court entered its order that the judgment of forfeiture of February 20, 1945 "be and the same is hereby vacated and set aside as of the 19th day of February, 1946." From this order the State has taken this appeal.

The State makes three main contentions: (1) That the court had no power to grant the relief requested under § 473a of the Code of Civil Procedure; (2) that service on Treadwell of the notice of seizure and intended forfeiture was made in exact compliance with the provisions of the Health and Safety Code; and (3) that, in any event, any relief the court could have granted to Treadwell was barred by his laches.

[4] It is probably true that the provisions of § 473a of the Code of Civil Procedure do not [directly] apply to the type of proceeding here involved. That section provides that: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." The three key words are "summons," "action" and "defendant." None of these

words applies to the specialized type of proceeding here involved. In the first place, there is no provision in the law in this type of case for the issuance of a "summons." The information that need be contained in the notice of seizure is not the same or as complete as that required for a summons. Compare § 407 of the Code of Civil Procedure, setting forth what a summons must contain, with the holding in People v. One 1933 Plymouth, etc., Auto, 13 Cal.2d 565, 569, 90 P.2d 799, discussing what the notice of seizure must contain.

[5, 6] In the second place, a forfeiture proceeding is not an "action" but a special *in rem* proceeding, equitable in nature, against the offending property. People v. One 1941 Mercury Sedan, 74 Cal.App.2d 199, 202, 168 P.2d 443; Traffic Truck Sales Co. of California v. Justice's Court, 192 Cal. 377, 384, 220 P. 306. This type of proceeding clearly is not an "action" but a "special proceeding," as those terms are normally used. Section 22 of the Code of Civil Procedure defines an "action" as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Section 23 of that code provides: "Every other remedy is a special proceeding." It is true that § 363 of the Code of Civil Procedure provides that "The word 'action' *as used in this title* is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." (Italics added.) But it should be noted that by statutory limitation this interpretation is to be given only where the word "action" appears "in this title." Section 363 is in Title II of the code entitled "Time of Commencing Civil Actions." Section 473a is in Title VI, entitled "Pleadings in Civil Actions." (See for a general discussion 1 Cal.Jur. p. 325, § 16.) Obviously, the rule of construction set forth in § 363 has no application to § 473a.

[7] In the third place, § 473a by its terms is limited to actions in which the summons has not been personally served on a "defendant." The automobile and not the owner is the "defendant" in a forfeiture proceeding. [It follows that § 473a does not directly apply to proceedings of the type here involved. But, as already pointed out, the last paragraph of § 473 is applicable, and the time within which the court may act is, by analogy, the one-year limit fixed in § 473a.] * * *

[8] [In view of our holding that the last paragraph of § 473 is applicable, and that a motion made thereunder is seasonable if made within one year, it] remains to be determined whether there was a sufficient service in this case to satisfy the requirements of due process. Section 473a applies primarily to cases where the service was constructive, and constructive service is permitted, and a valid judgment is secured, but the court relieves from the valid judgment because the defendant was not personally served. Fox v. Townsend, 149 Cal. 659, 661, 87 P. 82; Gray v. Lawlor, 151 Cal. 352, 354, 90 P. 691, 12 Ann.Cas. 990; Penland v. Goodman, 44 Cal.App.2d 14, 111 P.2d 913. But where the service made is an invalid service the court never acquires jurisdiction, the judgment based on such service is void, and may be collaterally or otherwise attacked * * * [by motion if seasonably made or by a suit in equity.] See discussion and cases collected 1 Freeman on Judgments, p. 685, § 340; 15 Cal.Jur. p. 52, § 141; 7 Cal.Jur. (Ten Yr.Supp.) p. 348, § 141; 31 Am.Jur. p. 193, § 597; In re Culp, 2 Cal.App. 70, 83 P. 89; § 1916, Code of Civil Procedure. Therefore, the real question in this case is whether the service here involved was a sufficient service as required by law.

[9, 10] Preliminarily, it should be noted that, although the action of forfeiture is one in rem against the vehicle, it is nevertheless necessary that the owner of the vehicle, under the due process clause, be given notice of the proceedings and an opportunity to be heard. That was the precise holding in People v. Broad, 216 Cal. 1, 12 P.2d 941, where the Supreme Court held that the then existing statute providing for a forfeiture of a vehicle involved in a narcotic offense was unconstitutional because it failed to provide for notice to the owner and an opportunity to be heard. (See cases collected 31 Am.Jur. p. 195, § 598.) Of

course, this notice need not, in all cases, be personal notice. Where the proceeding is one in rem, and in some other situations, the statute may constitutionally provide for substituted or constructive service. See cases collected 12 Am.Jur. p. 292, § 597; 12 C.J. p. 1228 et seq., § 1006 et seq.; 16 C.J.S., Constitutional Law, § 619c, p. 1252; 1 Freeman on Judgments, p. 705, et seq. § 347, et seq.

In the present case the State has seen fit to provide for constructive service in this type of case. Section 11612 of the Health and Safety Code provides that: "Notice of seizure and intended forfeiture proceeding shall be filed with the county clerk and shall be served on all owners." Section 11613 then provides: "Notice shall be given to each owner according to one of the following methods:

"(a) Upon each owner whose right, title, or interest is of record in the Department of Motor Vehicles, by mailing a copy of the notice by registered mail to the address as given upon the records of the Department of Motor Vehicles.

"(b) Upon each owner whose name and address is known, to the last known address of the owner.

"(c) Upon all other owners, whose addresses are unknown, but who are believed to have an interest in the vehicle, by one publication in a newspaper of general circulation in the county where the seizure was made."

There are several things to be noted about this statute. In the first place, there is no mention of personal service at all, even if personal service is feasible, although there can be no doubt that if the owner were personally served such service would be a valid service. Most constructive service statutes provide that the constructive service is permitted only where personal service cannot reasonably be had. That is true of our general constructive service statute set forth in § 412 of the Code of Civil Procedure. But § 11613 of the Health and Safety Code contains no such express limitation on its operation. It provides three methods of constructive service, that provided in subdivision "c" to be used only when some address of the owner is unknown. Subdivisions "a" and "b" provide two methods of constructive service where some address of the owner is known to the State. In the instant case the State elected to act under subdivision "a" and sent the notice to the address given on the certificate of registration, dated June 23, 1944. This notice was mailed from the attorney general's office on January 9, 1945. The evidence most favorable to Treadwell, the respondent, shows that on that date the state officials knew or should have known the following facts:

1. That Treadwell was then in jail as a result of his arrest by the narcotic officials. He had been arrested on December 8, 1944, and was not released until January 16, 1945. On January 14, 1945, two of the state narcotic officers were present in court when a motion to reduce Treadwell's bail was made. On January 9, 1945, therefore, the state narcotic inspectors knew [or should have known] that the present address of the registered owner was the county jail, and that he was not then * * * [staying] at the Glendale address.

2. That they had in their possession a document which showed that the latest address of the registered owner was on Larch Street in San Francisco. This was disclosed by the butane permit taken from Treadwell by the arresting officers at the time of his arrest and kept by the officers until the time of trial of the present proceeding. That document is dated July 5, 1944, while the Glendale address given on the certificate of registration appears on a document dated June 23, 1944.

[11, 12] In determining what the duties and responsibilities of the State were under the above circumstances, certain fundamental principles must be kept in mind. Substituted service is permitted in certain cases so that justice will not be delayed or thwarted because of the inability of the plaintiff to secure personal service. Due process requires, however, that the statutory type of notice provided must be of such a nature that it is reasonably probable that the party proceeded against will be apprised of the proceedings. This principle

is elementary. Obviously, the legislature in drafting a constructive service statute cannot possibly foresee all of the various factual situations to which the statute may be applicable. Frequently, therefore, the legislature does what it did in § 11613 of the Health and Safety Code, that is, provide several alternative methods of substituted service. But where alternatives are thus given the statute does not empower the complainant to select arbitrarily any one of the alternatives regardless of the facts or regardless of his knowledge that such selected method will be ineffectual, where he knows [or should know] that one of the other permitted alternatives would give the party proceeded against notice. There is a fundamental requirement of fair play which controls all of the constructive service statutes. This is not merely a general principle but is also based upon the due process clause. Where alternatives are given the complainant is under a constitutional duty to select the alternative that is reasonably calculated to notify the adverse party. Stated negatively, the complainant may not select an alternative that he knows [or should know] will not notify the other party when he also knows [or should know] that one of the other alternatives, if selected, would notify the adverse party.

In 16 C.J.S., Constitutional Law, § 619, p. 1259, it is stated: "The character of the notice required to constitute due process, however, varies with the nature of the proceeding and the circumstances of the case. Due process of law is satisfied if the notice given is sufficient to make it reasonably probable that the party proceeded against would be apprised of what is going on and given an opportunity to defend * * *."

In McDonald v. Mabee, 243 U.S. 90, 92, 37 S.Ct. 343, 344, 61 L.Ed. 608, L.R.A. 1917F, 458, Mr. Justice Holmes in discussing a Texas statute that permitted published service in personal actions against Texas citizens stated: "But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

The same problem in relation to personal actions was discussed by the Supreme Court of United States in Milliken v. Meyer, 311 U.S. 457, 462, 61 S.Ct. 339, 342, 85 L.Ed. 278, 132 A.L.R. 1357, where it was stated: "Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state [citing cases] as well as where he was personally served without the state. * * * Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard."

[13] By analogy, the rule of these cases is applicable here. There can be no doubt that § 11613 provides several "reasonable" methods of apprising the owner of the offending vehicle of the pending proceedings against the car. Normally, notice sent to the address on file with the motor vehicle department, where no other address is known, is reasonably calculated to reach him. It is then the best means available to notify the party in question, and if he does not receive the notice it is because he has failed to notify the motor vehicle department of his change of address. However, where the State knows [or should know] the address given on the registration certificate is not the present address of the registered owner, and knows [or should know] his present address, it is obvious that the alternative provided in subdivision "b"—notice to the "last known address"—is the method "best calculated" to notify the owner. In such a case subdivision "b" provides the method, to use the language of the Mabee case, supra, "that is most likely to reach the defendant," or, to use the language of the Milliken case, supra, subdivision "b" contains "the form * * * reasonably calculated to give him actual notice of the proceedings."

[14] Due process is a variable concept. Whether it has been violated depends upon the facts of the case. Where alternatives are given it requires that that alternative reasonably calculated to notify the person affected must be used.

[15] The application of these principles to the facts of the present case seems obvious. The evidence most favorable to respondent, and that is the evidence we must consider as true on this appeal, shows that the narcotic inspectors had in their possession not only the registration certificate but the butane permit. That permit was dated later than the registration permit. It showed the San Francisco address as the latest address of Treadwell. But of even greater importance, the narcotic inspectors knew that they had arrested Treadwell on December 8, 1944, knew he had been placed in jail, and, as late as January 14, 1945, they knew that he was still in jail. When the notice was mailed on January 9, 1945, they were chargeable with the knowledge that such notice could not possibly have reached Treadwell, he then being in jail at their instigation. When the notice was returned on January 23, 1945, unopened, no attempt of any kind was made to ascertain Treadwell's then address, and his default was entered on February 20, 1945. At that very time, according to the uncontradicted evidence, Treadwell then resided in San Francisco on Larch Street, and the inspectors knew or should have known that this was the latest address given by Treadwell on the butane permit.

[16] It is no answer to say that the deputy attorney general who prepared the notice did not have actual knowledge of all of these facts. By his own admission he made no effort of any kind to ascertain Treadwell's true address. He was content to send the notice to the address on the registration certificate without any inquiry. He knew that Treadwell had been arrested on December 8, 1944, because the notice recites that the offense forming the basis of the proposed forfeiture was committed on that day. Yet the deputy made no attempt on January 9, 1945, or at any other time, to ascertain if Treadwell was then incarcerated—a fact that could easily have been determined. The State is the one that seeks to forfeit the vehicle. The State through its duly authorized agents, the narcotic inspectors, knew the true facts. It was their duty to inform counsel for the State. Certainly, the State cannot escape the results that flow from the fact of knowledge by claiming that its officers, duly authorized to enforce the narcotic act, failed to notify the State's attorney of pertinent facts. It must be held that the legal and factual situation presented is one where the State knew [or should have known] on January 9, 1945, and thereafter, that Treadwell was in jail in San Francisco, where it knew his latest residence was on Larch Street, San Francisco, but nevertheless sent the notice to Glendale knowing that the notice so sent would not, in all probability, reach Treadwell, and where they knew that there were other addresses that would reach him. Certainly it cannot be held that such procedure satisfies elementary principles of fair play or of due process. Valuable property or constitutional rights cannot be taken away by such procedure. It follows, of course, that the State did not comply with the requirements of § 11613 of the Health and Safety Code as here interpreted, and for that reason the judgment of forfeiture was void and was properly set aside.

[17] The contention of the State that relief should be denied Treadwell because of his alleged laches is based on the theory that several state witnesses testified Treadwell learned of the forfeiture in June or July, 1945, and did not institute this proceeding until February, 1946. The answer to this contention is that Treadwell * * * denied such knowledge and denied having the conversations in question. [His attorney had no recollection of such conversations.] The trial court decided this and all other issues in favor of Treadwell. Therefore, even if knowledge gained several months after the forfeiture were a relevant factor to be considered, which we do not here decide, we must hold that no such knowledge here existed.

The order vacating the default judgment of forfeiture is affirmed.

BRAY, J., and OGDEN, J., pro tem., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

80 Cal.App.2d 887

DUEHR et al. v. CALLAWAY et al.

Civ. 7420.

District Court of Appeal, Third District, California.

July 19, 1947.

Appeal and error 🔑805

Appellants, who failed to appear on motion to dismiss the appeal or to file a written opposition to the motion as required by court rule, abandoned their appeal, and hence appeal would be dismissed. Rules on Appeal, rule 41(c).

Action by Raymond H. Duehr and another against Carl Callaway, also known as Omar Carl Callaway, and others, to quiet title to real property. From a judgment, plaintiffs appeal and defendants move to dismiss the appeal.

Motion granted and appeal dismissed.

Ralph H. Lewis, of Sacramento, for appellants.

McAllister & Johnson, of Sacramento, for respondents.

PER CURIAM.

The respondents moved to dismiss the appeal in this case for failure on the part of appellants to prosecute their appeal. The notice of motion was served on appellants' attorney May 16, 1947. Notice of appeal to the Supreme Court, from a judgment which was rendered against plaintiffs, November 22, 1946, in Sacramento County, in a suit to quiet title to real property, was filed February 13, 1947. The cause was transferred by the Supreme Court to this court on May 15, 1947. Appellants failed to appear in this court on the motion to dismiss the appeal, and also failed to file a written opposition to the motion as required by Rule 41 of Rules on Appeal.

Rule 41(c) of Rules on Appeal provides that:

"Failure of an appellant to appear and oppose a motion to dismiss an appeal after due service of notice of motion, or to file a written opposition to the motion, may be deemed an abandonment of the appeal authorizing its dismissal."

We assume from the foregoing record that the appellants have abandoned their appeal in this case.

The motion is granted and the appeal is hereby dismissed.

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81 Cal.App.2d 146

DOLGOFF v. DOLGOFF.

Civ. 7377.

District Court of Appeal, Third District, California.

Aug. 1, 1947.

Hearing Denied Sept. 29, 1947.

1. Divorce 🔑65

The superior court of Yolo county, in which husband residing in Yolo county instituted divorce action against wife residing in Nevada, acquired jurisdiction of both husband and wife, notwithstanding that wife was not present at time of trial, where wife submitted herself to jurisdiction of such court by filing her answer to husband's complaint.

2. Divorce 🔑303(1), 309

A court acquiring jurisdiction of parties to divorce suit retains ancillary jurisdiction to modify decree of divorce by awarding to either spouse the custody or necessary maintenance of their minor child, for its best interest, even though one of the spouses has acquired a residence with the child in another state. Civ.Code, § 138.

3. Divorce 🔑289, 290

Where husband and wife both submitted to jurisdiction of California court in divorce suit and both appeared and participated in subsequent motion for support money for their child, California court had jurisdiction under statute to make an order for such support against husband residing in California, notwithstanding that wife applying for such support resided with child in another state, and that child was absent from California during divorce trial and subsequent support proceedings. Civ. Code, § 138.

4. Guardian and ward ⟹8

Jurisdiction to appoint guardians of minor children, unlike applications for custody or maintenance of minor children in divorce cases under statute, ordinarily depends upon the residence or domicile of the children. Civ.Code, § 138.

◆

Appeal from Superior Court, Yolo County; Mervin C. Lernhart, Judge.

Divorce action by Jake S. Dolgoff against Mary H. Dolgoff, who filed a cross-complaint. From an order for maintenance of an infant child, which was made upon application of defendant after an interlocutory degree of divorce was rendered against the defendant, the plaintiff appeals.

Order affirmed.

J. J. Henderson, of Sacramento, for appellant.

Chalmers, Eddy, Cowing & Sans, of Woodland, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from an order in a divorce proceeding for maintenance of an infant child, which was made upon application of the defendant, after an interlocutory decree of divorce had been rendered against her.

[1] Plaintiff and defendant were married January 24, 1941. They resided in Yolo County. A son was born as the issue of the marriage. He was named Stephen, and was about three years of age at the time of the commencement of the divorce case. The plaintiff became a member of the armed forces and was absent from their home for several years. The defendant and their infant child went to Nevada, where they established a residence. When the plaintiff returned, he commenced suit in Yolo County for divorce on the ground of extreme cruelty. The complaint was filed November 14, 1945. The defendant appeared and answered the complaint, denying the alleged cruelty, and asked for custody of and maintenance for the child. She also filed a cross-complaint asking for a divorce on the ground of cruelty. A demurrer to the cross-complaint was sustained with leave to amend it. The amendment was not filed. The defendant was not present at the time of trial. But she submitted herself to the jurisdiction of the Yolo County court by filing her answer to plaintiff's suit for divorce, which remained on record in that proceeding. The court thereby obtained jurisdiction of both parties.

After trial an interlocutory decree of divorce was rendered against the defendant on the ground of cruelty, on June 10, 1946, but it failed to provide for either the custody or control of the child. October 8, 1946, the defendant filed her written application in said case for modification of the interlocutory decree and for allowance to her of maintenance for said child in the sum of $100 per month. That application was supported by her affidavit of merits. An order to show cause why said allowance should not be made was issued and served on the plaintiff. He appeared in opposition to the motion and filed his counter-affidavit of merits. The plaintiff averred that defendant obtained an absolute divorce from him in the State of Nevada on July 8, 1946, together with an order for custody and control of the child, and further averred, on information and belief, that the defendant and their child were residents of Nevada on September 27, 1946.

The motion in the Yolo County court, for maintenance of the child, was heard on the affidavits filed, and submitted upon briefs of the respective parties. November 26, 1946, the court made its order modifying the interlocutory decree, and awarding the defendant a specified sum per month for maintenance and support of the child. From that order the plaintiff has appealed.

The appellant contends that the Yolo County court was without jurisdiction to allow the defendant maintenance for the child, since both she and the child were residents of the State of Nevada at the time of the divorce trial and when the motion for support of the child was heard.

This is not a question of jurisdiction of a court to render a judgment in a divorce suit for maintenance of a minor child *against* the spouse who resides in another state and who has never appeared or submitted himself to the jurisdiction of the court. It is an entirely different problem. This appeal presents the question of whether a court, having acquired jurisdiction of both parties to a divorce case, by their appearances and participation in the motion for support money for the child, has jurisdiction under Section 138 of the Civil Code, to make an order for such maintenance against the resident spouse, even though the applicant therefor actually resides with their child in another state.

Section 138, supra, provides in part:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."

[2] It has been decided by the great weight of authority that when a court has acquired jurisdiction of the parties to a divorce suit it retains ancillary jurisdiction to modify the decree of divorce by awarding to either spouse the custody or necessary maintenance of their minor child, for its best interest, even though one of the spouses has acquired a residence with the child in another state. In re Kolb, 60 Cal.App. 198, 200, 212 P. 645, 646; Stephens v. Stephens, 53 Idaho 427, 24 P.2d 52, 55; 70 A.L.R. 526, note. In the Kolb case, supra, the husband, who resided in California, brought suit for divorce in this state. His wife and minor child resided in New York. The wife came to California and answered the complaint, denying the material allegations thereof. She also filed a cross-complaint, upon which she was awarded a divorce. The decree did not award the custody of the minor child to the cross-complainant, but did award maintenance to the wife and minor child. The child was not brought to California. After the interlocutory decree was rendered the wife returned to New York. For failure to pay the maintenance award, upon motion to show cause the husband was adjudged guilty of contempt. He instituted habeas corpus proceedings to secure his release from jail, on the theory that the court was without jurisdiction, since both the wife and their minor child were residents of New York. Upon hearing, the writ was discharged and the prisoner was remanded. The court said:

"At the time the divorce case was commenced the wife was residing in New York. Upon being informed of the pendency of the action, she came to California, but the minor child was not brought into this state. After the interlocutory decree was entered, the wife returned to New York. It does not appear that the decree purported to give the wife the custody of the minor child. No issue of or concerning its custody is involved. Hence the rule stated in De La Montanya v. De La Montanya, 112 Cal. 131, 44 P. 354, is not involved. The decree did award maintenance to the wife and minor child, residents of New York, and such money judgment was rendered by a court of this state against the husband, a resident of this state.

* * * * * *

"It follows that the petitioner should be remanded, and the writ discharged. It is so ordered."

[3] The principle involved in that cause is the same which is presented in this case. That decision is in accord with the great weight of authority, and we think it controls the issue on the present appeal. The Kolb case determines that even though the wife, who is a party to a divorce suit, resides with their minor child in another state, but personally appears in that suit in a California court, and thereby confers jurisdiction on the court, an order to pay maintenance to the wife "*and minor child*" is valid and enforcible. The only distinction between that case and the present one is that the court there made the order for maintenance in the interlocutory decree, while in this case the order was made upon subsequent motion for modification of that decree and allowance of support money for the minor child. Both parties appeared and participated in that proceeding. We conclude that the court in this case retained juris-

diction to make the challenged order, despite the fact that the mother and child resided in the State of Nevada.

We are of the opinion the absence of the minor child from this state during the trial and subsequent proceeding for maintenance is immaterial. In the Stephens case, supra [53 Idaho 427, 24 P.2d 55], it is said in that regard:

"Formally the child was not a party to the action. She was before the court because of the fact that her parents were in court, and both parents voluntarily submitted to the court, who, as between the parents, should have custody and control. In the case of Anderson v. Anderson, 74 W.Va. 124, 81 S.E. 706, 707, the court laid down the following rule: 'That the children may not have been within the jurisdiction of the court at the time of the institution of the suit or entry of the decree is immaterial, since the parties litigant were the father and mother, and the cause of action, the right of custody, in so far as it affected the children, was between them, and the court had full jurisdiction over them with power to render a personal decree.' "

It will be observed this case does not involve the right of the custody of the minor child. It merely affects the jurisdiction of the court in which a divorce suit is pending to award to the wife, who has the custody of the child but lives in another state, a specific sum for necessary maintenance of the child. Moreover, it is said in 27 C.J.S., Divorce, § 303b, page 1164, that:

"The court may make a decree for the support and maintenance of a nonresident child *where the parents have submitted to the jurisdiction of the court.*" (Italics added.)

Likewise, it is said in 17 American Jurisprudence 520, section 686, that:

"The proceedings to modify such a decree [awarding the custody of children in a divorce case] are, in a sense, ancillary to the suit for divorce *in which jurisdiction of the parties has been properly acquired.*"

In the heading to annotations appearing on that subject, in 70 A.L.R. at page 526, note, which is supported by numerous authorities from various states, the author states:

"In some jurisdictions there are statutes which empower the court, in entering a decree of divorce, to make an order fixing the right to the custody of children, and to alter or modify the same from time to time, as the circumstances may require. The question whether, under such statute, or, in the absence of statute, in the exercise of its inherent powers, a court may alter or modify its decree of divorce as to the custody of children, in the absence of the parent or the child from its territorial jurisdiction, has been resolved, by the great weight of decisions, in favor of the existence of such power in the court."

In California, the authority to make an allowance to a spouse in a divorce case for the maintenance of a minor child which is the issue of the marriage, at any time during the pendency of the action, or at the final hearing, or "at any time thereafter during the minority of any of the children of the marriage," is found in Section 138 of the Civil Code, as we have previously stated. When that order is made upon due notice to the adverse party, and both parties appear and participate in the proceeding, it is valid and binding regardless of the actual residence of the applicant therefor, or of their minor child.

The cases cited by the appellant in opposition to the previously stated rule are distinguishable from the facts of the present case. The text cited by the appellant from 9 California Jurisprudence, at page 786, section 130, to the effect that a court has "no authority to award custody of children not within its territorial jurisdiction," has no application to an order made in a divorce case for the maintenance of a child, where both parties appear and participate in the proceeding. The first case cited in support of that statement in the text is In re McMullin, 164 Cal. 504, 129 P. 773. That was a petition for a writ of habeas corpus in which petitioner, the husband, alleged that he was being unlawfully imprisoned by the sheriff of Sonoma County under Section 270 of the Penal Code for wilfully failing to support his minor child. It was not an application in a divorce case, under Section 138 of the Civil Code, for an order to support a minor child. No divorce suit was ever commenced in California. The wife did take their daughter to Nevada, where she procured a divorce and custody of the child. She then returned to Sonoma County, where she was duly appointed guardian of the person and estate of their daughter. Since there was no divorce suit pending in Sonoma County, the question of actual or ancillary jurisdiction of a divorce court was not involved.

In support of the same quotation from California Jurisprudence, last mentioned, the case of De La Montanya, 112 Cal. 131, 44 P. 354, was cited. That was a separate suit brought in San Francisco by the wife, for the guardianship, custody and control of children. It was not a divorce case. Prior to the commencement of that suit, and a former suit for divorce, which last-mentioned case was reversed on appeal (112 Cal. 101, 44 P.345, 32 L.R.A. 82, 53 Am.St.Rep. 165), the husband had taken the children and left the State of California. He was not present and did not participate in either trial. In both suits service by publication of summons, only, was made. The defendant did not appear or answer either complaint. In the latter suit for guardianship and custody of the children, the default of the defendant was entered, and judgment was rendered awarding plaintiff the custody of the children. Subsequently the father moved to vacate the judgment on the ground that the court lacked jurisdiction, since the father and the children were residing in another state, and he did not appear or submit himself to the jurisdiction of the court. That motion was granted. The court said, "Jurisdiction *to appoint a guardian* for infants, under the American system, is entirely local." That case has no application to the facts of this suit. The court never acquired jurisdiction in that case of either the father or the children. That was a petition for guardianship, and not a suit for divorce. In the present action both parties submitted to the jurisdiction of the court in the divorce suit, and participated in the very motion for support of the children.

In re Chandler, 36 Cal.App.2d 583, 97 P. 2d 1048, 1049, relied on by the appellant in this case, is not in point. The question of jurisdiction of a California court to make an order for the maintenance of minor children, in a divorce suit, was not involved. In that case, the father, who petitioned for a writ of habeas corpus, had taken the minor children from California and established a residence in Texas. The wife subsequently commenced suit for divorce in Los Angeles. The defendant appeared in that suit in California. The court made an order for the defendant to "bring said children from the state of Texas and produce them in the Los Angeles superior court." For failure to do so he was cited before the court on a charge of contempt, and found guilty thereof. He was imprisoned for contempt, and instituted the petition for habeas corpus on the ground that the California court had no authority to *compel him to bring the children from Texas to California.* That was the only issue determined in that case. The court held that a parent could not be compelled to bring children from their domicile in one state into another state. In support of that conclusion the court cited the text in 9 California Jurisprudence, at page 786. That case is not authority, precluding a court from awarding maintenance for the benefit of minor children in a divorce court when both parties have submitted themselves to the jurisdiction of that court.

The other cases cited by the appellant may be likewise distinguished.

[4] It is true that jurisdiction to appoint guardians of minor children, unlike applications for custody or maintenance of minor children in divorce cases under Section 138 of the Civil Code, ordinarily depends upon the residence or domicile of the children. 13 Cal.Jur. 146, secs. 8 and 9. That very distinction has led to much confusion upon that subject.

That portion of the order awarding maintenance to the respondent for support of the minor son, from which this appeal was taken, is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. McRAE.

In re McRAE'S ESTATE.

Civ. 7338; Sac. 5810.

District Court of Appeal, Third District, California.

July 26, 1947.

1. Executors and administrators ⚿92

The estate of a guarantor or a surety may be held responsible for claims arising under the contract which have accrued prior to his death.

2. Executors and administrators ⚿92, 431(1)

Where promissory notes matured before death of guarantor of the notes, the estate of the guarantor was absolutely bound to pay the notes where the maker of the notes had defaulted, and creditor was not required to exhaust his remedies against the maker. Civ.Code, § 2806, 2807.

3. Guaranty ⚿47, 77(2, 3)

The liability of the guarantor of an absolute and unconditional guaranty is fixed when the principal obligation matures, and is not predicated upon the exhaustion by the creditor of his remedies against the principal debtor or the exhaustion of other security of the debt, and it is immaterial whether the debtor can or cannot pay the debt.

4. Guaranty ⚿42(1)

A guaranty is "unconditional" unless its terms import some condition precedent to the liability of the guarantor. Civ.Code, § 2806.

See Words and Phrases, Permanent Edition, for all other definitions of "Unconditional Guaranty".

5. Wills ⚿743

An assignment of defendant's interest in his father's estate was construable as made to bank as executor to secure the estate for payment of defendant's debt to bank represented by three promissory notes which father had guaranteed prior to his death and not as made to creditor bank as a corporation.

6. Executors and administrators ⚿92

Where a claim was required to be filed in an estate in order to collect an indebtedness, attorney's fees were properly included in the indebtedness payable by decedent's estate as result of default in payments of promissory notes of defendant guaranteed by decedent, where the notes representing the indebtedness specifically provided for payments of attorneys' fees if suit were necessary to enforce payments.

7. Wills ⚿743

Evidence sustained finding that assignment by debtor to executor of debtor's interest in the estate of debtor's decedent to secure the estate for payment of defendant's debt to creditor which deceased had guaranteed prior to his death was not procured by fraud or misrepresentation on the part of the executor or the creditor.

8. Executors and administrators ⚿508(2)

Where a creditor's claims had been approved and allowed, were included in the annual account of executor which, after due notice, was formally confirmed and approved without objections, and from which order no appeal was taken, the order settling the annual account was final and conclusive against all persons interested in the estate. Probate Code, § 931.

9. Bills and notes ⚿139(3)

The consideration was adequate for renewal notes executed to executor of estate of deceased where notes were given in payment of an antecedent debt due from maker to a creditor of maker which had been guaranteed by decedent and the notes extended time of payment. Civ.Code, § 3105.

10. Bills and notes ⚿518(1)

Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. Civ.Code, § 3105.

11. Bills and notes ⚿94(1), 139(3)

An antecedent or pre-existing debt is sufficient consideration for a promissory note, and the extension of time for payment of the debt constitutes adequate consideration for the renewal of a note.

12. Executors and administrators ⚷473(4)
Trusts ⚷44(2)
Wills ⚷743

In suit by executor to recover amount due estate from legatee upon promissory notes, evidence sustained findings, adverse to legatee's cross-complaint, that legatee conveyed realty to executor for the purpose of revesting legal title in successors in interest of decedent of realty conveyed by decedent to legatee to enable legatee to borrow money with realty as security, that legatee's reconveyance to executor was absolute and not in trust, and that an accounting was made of proceeds of sale of part of the realty.

13. Executors and administrators ⚷87, 269

The statute requiring petition for authorization to compromise claims did not require executor to file petition with probate court for authorization to collect an indebtedness or for authorization to allow claims of bank on legatee's notes guaranteed by testator, before bringing suit upon legatee's renewal notes voluntarily given to the estate after bank's claims had been allowed and to foreclose the lien to secure their payment created by assignment to executor of defendant's interest in the estate as a legatee to executor. Probate Code, § 578.

14. Limitation of actions ⚷148(3)

Execution and delivery to executor of defendant's written assignment of defendant's interest in defendant's father's estate as legatee to secure payment of promissory notes owed by defendant and guaranteed by defendant's deceased father initiated a new period of limitations where suit on the notes was not barred by limitations at time of the execution and delivery.

15. Limitation of actions ⚷13

In suit by executor to recover amount due from defendant upon defendant's promissory notes, defendant was estopped from asserting bar of statute of limitations where he voluntarily executed renewal notes for the same indebtedness several times and executed and delivered to executor his assignment of interest in the estate as legatee to secure payment of the identical indebtedness asserted to have been previously barred by limitations. Code Civ.Proc. § 360.

16. Limitation of actions ⚷146(1)

Codal provisions requiring written acknowledgment of debtor's promise to remove bar of statute of limitations have for their object the establishment of a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment should be proved. Code Civ.Proc. § 360.

◆

Appeal from Superior Court, Placer County; Dal M. Lemmon, Judge.

Suit by Bank of America National Trust & Savings Association, as executor of the estate of Alexander Bell McRae, also known as A. B. McRae, also known as Alexander B. McRae, deceased, and Bank of America National Trust & Savings Association (a corporation), against Clarence A. McRae, also known as C. A. McRae, upon four promissory notes due the estate and upon an indebtedness due to the bank, wherein defendant cross-complained. From an adverse judgment defendant appeals.

Judgment affirmed.

F. H. Bowers, of Roseville, for appellant.

L. C. Anderson, of Roseville, and Van Dyke & Harris, of Sacramento, for respondent.

THOMPSON, Justice.

The Bank of America National Trust and Savings Association, as Executor of the Estate of Alexander Bell McRae, deceased, and also in its corporate capacity, brought suit against the defendant upon four promissory notes due to the estate, and upon an indebtedness due to the bank. Said deceased guaranteed payment, before his death, of said notes to the extent of $10,670, which were originally payable to the bank and renewed in the name of the executor of the estate after the claims were allowed. The defendant, who is a son of the deceased and a legatee under his will, assigned to the bank all his interest in his father's estate to secure payments of said indebtedness. The complaint also asked to foreclose said lien and to sell the defendant's interest in the estate to satisfy the lien.

The defendant answered the complaint denying the material allegations thereof, except that the execution of the notes was acknowledged, but a lack of consideration therefor was pleaded. In an amended cross-complaint the defendant charged the executor with mismanagement and failure to account, in the estate, for rents, issues and profits derived. The defendant also alleged conveyance to the executor of two lots in Roseville as security for payment of another $6,000 note, and failure to account therefor to the estate. The cross-complaint demands an accounting as trustee of said two lots. An answer to the cross-complaint denies the material allegations thereof and alleges settlements in the estate of annual accounts of the executor covering all the disputed items relied upon by the defendant in this case, which became final and conclusive thereof since no appeal was taken from such orders.

Alexander Bell McRae died testate in Placer County June 3, 1932, possessed of real and personal property of the appraised value of $132,500. The deceased left surviving him a widow, Maggie McRae, the defendant Clarence A. McRae, an adult son, and several other heirs and legatees. The will was admitted to probate June 27, 1932, and the plaintiff, Bank of America, was appointed and qualified as executor of the will. Ten detailed annual accounts were filed and settled by the probate court. The last one was filed and settled after the commencement of this action. No objections were filed to any of the accounts, except the tenth one, to which the defendant, Clarence A. McRae, only, filed objections, which were overruled, and the account was formally settled April 29, 1946.

In 1931, the defendant, Clarence A. McRae, borrowed money from said bank, for which he executed and delivered three promissory notes as follows: January 7, 1931, for $6,000, due October 7, 1931; June 30, 1931, for $4,100, due December 30, 1931; and July 16, 1931, for $950, due October 13, 1931. These notes were payable in monthly or quarterly installments, at stipulated interest of 7% per annum. Each note provided for payment of reasonable attorney's fees, in the event of the necessity of bringing suit to enforce payment. The notes were not paid, but were subsequently renewed. October 6, 1931, defendant's father, Alexander Bell McRae, executed and delivered to the bank a written guaranty of payment of his son's said notes in the specified aggregate sum of $10,670, together with interest. After the appointment of said bank as executor of the will, claims were duly approved by the probate judge and filed in said estate for the amounts of said notes on the theory that the estate became liable therefor as a guarantor. December 5, 1932, the defendant, Clarence A. McRae, who became an heir to one-tenth of his father's estate, executed and delivered to the executor a written assignment of his interest in the estate to secure payment of said three notes in the aggregate sum of $10,670 and accrued interest. On July 12, 1940, the notes were renewed by the defendant and made payable to the bank "as Executor of the Last Will of A. B. McRae, deceased," on account of the liability of the estate as guarantor thereof. Neither the principal nor interest of said notes was paid.

May 17, 1944, this suit was commenced. The complaint was couched in five counts. The first three counts are based on the amounts due upon said three notes, together with accrued interest and reasonable attorney's fees. The fourth count is based on another note executed by C. A. McRae, dated March 4, 1941, payable to the executor of the estate, for the sum of $4,204.57, together with interest and counsel fees. The fifth count alleges the lien on defendant's interest in the estate by virtue of said assignment, which is attached to the complaint as exhibit "A" and made a part thereof. The fifth count seeks to foreclose the lien and to sell said interest in the estate to satisfy the first three notes. The defendant's answer to the complaint denies the material allegations thereof, and affirmatively asserts that the notes were given without consideration and that the executor was guilty of mismanagement of the estate to the detriment of the defendant and the other heirs. In a cross-complaint filed by the defendant it is charged that he and his wife, Mae L. McRae, conveyed to the bank, as executor of the estate on June 19, 1933, Lots 3 and 5 of Block 4, in Roseville, in trust, for the benefit of the estate, one of which lots was subsequently sold by the executor for the sum of $5,000, and that the grantee has failed to account for said proceeds of sale or for the rents, issues and profits of said lots. The cross-complaint prays that plaintiff be allowed no more than the sum of $11,050, in payment of the notes due to the estate, and that the executor be required to render an accounting of the properties and of the rents, issues and profits therefrom.

Plaintiff's motion to strike out portions of the answer and cross-complaint was denied. A demurrer to said pleadings was also overruled. The cross-complaint was answered, denying the essential allegations thereof, and affirmatively alleging the entire transaction, the probating of the estate, including the formal annual accounts containing all of said transactions, and approval thereof, from which orders no appeal was taken, and that the defendant and cross-complainant is thereby estopped from now challenging any of said transactions in this suit.

The court adopted findings favorable to the plaintiff upon every essential issue. The court specifically determined that the executor had fully accounted for all the property of the estate, and that the settlement of the annual accounts estopped the defendant and cross-complainant from disputing the items therein contained. Regarding the conveyance to the executor of the two Roseville lots, the court found that they were merely conveyed to the defendant and his wife by Alexander Bell McRae, in his lifetime, in trust to enable them to give temporary security for a loan which they desired to procure; that said lots did not belong to the defendant and his wife, and that they were reconveyed by a deed intended to be absolute in effect to the executor of the estate on June 19, 1933, as the property of the estate; that the value of said lots was then $6,000, and that the executor subsequently sold one of said lots for $5,000, which sale was approved by the probate court, and the proceeds thereof duly accounted for in the estate, and that the other lot was duly inventoried and accounted for and still remains as the property of said estate. Judgment was rendered accordingly, to the effect that the defendant take nothing by his cross-complaint, and that the plaintiff, as executor of the estate of Alexander Bell McRae, deceased, take judgment for the specified amounts of the notes described in counts one, two, three and four of the complaint, together with accrued interest. Attorney's fee was allowed in the first count for the sum of $150, and in each of counts two, three and four in the sum of $250. The judgment further provides that the bank, as executor of said estate, holds a lien upon defendant's interest in the estate of his father, by virtue of said assignment, to secure the payment of the notes described in counts one, two and three of the complaint, in the aggregate sum not exceeding $10,670, and interest. Foreclosure of the lien and sale of said interest in the estate to satisfy that lien was directed. From that judgment the defendant has appealed.

Separate findings and an order of court settling the tenth annual account of the executor of the will of said deceased also appear in the clerk's transcript of this case, but no appeal appears to have been taken from that order. However, there is adequate evidence to support the findings and order settling and approving that tenth annual account.

The complaint states valid causes of action for money due to the estate of Alexander Bell McRae, deceased, upon the four promissory notes set out in counts one, two, three and four thereof, and for foreclosure and sale of defendant's interest as an heir of said estate to satisfy the lien created by defendant's assignment to the executor of the estate of that interest to secure payment of said notes, to the extent of $10,670, and interest, as provided therein.

[1] The appellant contends that the complaint fails to state causes of action as to the first, second and third counts because each count asserts that "This note represents the same indebtedness of the maker to Bank of America N. T. & S. A., which

was guaranteed by A. B. McRae." It is not claimed the fourth and fifth counts are defective on that account. The fourth count states a cause of action upon an original indebtedness to the estate due upon a promissory note for the sum of $4,204.57, dated March 4, 1941. The fifth count states a cause of action for foreclosure and sale of a lien on defendant's interest in the estate created by his assignment to the estate to secure the payment of the notes described in the first three counts. The first three counts do allege that the respective notes described therein were for an original indebtedness due to the Bank of America, but it is alleged that each of said notes was guaranteed by A. B. McRae. Those guarantees created a liability on the part of the estate to pay the notes. In 34 Corpus Juris Secundum, Executors and Administrators, § 376, p. 122, it is said:

> "The estate of a guarantor or surety may be held responsible for claims arising under the contract which have accrued prior to his death."

[2, 3] The original notes held by the bank matured according to their express terms prior to the death of the guarantor, Alexander Bell McRae, which occurred June 3, 1932. There was then an absolute liability of the estate to pay the notes since the maker thereof had defaulted. It was not necessary for the bank to first exhaust its remedy by suit, foreclosure of the lien, or otherwise, as a prerequisite to liability of the guarantor. The guaranty was absolute and unconditional. Civil Code, sec. 2807; Pierce v. Merrill, 128 Cal. 464, 61 P. 64, 79 Am.St.Rep. 56; Cooke v. Mesmer, 164 Cal. 332, 342, 128 P. 917; 13 Cal.Jur. 110, sec. 22. In the text last cited it is said:

> "The liability of the guarantor of an absolute and unconditional guaranty is fixed when the principal obligation matures and is not predicated upon the exhaustion by the creditor of his remedies against the principal debtor, or the exhaustion of other security for the debt; and it is immaterial whether the debtor can or cannot pay the debt."

[4] A guaranty is unconditional unless its terms import some condition precedent to the liability of the guarantor. Cooke v. Mesmer, supra, 164 Cal. at page 342, 128 P. 917; Civil Code, sec. 2806. The bank's claims, based on the three matured and unpaid notes, which were guaranteed by the deceased, were properly presented to and allowed by the probate judge, on November 14, 1932. Probate Code, sec. 703. After their allowance, and before their payment they would bear the same rate of interest which is allowed on judgments. Probate Code, sec. 733; 11A Cal.Jur. 799, sec. 568.

[5-7] The defendant's assignment of his interest in his father's estate was made December 5, 1932, to the executor and not to the bank in its corporate capacity, after the bank's claims had been approved by the probate judge and filed in the estate. The assignment declares that, "I, Clarence A. McRae, do hereby assign, sell and transfer to Bank of America * * * *as executor of the will and estate of Alexander Bell McRae* * * * *deceased,* all that part (and the whole if necessary) of my right, title and interest in the estate of Alexander Bell McRae, * * * sufficient to cover and/or pay any payment or payments which said estate shall make *on account and by reason of the said guarantee* to said Bank of America National Trust and Savings Association, not exceeding said sum of $10,670.00 and interest." The court properly determined that the assignment was made to the executor to secure the estate for payment of defendant's debt to the bank, represented by the three notes described in counts one, two and three of the complaint, which the deceased had guaranteed prior to his death. The attorney's fees which were allowed by the court were properly included in that indebtedness, for the notes specifically provided for such payments. The court also found that the assignment was not procured by fraud or misrepresentations on the part of the executor or the bank. That finding is amply supported by the evidence. The assignment was procured for the benefit of the estate.

[8] After the bank's claims had been approved and allowed, they were included in the annual account of the executor, which, after due notice, was formally confirmed and approved without objection, from which order no appeal was taken.

That order settling the annual account of the executor, which included the allowance of said claims, was final and conclusive upon this appellant and against all persons interested in the estate. Estate of Wear, 20 Cal.2d 124, 127, 124 P.2d 12; Estate of Soboslay, 4 Cal.2d 177, 180, 47 P.2d 714; Probate Code, sec. 931; 11B Cal. Jur. 619, sec 1150. In Estate of Rider, 199 Cal. 742, at page 746, 251 P. 805, at page 807, it is said that:

> "It was error, therefore, on the part of the probate court to charge said executor with the items which had previously been allowed and approved by the court in the order settling the first and second annual accounts. These orders were conclusive against all parties in any way interested in the estate, saving, of course, persons laboring under any legal disability."

[9-11] The court properly determined that there was adequate consideration for the notes executed to the executor of the estate of said deceased. They were given in payment of an antecedent debt due from the maker thereof to the bank and guaranteed by the deceased. The renewal notes contain the endorsements that they were given in renewal of the notes payable to Bank of America, which were guaranteed by A. B. McRae. It also appears that the times of payments of the original notes were extended by the renewal notes. The defendant did not deny that he owed the indebtedness. There was therefore sufficient consideration for the renewal notes upon which this action is founded. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. Civil Code, sec. 3105. An antecedent or preexisting debt is sufficient consideration for a promissory note, and the extension of time for payment of the debt constitutes adequate consideration for the renewal of a note. Lincoln Holding Corporation v. Levering, 219 Cal. 427, 27 P.2d 74; Bank of America Nat. Trust & Savings Ass'n v. Hollywood Improvement Company, 46 Cal.App.2d 817, 822, 117 P.2d 13; 19 Cal.Jur. 839, secs. 36, 37; 10 C.J.S., Bills and Notes, § 150, p. 604.

[12] The chief contention of the appellant is that Lots 3 and 5, in Block 4 of Roseville, were conveyed by the defendant and his wife, January 19, 1933, to the executor of the estate of Alexander Bell McRae, deceased, in trust, and without consideration, and that the executor failed to account therefor or for the rents, issues and profits therefrom. We are of the opinion there is no merit in these contentions. The court found that said lots were not the property of the defendant or his wife; that they belonged to the estate; that "shortly prior to his death, said decedent conveyed the legal title to said real property to defendant and his wife, *for the purpose of enabling defendant to borrow money upon the security thereof, and that the conveyance by defendant and his wife to plaintiff herein, as executor aforesaid,* and for the benefit of the estate of said decedent and those entitled thereto, *was for the purpose of revesting said legal title in the successors in interest of said decedent.*" The court further found "that said conveyance was not made to plaintiff, as executor, in trust; that said deed was a deed absolute." The court also found that the deeds were not procured by fraud or without consideration, and that the lots were of the value of $6,000, and that the executor subsequently sold one of said lots for $5,000, and accounted to the estate therefor, together with the other lot, with the rents, issues and profits therefrom, and which account was settled, allowed and approved without objection. The evidence adequately supports the foregoing findings.

[13] We are of the opinion the failure to proceed under Section 578 of the Probate Code is immaterial under the facts of the present suit by the executor to recover the amounts due from the defendant upon his promissory notes, and to foreclose the lien to secure their payment, created by the assignment of defendant's interest in the estate. There was no effort on the part of the executor to *compromise* the indebtedness of the defendant. It was the duty of the executor to collect that indebtedness for the benefit of the estate. The filing and allowance of the bank's claims was not a compromise of indebtedness. It was the enforcement of the absolute liability of the estate pursuant to the written guaranty of the decedent to pay defendant's three notes

held by the bank. In fulfilling that duty the executor procured the defendant to execute new notes payable to the estate, after the bank's claims had been allowed. The defendant voluntarily renewed the notes. Upon default of payment of those notes the executor proceeded to bring this suit to enforce their payment for the benefit of the estate. It was not necessary, as a prerequisite to the maintenance of this suit, to first file with the probate court a petition under Section 578 of the Probate Code, for authorization either to allow the claims or to collect the indebtedness.

[14] Finally, the appellant contends that since the bank's claims were allowed and filed in the estate November 14, 1932, and this suit was not commenced until May 17, 1944, the statute of limitations bars this action. The defendant's original three notes had not been permitted to outlaw. Those notes had been renewed "three or four times." The three notes, dated July 12, 1940, upon which counts one, two and three of the complaint are based, were signed by the defendant. His answer admits the execution of those notes. Each of them specifies that it represents "the same indebtedness of the maker to Bank of America * * * which was guaranteed by A. B. McRae." Within one month thereafter, the defendant executed and delivered to the executor his written assignment of his interest in his father's estate to secure payment of those identical notes to the extent of $10,670, *and interest.* That assignment became a lien on defendant's interest in the estate to that extent. The defendant paid no portion of that indebtedness. The estate was a guarantor of that indebtedness. In 24 American Jurisprudence 957, section 125, it is said: "The statute of limitations does not begin to run upon the implied undertaking of the debtor to reimburse the guarantor, until the latter has paid the debt." It does not appear when the bank's claims upon the guaranteed notes were paid, if indeed they have been paid. The bank was entitled to payments of its claims in due course of administration. The estate has not been closed. But, assuming the claims were actually paid, each renewal of the notes extended the statute of limitations. 16 Cal. Jur. 573, sec. 169. In the text last cited it is said in that regard:

> "If before an obligation is barred by the statute it is renewed for an additional period, *or another obligation given in its stead,* this has the effect of initiating a new period of limitations, which commences to run after the expiration of the time set in the renewal."

[15, 16] Moreover, the defendant is estopped from asserting the bar of the statute of limitations for he voluntarily executed renewal notes for the same indebtedness several times, and, with full knowledge of the transactions, he executed and delivered to the executor his assignment of interest in the estate to secure payment of the identical indebtedness which he now asserts was previously barred by the statute of limitations. The repeated renewal of the notes with accumulated unpaid interest on the original indebtedness, including the notes dated July 12, 1940, which specifically refer to the original indebtedness and the written guaranty of the deceased, and the defendant's assignment as security for payment thereof, of his interest in the estate which also refers to the same notes guaranteed to the Bank of America, furnishes adequate evidence of new promises to pay the indebtedness represented by the original notes, in compliance with Section 360 of the Code of Civil Procedure, to toll the statute of limitations, even though the statutory time for commencing this action had previously expired. Tuggle v. Minor, 76 Cal. 96, 101, 18 P. 131; Clunin v. First Federal Trust Company, 189 Cal. 248, 253, 207 P. 1009; Estate of Cole, 52 Cal.App.2d 520, 527, 126 P.2d 660, 663. In the Cole case, supra, the court says:

> "The provisions of section 360 of the Code of Civil Procedure that no acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of the statute of limitations 'unless the same is contained in some writing, signed by the party to be charged thereby,' as was stated in Lehman v. Newcomer, 118 Cal. App. 145, 147, 4 P.2d 994: 'have for their

object, and effect, the establishment of "a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved." * * * Extrinsic evidence to make certain the reference in such a writing, is proper. [Citing authorities.]'

* * * * * *

"'* * * If one of the series of papers which appear to have some relation to the same mattter is signed by the party to be charged, this is enough, as all the papers are to be considered together as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to.'"

We think there is adequate competent evidence in this case to show a written promise of the defendant to pay the three notes, to prevent the statute of limitations from barring this action, and to estop him from denying his liability on those notes.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

30 Cal.2d 531

MAZZERA v. WOLF et ux.

Sac. 5776.

Supreme Court of California.

Aug. 19, 1947.

1. Trusts 🔑91

A "constructive trust" may be imposed when a party acquires property, to which he is not justly entitled, by actual fraud, mistake, or violation of fiduciary or confidential relationship.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

2. Trusts 🔑92½

A constructive trust, imposed on partner, agent, or other fiduciary by party's acquisition of property, to which he is not justly entitled, by actual fraud, mistake, or violation of fiduciary or confidential relationship, arises by operation of law, and hence is not barred by statute of frauds. Civ.Code, § 852, § 1624, subd. 4; Code Civ. Proc. § 1973, subd. 4.

3. Frauds, statute of 🔑119(2)

Mere failure to perform oral promise to convey realty is not fraud, and such agreement will be held unenforceable under statute of frauds, in absence of actual or constructive fraud.

4. Trusts 🔑110

In suit to establish trust for plaintiff as to half interest in vacant lot, alleged to have been purchased by defendant for parties' mutual benefit pursuant to oral agreement to convey half interest therein to plaintiff on his payment of half of cost, evidence supported finding that there was no partnership or confidential relation between parties and hence no constructive fraud. Civ.Code, § 2401(2).

5. Trusts 🔑99

An oral agreement for purchase of vacant lot by one of parties with his own money and conveyance of half interest therein to other party gave rise to no constructive trust for such other party, in absence of confidential or fiduciary relationship.

6. Trusts 🔑72

A "resulting trust", or "intent-enforcing trust", may arise where purchase price of realty is paid by one person in whole or part and title is taken in another's name. Civ.Code, § 853.

See Words and Phrases, Permanent Edition, for all other definitions of "Intent-Enforcing Trust" and "Resulting Trust".

7. Trusts 🔑72

An agreement for purchase of lot by one of parties and conveyance of half interest therein to other party did not give rise to resulting trust, in absence of showing that such other party made any payment on or advanced any part of purchase price or any pleading, proof, or finding of agreement or intention that purchaser should lend money to other party.

CARTER and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Suit by Harry A. Mazzera against Ed Wolf and wife to declare a trust for plaintiff as to a half interest in a vacant lot and quiet his title thereto. Judgment for defendants, and plaintiff appeals.

Affirmed.

Prior opinion 173 P.2d 44.

Gumpert & Mazzera, Charles A. Zeller, and J. Calvert Snyder, all of Stockton, and C. Ray Robinson, of Merced, for appellant.

O. C. Parkinson, of Stockton, for respondents.

GIBSON, Chief Justice.

Plaintiff has appealed from a judgment decreeing that defendants are the owners of a vacant lot, fifty feet in width, which lies between two pieces of property separately owned by the respective parties.

The complaint alleged that plaintiff and defendants orally agreed that defendants, who are husband and wife, were to purchase the lot for the mutual benefit of the parties and to convey an undivided one-half interest to plaintiff upon payment of one-half of the costs, and that defendants purchased the lot but refused to accept plaintiff's tender of half the costs or to make a conveyance. A second count was in the usual form of a quiet title action. Plaintiff asked that a trust be decreed as to the one-half interest and that he be adjudged the owner thereof.

Defendant Ed Wolf testified that he met plaintiff Mazzera on the lot in April, 1944. They had not become acquainted until shortly before this date, and they had not had any prior business transactions, except that Wolf, who was renting the lot, permitted Mazzera to use a portion of it for storing materials at a monthly rental of $10. Mazzera asked Wolf why he did not buy the lot, to which he replied that the owners wanted too much for it. Mazzera then said, "Buy it for $2,500.00, but don't pay any more than $2,500.00, and then we will go fifty-fifty," Wolf answered, "All right." However, nothing was done about purchasing the lot until sometime in October, when Wolf received a letter from one of the owners asking him to make an offer for the lot. He offered $2,500, which was refused, and various other offers and counter offers were made. Finally, during the latter part of November, an agreement was made with the owners for a sale at $4,500, but the deeds to Wolf and his wife were not executed and delivered until February. The agreed purchase price was paid by Wolf from community funds, and no part thereof was furnished by Mazzera. There was no further conversation between Mazzera and Wolf after the one that took place in April until Mazzera learned sometime in November that Wolf had arranged to buy the lot. Mazzera then asked Wolf if the purchase was to be "fifty-fifty." Wolf replied it was not, saying: "I paid $4,500.00 which was not the $2,500.00 that I said yes to." Mazzera did not then offer to pay half the price, but knowing that Wolf had made no deposit, Mazzera said he was going to call the owners and "raise the ante." Wolf told him to "go ahead."

Mazzera's version of the April conversation differed from that of Wolf in several particulars. He testified that Wolf said he was negotiating to buy the lot, and he understood that Mazzera was also trying to buy it. Mazzera replied that he was interested but the owners wanted too much for it. He then said to Wolf: "There is no need for you and I cutting each other's throat in bidding for this property. * * * Why don't we buy it together in partnership; I will take an undivided half and you take an undivided half * * *. That way we won't be bidding against each other." Wolf said "okay" but to let him do the bidding and buy it in his own name. Mazzera agreed and instructed Wolf to start the bidding at $2,500. He also told Wolf that his tenant, Dye, could use the south 25 feet of the lot and Wolf could use the remaining 25 feet. There was a conflict in the testimony as to when the parties became acquainted, whether Dye was present at this conversation, whether the parties again discussed the lot before Wolf bought it, and whether Mazzera offered to pay half the cost upon learning of the purchase. There is also testimony that Wolf subsequently told Dye that they were "just talking and kidding" at the time of the April conversation.

The court found as follows: Neither of the parties had any interest in or business connection with the operations conducted on the property of the other. In April, 1944, they met casually on the lot and in the course of a general conversation Mazzera proposed that Wolf endeavor to purchase the lot, taking title in his own name, and that they would then go fifty-fifty in the property, each taking an undivided one-half interest. To this proposal Wolf assented, but he took no steps toward purchasing the property until one of the owners wrote him in October urging him to make an offer for the lot. An offer of $2,500 was made and refused, and various other offers and counter offers were made. Finally a sale was agreed at a price of $4,500, and the agreed purchase price was paid by Wolf and his wife from their own funds. No part of the price was furnished by Mazzera, although he offered to pay one-half of the expenditures and made a deposit in court. Wolf refused to accept any money or to make a conveyance.

The trial court concluded that Wolf and his wife were the owners of the lot, that the April conversation did not create an enforceable contract, and that the agreement was barred by the statute of frauds. Civ.Code, § 1624, subd. 4, and Code Civ. Proc. § 1973, subd. 4. It also concluded that no partnership existed between the parties before or at the time of that conversation and none was formed by reason of that conversation or by their subsequent conduct, that no trust was created in the property by the oral conversation or by the conduct of the parties, and that Wolf and his wife were entitled to have their title quieted as against Mazzera's claims.

Mazzera seeks to avoid the bar of the statute of frauds by contending that the oral agreement had the effect of making the parties partners in the enterprise of buying and holding the lot, and that the existence of the partnership relationship placed the parties in a confidential relation and made Wolf a trustee of a constructive trust with respect to his purchase of the lot. He further contends that Wolf's refusal to perform the agreement was a violation of his trust duties, and that such an oral agreement is not required to be in writing.

[1-3] A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship. Crosby v. Clark, 132 Cal. 1, 63 P. 1022; Crabtree v. Potter, 150 Cal. 710, 89 P. 971; Koyer v. Willmon, 150 Cal. 785, 90 P. 135; Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767. Such a trust, imposed upon a partner, agent, or other fiduciary, arises by operation of law, and, accordingly, the statute of frauds is no bar. Civil Code § 852; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732; Bastjan v. Bastjan, 215 Cal. 662, 670, 12 P.2d 627. But the mere failure to perform an oral promise to convey real property is not itself fraud, and the agreement will be held unenforceable under the statute of frauds in the absence of actual or constructive fraud. Rheingans v. Smith, 161 Cal. 362, 366, 119 P. 494, Ann. Cas.1913B, 1140; Feeney v. Howard, 79 Cal. 525, 529, 21 P. 984, 4 L.R.A. 826, 12 Am.St.Rep. 162; Ampuero v. Luce, 68 Cal. App.2d 811, 817, 157 P.2d 899; Bradley v. Duty, 73 Cal.App.2d 522, 525, 166 P.2d 914.

[4] In the present case there is no claim of actual fraud, and Mazzera's theory, both at the trial and on appeal, is that the agreement created a partnership and gave rise to a confidential relationship, and that the violation of that relationship constituted constructive fraud. The evidence supports the trial court's determination that there was no partnership or confidential relationship. According to Wolf they did not become acquainted until shortly before the April conversation. Further, there had been no prior partnership and no other business dealings between the parties except as to the temporary rental of a small part of the lot. There is no evidence that the parties ever contemplated going into a business or a joint venture whereby they would share profits and losses. They did not plan to use the lot together in a business enterprise, but, according to Mazzera's own testimony, the lot was to be physically divided, with his tenant using one half and Wolf the remainder of the lot. As provided by section 2401(2) of the Civil Code, the ownership of property jointly or as tenants in common does not of itself establish a partnership, even if profits from the use of the property are shared. Also, in connection with the claim of a confidential relationship, it is significant that, according to Wolf's testimony, the parties did not discuss the matter between the time of the April conversation and the purchase of the lot some seven months later.

The situation in this case is materially different from that presented in Koyer v. Willmon, 150 Cal. 785, 90 P. 135, wherein this court reversed a judgment of nonsuit in an action to impose a trust upon an undivided one-half interest in a lot purchased by defendant. There the parties had orally agreed to buy certain water-front properties for their joint use and benefit, with each party paying one-half the price. Several of the properties were acquired pursuant to the agreement and paid for by the parties before the lot in question, which was necessary for the venture, was bought. The parties were then engaged in the contemplated enterprise and, furthermore, the plaintiff had assisted in obtaining information about the ownership of the lot, paid the railroad fare for defendant to locate the holder of an option on the lot, and otherwise contributed to that part of the venture. The court held that since there was a sufficient showing of partnership and confidential relationship, plaintiff had made out a prima facie case. Whereas, in the present case, the trial court properly concluded that no partnership existed between Mazzera and Wolf.

[5] It was not claimed at the trial, and it is not contended on appeal, that the April conversation constituted Wolf an agent to purchase the property, and there is no specific pleading or evidence that any agency was intended or created. Further, there is no specific finding of agency, and the finding relating to the April conversation is susceptible to the interpretation, in support of the judgment, that there was merely an oral agreement that if defendant was able to buy the property he would convey an undivided one-half interest to plaintiff. Accordingly, in the absence of any confidential or fiduciary relationship, there was no more than an unenforceable oral agreement by the terms of which one party was to buy property with his own money and subsequently convey it to another, and no constructive trust arose. Neet v. Holmes, 25 Cal.2d 447, 464, 154 P.2d 854; Lincoln v. Chamberlain, 61 Cal.App. 399, 214 P. 1013; Bauman v. Wuest, 32 Cal. App. 217, 219, 162 P. 434; see 42 A.L.R. 10, 11.

In 42 A.L.R., page 63, it is said:

"Ordinarily, oral agreements to join in the purchase of land do not give one party any enforceable right to claim the benefit of the purchase by the other. Viewed as agreements to transfer an interest in the land to be acquired, they are clearly within the Statute of Frauds; nor can they be given effect as a promise to hold for the benefit of another, save in those jurisdictions where express trusts need not be evidenced by writing. Except in those jurisdictions, therefore, the complainant cannot obtain relief unless he can establish a resulting trust, growing out of the use of his money in making the purchase, or a constructive trust, based upon the fraud of the defendant in procuring the title, or the abuse of some confidential relationship. The mere breach of the agreement that the complainant may share in the benefit of the purchase is not fraud in obtaining the title, and so will not give rise to a constructive trust."

[6, 7] Mazzera is likewise in no position to claim that there was a resulting trust in this case, not only because he did not urge this theory in his pleadings or at the trial, but also because there is no evidence of the existence of such a trust. A resulting trust, or "intent-enforcing trust," may arise where the purchase price is paid by one person, in whole or in part, and the title is taken in the name of another. Civ.Code, § 853; Stewart v. Douglass, 148 Cal. 511, 83 P. 699; Moultrie v. Wright, 154 Cal. 520, 98 P. 257; see Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732. Obviously there is no such showing here, for Mazzera did not make any payment or advance any part of the consideration for the purchase.

The suggestion has been made, in this connection, that it is not essential that the payment should have been made by Mazzera with his own money, and that a resulting trust may arise if the payment is made by the grantee, on behalf of the claimant, pursuant to an agreement to lend money to the claimant. The case of Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3, relied upon in support of this argument, is clearly distinguishable. In that case, the trial court found that the purchaser expressly agreed to lend the money and to hold the property in trust, and the claimant was actually obligated to repay the money. In the present case there is no pleading, proof or finding that there was any agreement or intention that Wolf should lend money to Mazzer, and hence the essential element of payment of the purchase price by plaintiff is absent. It is clear from the trial court's findings that Wolf bought the land with his own money, not with Mazzera's, and that there was no agreement for any loan of money to Mazzera, but at most merely an unenforceable agreement to convey half the property upon payment by Mazzera of half the purchase price.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The issue presented in this case is whether any reasonable inference may be drawn other than one supporting, contrary to the trial court's judgment, a constructive trust or resulting trust.

There is no substantial dispute between Mazzera and Wolf that they had an oral agreement that Wolf should buy the property for the joint benefit of the parties. But in *addition to that, any conflict there may have been in the evidence with regard to that agreement has been resolved by the trial court in its findings.* It found: "Plaintiff and Defendant Ed Wolf met casually upon the * * * [Gilbeau] lot and held a general conversation with each other on various subjects, in the course of which conversation Plaintiff proposed to Defendant Ed Wolf that he, Wolf, endeavor to purchase the lot from the owner, taking title in his own name, and that they would then go fifty fifty in the property, each taking an undivided one-half interest. To this proposal Defendant Ed Wolf assented." Fortifying that finding is the opinion of the trial judge. He there stated that the decision of the case *"turns on a question of law"* as the "essential facts, except for minor variations in the testimony as to the exact words of the parties when the oral agreement was made" are not in dispute. While it is true the judge stated that he need not discuss whether there was a price limitation, he indicated that a *complete agreement was made* in which the minds of the parties met. The judge said in his memorandum opinion that: "The circumstances surrounding the conversation do not suggest that the parties were indulging in idle talk. It seems more than likely to the Court that neither misunderstood the other." This is in harmony with the *conclusions of law* which state that the *contract* (found in the findings of fact above quoted) was not enforceable because of the statute of frauds. Those conclusions also state that there was no partnership between the parties, and that there was no trust created by the agreement above mentioned. It thus appears that the court found that there was a meeting of the minds and an agreement was made, and that all of the legal theories were given general consideration in the conclusions of law.

The only possible inferences that may be drawn from the foregoing finding of an agreement is (1) that Wolf was acting as Mazzera's agent or (2) that Wolf was to advance the purchase money for a one half interest in the property for Mazzera. A fair appraisal of the findings cannot, as asserted by the majority opinion, point to a third possible inference, namely, that Wolf, as an independent actor, was to purchase property and then sell a half interest to Mazzera. According to the finding the parties were to "go fifty-fifty" on the deal. That means that Wolf was *acting for Mazzera.* He was not acting independently as a speculative buyer of property which he would later sell to Mazzera. Where a person pursuant to an agreement acts for another we have a principal-agent relationship. "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." Civ.Code, sec. 2295. Under the agreement as found by the court, Wolf was to purchase the lot *for* Mazzera and himself. If that is not an agency relation it is hard to imagine one. But even if there is no agency the only other rational inference would be that Wolf would advance half of the purchase price as a loan to Mazzera.

The result is the same whether we have an agency or a loan. If it is an agency then the agent (Wolf) holds a half interest in the property as constructive trustee for the principal (Mazzera) and the statute of frauds is inapplicable. Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732. If Mazzera's half of the purchase price was to be advanced by Wolf then we have a loan from Wolf to Mazzera (the law implies a promise by Mazzera to pay the loan [Viner v. Untrecht, 26 Cal.2d 261, 270, 158 P.2d 3; Brown v. Spencer, 163 Cal. 589, 126 P. 493; Couts v. Winston, 153 Cal. 686, 96 P. 357]) and a resulting trust follows which is also exempt from the statute of frauds. Viner v. Untrecht, supra; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478.

Bearing upon the evidence of agency and the necessity of such a conclusion from the court's finding of the agreement, it is aptly said in O'Connor v. Irvine, 74 Cal. 435, 439, 16 P. 236, 237: "It was *not necessary* for the plaintiff to show the defendant agreed *in formal or express* language that he would make the purchase for Fair and others and hold it for their benefit. It is sufficient if it was *mutually understood* between the parties that he was so acting in their behalf. What was said and done by the parties, so far as the evidence shows, is capable of only one interpretation, and establishes a perfect understanding between the parties as above stated. Under such circumstances, *although the language used may not of itself show an express promise, it is the duty of the party whose services are sought, if he does not mean to act in accordance with the evident expectation of the parties with whom he is dealing, to expressly declare that he will not, otherwise his silent acquiescence is a fraud.*" [Emphasis added.] Likewise in the instant case there is no need for an express agreement of agency. There is no magic in the use of the word agent or principal by the parties. Their conduct and agreement speak for themselves.

If it be conceded that under the evidence the trial court could have found either an agency or the lack of it or a loan or the absence of it, then it has failed to find upon material vital issues. It has found the agreement as above stated. If inferences either way may be drawn from that agreement then the trial court should make such deduction and find the ultimate facts. This it has not done. It has gone part way and found the agreement thus leaving the matter suspended without an actual determination. At least the case should be returned to the trial court to enable it to express itself on the subject.

SCHAUER, J., concurs.

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30 Cal.2d 524

PEOPLE v. BARNES.

Cr. 4791.

Supreme Court of California.

Aug. 6, 1947.

1. Criminal law ⚿489

Where defense was attempting to show by means of testimony of psychiatrist that defendant's confession was unworthy of belief because of his mental condition and questions regarding paranoid trends left jury with impression that defendant was insane or bordering on insanity, prosecution was justified in clarifying witness' meaning by cross-examining him as to defendant's sanity.

2. Criminal law ⚿489

Where defendant's direct examination of witness justified prosecution's cross-examination regarding defendant's sanity, attempted redirect examination as to distinction between legal insanity and medical insanity was improper, especially where defendant did not contend that he was prevented from proving that he did not fully know meaning and effect of his confession and there was no attempt to prevent defense from showing defendant's mental condition.

3. Criminal law ⚿736(2)

Under proper instuctions, jury is ordinarily permitted to come to an independent conclusion as to voluntary nature of a confession.

4. Stipulations ⚿14(7)

Defendant's stipulation that there was no form of coercion excused district attorney from proving voluntariness of confession.

5. Stipulations ⚿14(7)

Defendant's stipulation that confession was voluntary was not a stipulation as to truth of confession.

6. Criminal law ⚿781(1), 1173(2)

Even though defendant stipulated that confession was voluntary and court instructed that jury were judges of credibility of witnesses and weight of evidence, it would have been better practice to instruct that jury were exclusive judges as to whether confession was true, but failure to give such instruction did not prejudice defendant in view of fact that many of important elements of confession were corroborated by witnesses, and defendant's psychiatrists were unanimous in conclusion that defendant fully knew meaning of questions asked him and meaning and effect of answers he gave.

7. Homicide ⚷253(1)

Evidence sustained conviction for first-degree murder.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Francis Paul Barnes was convicted of first-degree murder, and he appeals.

Affirmed.

William B. Neeley, Public Defender, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was found guilty on one count of murder in the first degree, nine counts of robbery, seven counts of kidnaping for the purpose of robbery and three counts of rape. The jury's verdict that defendant was guilty of murder in the first degree was without recommendation as to penalty. Defendant waived his right to a trial by jury on the issue of sanity, and the trial court found him sane. This appeal is an automatic one from the judgment imposing the death penalty for murder in the first degree.

Defendant attacks none of the verdicts of guilty for the crimes charged in the amended information except that for murder. It is therefore unnecessary to review in detail defendant's conduct relating to the other crimes.

Defendant contends that the trial court erred in its rulings regarding the testimony of certain psychiatrists. He also contends that the trial court erred in refusing to instruct the jury to determine whether certain confessions of defendant were free and voluntary, and to weigh and determine the effect and credibility of the confessions.

The crimes with which defendant was charged were committed between the months of March and August of 1946. During that time defendant robbed five women besides decedent, and raped and robbed three others.

Decedent was a dressmaker, 66 years of age, whose establishment was located in an office building in Los Angeles. Defendant confessed to a police officer that he killed decedent. According to this confession, defendant entered decedent's establishment carrying gloves in his pocket and a pistol in his waistband. He had the "idea of holding someone up." Decedent asked him what he wanted and he applied that he wanted a glass of water. Decedent brought him a glass of water and after drinking it he noticed another woman in the room. He therefore excused himself and went outside into the hall where he sat on the steps until he saw the other woman leave. Then he took out his pistol and inspected it as he reentered decedent's office. When decedent saw the pistol she became frightened and screamed; defendant, in turn, "got kind of jittery" and the pistol went off. He started to escape the way he entered, but someone shouted at him and he then decided to use another exit. As he retraced his steps he noticed decedent's purse through the open doorway. He took the purse and ran to his automobile and then drove to an empty lot and ransacked the purse, throwing it away after removing the money.

The evidence shows that decedent was shot through the neck. She must have been shot at close range, for the entrance wound of the bullet was marked with powder burns. Two witnesses identified defendant as the man they saw near decedent's room shortly before and after the shot was fired. Photographs taken of the scene after the killing reveal an overturned glass of water near decedent's body. In addition to the bullet wound there was a gaping wound on decedent's scalp, a bruise over her eye, bruised knuckles on her left hand and still another bruise on her right leg, midway between the knee and ankle.

On August 28, 1946 defendant was stopped by a motorcycle patrol in Los Angeles, apparently for the violation of a traffic ordinance. As the officers approached defendant's automobile, they observed that he had opened a door and that some rags had fallen to the street. Defendant put the rags back into the automobile and began searching under the seat. He told the officers that he was looking for his driver's license. The officers searched the automobile and found a knife buried in the rags. Defendant was then ordered to drive his automobile to the police station while they followed. When defendant's automobile started forward, one of the officers noticed a pistol lying on the pavement near where defendant's vehicle had stopped. He picked up the pistol and another officer followed defendant, who had meanwhile speeded up in an apparent attempt to elude the officers. The pursuing officer fired shots but defendant crashed his automobile against a retaining wall and escaped. He was arrested later by the police.

Defendant admitted to the police that he had shot decedent. He led the police to a vacant lot where he had discarded decedent's purse after removing the cash therefrom. A ballistics expert identified the pistol found near defendant's automobile as the one that had fired the bullet that killed decedent.

At the trial, defendant's statements to the police were admitted after his counsel examined two psychiatrists. The first of these witnesses testified that defendant had a psychopathic personality and "was overwhelmed by guilty feelings that he had in regard to the commission of his deeds * * *." The witness stated that defendant had a tendency toward self-accusation and "was emotionally driven to make certain statements regardless of the possible effect they could have." He testified, however, that defendant knew the full meaning and effect of the questions put to him and of his answers. The witness found defendant to be "absolutely sincere and honest" but could "conceive of the possibility that he added some details that are incriminatory and that are bad for him, or stressed them in such a way that they might make his case worse than it would otherwise have been. I mean I can conceive of this possibility; I can't say that that is what happened."

The other psychiatrist also testified that defendant had a psychopathic personality. He found that defendant "would wish to be as truthful as he could to support his belief that he should be placed under arrest because he had committed certain crimes for which he believed he should be punished and * * * in that state of mind he was in at that time * * * he would be in a more suggestible state of mind, he would reply more readily or accede more readily to what would be asked of him that would tend to incriminate him." The witness refused to state that defendant would add untruths to his story; in his view defendant "probably would be more suggestible and be perfectly willing to make things a little worse than they were provided he were asked the question in the right way."

At this point testimony was elicited from the witness that led to a ruling by the trial court that defendant regards as erroneous. Defendant's counsel asked the witness if defendant exhibited paranoid trends. The witness replied that he had. Counsel then asked, "Q. A paranoia is a form of insanity, is it not? A. Paranoia is, yes. Q. And paranoid trends, is that a trend towards that state of paranoia? A. No, it is like, similar to but not identical with. That is, the term really means like, suggesting it." The defense then turned the witness over to the district attorney for cross-examination, and the district attorney asked the witness if he found defendant sane. The defense objected to this question but the district attorney, upheld by the court, contended that since the defense had injected the subject of paranoia into the record the question was proper. The witness answered the question, stating that defendant was not insane and knew the difference between right and wrong. He also testified that defendant had "fully appreciated the nature and consequences of the statements" he had made to the witness.

Upon redirect examination, defense counsel asked the witness, "You distinguish the difference between what you said with reference to insanity to the extent that a person doesn't know the nature and quality of his acts from medical insanity, based upon medical science?" This question was objected to and the court sustained the objection.

[1] Defendant contends that since the trial judge allowed the district attorney to question the witness as to sanity, he should not have sustained the objection to the foregoing question asked on redirect examination. There is no error here. The defense was attempting to show by means of the testimony of psychiatrists that defendant's confession was unworthy of belief because of his mental condition. When the defense questioned the psychiatrist regarding paranoid trends there was no attempt to relate the questions to defendant's understanding of the meaning and effect of his statements. The result of the defense's concluding questions was undoubtedly to leave the jury with the impression that defendant was insane or bordering on insanity; hence the prosecution was justified in clarifying the witness's meaning.

[2] Defendant's attempt, on redirect examination, to inject the question of the distinction between legal insanity and medical insanity was clearly improper. There was no need to engage in a general discussion of insanity. Defendant does not contend that he was prevented from proving that he did not fully know the meaning and effect of his confession. Nor was there any attempt to prevent the defense from showing defendant's mental condition. The trial court merely put an end to questions that would have evoked general answers not pertinent to the specific issue then to be decided.

After the psychiatrists testified, the district attorney introduced a police witness who had received the confession. This witness was examined for the purpose of showing that the confession was freely given. In the course of this examination, however, counsel for the defense stipulated that "there is no intention or indication of intention to intimidate," and that no "form of coercion was used by any officer of the Los Angeles Police Department upon this defendant," and that no promises were made to defendant. Finally, the defense counsel stated: "I want to make my position very clear in that regard." The district attorney accepted the stipulation in lieu of laying a foundation to show the free and voluntary nature of the confession.

Defendant contends that the trial court erred in refusing to give an instruction requested by defendant relating to the confession. This instruction was to the effect that the jury should decide whether the confession was freely and voluntarily made. The refused instruction further stated: "You have the right to reconsider the question as to whether the same was voluntary or not, and in this connection you are the judges of the effect and value of evidence and the credibility of witnesses as the same pertains to such alleged statement or confession the same as to all other evidence and all other witnesses in this case."

The trial court's refusal to give the foregoing instruction, as well as a similar one tendered by the prosecution, was expressly based upon defendant's stipulation. Defendant contends, however, that since he was shown to have a "subnormal mentality, amounting to a psychosis," he was entitled to an instruction that the confession was not binding upon the jury and that the determination of the voluntary character of the statements, as well as the determination of the weight and credibility to which they were entitled, were for the jury to decide. Defendant maintains that the jury was entitled to infer "mental coercion."

[3, 4] Under proper instructions, the jury is ordinarily permitted to come to an independent conclusion as to the voluntary nature of a confession. People v. Gonzales, 24 Cal.2d 870, 877, 151 P.2d 251. In the present case, however, defendant's stipulation that there was no "form of coercion" excused the district attorney from proving the voluntariness of the confession. Such a stipulation, in the absence of extraordinary circumstances, removes from controversy the question of coercion. State v. Marx, 78 Conn. 18, 60 A. 690; Common-

wealth v. Desmond, 71 Mass. 80; See, 9 Wigmore on Evidence, 3rd Ed., §§ 2588-2590.

[5] The defendant's stipulation that the confession was voluntary was not, however, a stipulation as to the truth of the confession. The voluntariness of a confession is one thing; the weight to be given that confession in the light of defendant's mental state is another. Experience has demonstrated that a confession may be entirely voluntary and yet not be entitled to much credence. People v. Lehew, 209 Cal. 336, 342, 287 P. 337; People v. Elder, 55 Cal.App. 644, 648, 204 P. 29; People v. Joyce, 233 N.Y. 61, 68, 134 N.E. 836. Juries are therefore usually instructed not only to make an independent judgment as to the voluntariness of a confession, but to decide whether or not the confession was true and made with the full knowledge of its meaning and effect. People v. Goold, 215 Cal. 763, 766, 12 P.2d 958; People v. Lehew, supra, 209 Cal. at page 343, 287 P. 337.

[6] In the present case, owing to the stipulation, there was no instruction relating particularly to confessions. The members of the jury were instructed merely that they were the judges of the credibility of the witnesses and of the weight of the evidence. It would have been better practice to instruct them that they were the exclusive judges as to whether or not the confession was true. In a closer case than the present one it is possible that the jury might view the stipulation as bearing both upon the voluntary character of the confession and upon its credibility. The failure of the court to give such an instruction, however, did not prejudice defendant. The psychiatrists called by defendant to testify were unanimous in their conclusion that defendant fully knew the meaning of the questions asked him and the meaning and effect of the answers he gave. Although these witnesses were of the opinion that defendant might be unduly subject to suggestion, the record shows that when he confessed he was unable to answer certain questions and categorically denied the commission of various acts charged by his victims. Furthermore, many of the important elements of the confession were corroborated by witnesses.

[7] The evidence that defendant murdered decedent is sufficient to sustain the verdict independently of his confession of that crime. He was identified by two witnesses as the person near the scene of the crime at the time of the murder. The murder weapon was traced to him and he directed the police in the recovery of decedent's purse. A complete examination of the record reveals no error substantial enough to warant a disturbance of the verdict or the judgment. (People v. Gonzales, supra, 24 Cal.2d at page 877, 151 P.2d 251.)

The judgment and the order denying defendant's motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 496

DODDS v. STELLAR et al.
No. L. A. 20067.

Supreme Court of California.
July 31, 1947.

1. Workmen's compensation 🔑2254

Employer's compensation insurer seeking lien against judgment recovered by injured employee against physician for malpractice was not relieved, by employee's stipulation that insurer had spent a certain sum as compensation payments and a certain sum for medical expenses, of the duty of correlating its lien claim with damages recoverable in the malpractice action.

2. Workmen's compensation 🔑2254

Employer's compensation insurer, seeking reimbursement for expenditures in compensating employee for an industrial injury which has been aggravated by negligent medical treatment, may bring action against third party tort feasor but right of recovery depends upon establishing a causal connection between malpractice and injuries sustained in the employment. Labor Code, § 3852.

3. Workmen's compensation ⚷2254

Where an employee brings action against doctor whose negligent treatment has aggravated industrial injury, and insurance carrier, because of expenditures for compensation in relation to such injury, claims a lien against judgment for damages recovered by the employee, lien is limited to amount actually paid by insurance carrier or for which it has become liable because of the malpractice. Labor Code, § 3856.

4. Workmen's compensation ⚷2254

Where compensation insurer sought lien against judgment recovered by injured employee against physician for malpractice but evidence did not establish with any degree of certainty the precise amounts of challenged medical expenses upon which lien was based, amount of lien would be left for determination upon retrial, at which time amount of lien would be limited to amount that insurer was required to pay because of the malpractice.

5. Workmen's compensation ⚷2254

Injured employee by whom judgment was recovered against physician for malpractice was not entitled to an allowance for attorney's fees from that part of the judgment upon which employer's compensation insurer was granted a lien. Labor Code, §§ 3850–3862.

6. Workmen's compensation ⚷2188, 2190, 2225, 2252

An employer or insurance carrier, upon paying or becoming obligated to pay compensation to employee may seek reimbursement from negligent third party by suit, by intervention as a party in employee's suit, or by filing a lien claim in employee's suit, the choice of procedure being at the option of employer or carrier, but whatever procedure it chooses, the employer or carrier is entitled to recoup full amount of its lien out of entire amount of judgment recovered. Labor Code, §§ 3852, 3853, 3856.

7. Workmen's compensation ⚷2252

An injured employee may sue negligent third party but must do so without prejudice to statutory right of reimbursement granted employer or insurance carrier and where employer or carrier timely asserts lien on recovery by employee, the employee takes the position of statutory trustee for the employer or carrier to extent of compensation, etc., paid. Labor Code, §§ 3852, 3853, 3856.

8. Workmen's compensation ⚷2252

An action by injured employee against negligent third party is not a "class suit" in sense which would permit apportioning litigation expenses between employee and employer or insurance carrier asserting lien against recovery by employee, for compensation, etc., paid. Labor Code, §§ 3852–3854, 3856, 3858, 3860, 3861.

See Words and Phrases, Permanent Edition, for all other definitions of "Class Suit".

CARTER and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Harold Dodds against Robert Woodley Stellar and others for damages. Judgment was entered for plaintiff. From an order granting a motion by the Liberty Mutual Insurance Company for a lien, and from an order denying plaintiff's motion for allowance of counsel fees, plaintiff appeals.

Order granting a lien reversed with directions; order denying application for attorney's fees affirmed.

Prior opinion 175 P.2d 272.

Hahn & Ross and Phillip W. Silver, all of Los Angeles, for appellant.

Lyndol L. Young, of Los Angeles, for respondent.

Leonard, Hanna & Brophy, of San Francisco, amici curiae on behalf of respondent.

SPENCE, Justice.

Plaintiff appeals from certain orders made in ancillary proceedings in his malpractice action and affecting the distribution of the proceeds of recovery by (1) granting the claimant insurance carrier a lien against the judgment by reason of its "expenditures for compensation" and (2) denying plaintiff an allowance for attorney fees. Plaintiff argues: (1) The improper scope of the lien award and (2) the inequity of the disallowance of the attorney fee. His position is well taken as to the first point but not as to the second.

While employed as a workman in the yards of the California Shipbuilding Corporation, plaintiff "suffered a bruise and laceration * * * of his middle, left finger * * * when a steel beam fell upon it." In the course of medical treatment for the injury, plaintiff sustained x-ray burns through the negligence of the attending physicians, and the ultimate result was amputation of the finger. Plaintiff brought an action against the physicians for malpractice and included as defendants his employer and its insurance carrier, Liberty Mutual Insurance Company. Previously plaintiff had applied to the Industrial Accident Commission for compensation benefits by reason of his industrial injury and on November 28, 1944, an award was made against the insurance carrier. On February 28, 1945, the latter served upon plaintiff a notice of claim of a lien in the malpractice action in the amount of $4,494.81, by reason of the compensation award. Meanwhile as a special defense in the malpractice action, the insurance carrier had urged that the Industrial Accident Commission had exclusive jurisdiction over plaintiff's claim of liability against it. That single issue was severed for separate trial by the court without a jury on March 29, 1945, and was determined in favor of the insurance carrier. A separate judgment of dismissal was made accordingly. The malpractice action against the physicians then proceeded to trial before a jury and on April 11, 1945, judgment for plaintiff was entered for the sum of $14,942.05, based upon a verdict which had awarded $10,000.00 general damages and $4,942.05 special damages. That judgment has become final. Dodds v. Stellar, 77 Cal.App.2d 411, 175 P.2d 607.

On June 12, 1945, Liberty Mutual Insurance Company served and filed its notice of motion for an order "allowing a lien against the judgment of the plaintiff * * * in the sum" theretofore claimed, to-wit, "$4,494.81 duly paid out by [it] as insurance carrier for [plaintiff's] employer * * * by reason of the injuries sustained by * * * plaintiff arising out of his * * * employment, and pursuant to the award of the Industrial Accident Commission * * * dated November 28, 1944, and the provisions of the Labor Code." On June 18, 1945, plaintiff served and filed his notice of motion for an order allowing counsel fees to his attorneys "on that part of the judgment heretofore entered * * * upon which the Liberty Mutual Insurance Company is granted a lien * * * on the ground that the * * * action was a representative suit brought by the plaintiff on his own behalf and on behalf of the * * * Company * * * and for the benefit of [both] to obtain a common fund." Supporting and opposing affidavits were served and filed; and on June 28, 1945, after both motions had been argued and submitted, the court made its order granting the insurance carrier's lien in the sum of $4,494.81 and denying plaintiff's application for attorney fees. On July 3, 1945, plaintiff served and filed two notices of motion: (1) For reconsideration and setting aside of the order of June 28, permitting the insurance carrier to assert its lien in the malpractice action; and (2) for reopening the matter of the lien allowance on the ground that the application of the insurance carrier "failed to segregate and itemize all the moneys claimed to have been expended by them for which they claim a lien." Both of these motions were denied on July 30, 1945. Plaintiff has appealed from such denial as well as from the original order granting the insurance carrier's lien and denying him attorney fees.

Plaintiff does not now challenge the propriety of the insurance carrier's assertion of a lien in the malpractice action (Heaton v. Kerlan, 27 Cal.2d 716, 721, 166 P. 2d 857), but he contends that the trial court made an excessive allowance. Thus, he maintains that is was error to include in such lien "(a) any sums of money expended by the [insurance carrier] which were not recovered by" plaintiff in the malpractice action; "(b) payment of medical expenditures in the treatment of ailments wholly disconnected with the injury sustained by plaintiff as the result of the acts of the" negligent physicians; and "(c) payment of medical expended by the lien claimant * * * for [its] sole benefit * * * to aid [it] in determining the extent of [its] liability * * * for future medical or disability payments." Upon this basis plaintiff urges that the lien should be limited to the sum of $3,668.80, representing $1,525.00 for compensation payments and $2,143.80 for hospitalization and medical services allegedly allowed in the computation of the special damages in the malpractice action. The insurance carrier takes the position that "no evidence which developed during the trial of the [malpractice] action * * * could have any effect whatever on the amount of the lien covering actual expenditures made by the insurance carrier under the award of the Industrial Accident Commission to the plaintiff," and therefore its lien claim of $4,494.81, representing $1,525 for compensation payments and $2,969.81 for medical payments must be sustained. Thus, the point of dispute between the parties concerns only the discrepancy as to the item of hospital and medical expense properly entering into the lien allowance.

[1] In opposing any deductions from its lien on plaintiff's judgment, the insurance carrier argues that plaintiff is concluded by his stipulation in the trial court "that the Liberty Mutual Insurance Company did spend the sum of $1,525.00 as compensation payments and the sum of $2,969.81 for medical expenses," or a total of $4,494.81. By reason of this agreement as to the "correctness of the full amount of [its] expenditures," the insurance carrier asserts that it did not introduce in evidence at the hearing on the lien allowance its file of hospital and medical expenses. It also maintains that in the light of such stipulation the trial court properly deemed it unnecessary for the insurance carrier to segregate and itemize its medical expenditures in establishing the extent of its lien. But the stipulation cannot be reasonably interpreted on that basis. Rather, it only recognized the insurance carrier's payments to have been made in pursuance of the Industrial Accident Commission's award and did not relieve the insurance carrier of the duty of correlating its lien claim with the damages recoverable in the malpractice action. These considerations, indicating the false premise of the trial court's decision as to the scope of the lien, render inapplicable the general rule, cited by the insurance carrier, that "where the trial court makes a finding on conflicting evidence, [it] is binding on an appellate court if there is any substantial evidence whatsoever in the record in support thereof." Here the trial court resolved no conflict in the evidence but assigned an erroneous effect to plaintiff's stipulation which in nowise can be said to constitute "substantial evidence * * * in support" of the lien allowance.

[2, 3] The insurance carrier for the employer seeking reimbursement for expenditures in compensating the employee for an industrial injury which has been aggravated by the negligent treatment of a doctor, may bring an action against such third party tort feasor (Labor Code, sec. 3852), but its right of recovery therein will depend on the establishment of a causal connection between the malpractice and the injury sustained in the employment. Hartford Accident & Indemnity Co. v. Sprague, 6 Cal.App.2d 61, 63, 44 P. 2d 361. The same principle applies where the employee brings the action against the doctor whose negligent treatment has aggravated the industrial injury and the insurance carrier, because of "expenditures for compensation" in relation to such injury, claims a lien against the judgment for damages recovered by the employee. Labor Code, sec. 3856. Such lien is limited to the amount actually paid by the insurance carrier or for which it has become liable because of the malpractice. Thus, it is said in Heaton v. Kerlan, supra, 27 Cal.2d 716, at page 720, 166 P.2d 857, at page 859: "It has been settled by decisions in tort actions that the aggravation of injuries by the negligence of a doctor is within the scope of the risk created by the original tortious act. (Citing cases.) The same rule applies in this state in workmen's compensation cases:

'* * * "under the great weight of authority the employer is liable for all legitimate consequences following an accident, including unskillfulness or error of judgment of the physician furnished as required, and the employee is entitled to recover under the schedule of compensation for the extent of his disability, based on the ultimate result of the accident, regardless of the fact that the disability has been aggravated and increased by the intervening negligence or carelessness of the employer's selected physician." The reasonableness of this principle is patent.' (Citing cases.)" And continuing, 27 Cal.2d at pages 722, 723, 166 P.2d at pages 860, 861: "In the present case the commission determined the amount of the disability benefits to which [the employee] was entitled under the act, but it did not determine what part thereof was attributable to the aggravation of [the employee's] injury caused by the doctor's malpractice. Since [the employee] was entitled to compensation for the injury including such aggravation, the commission had no reason to determine to what extent [the employee's] disability was caused by the malpractice, or the amount of compensation payable for disability so caused. Awards for disability are based on the ultimate result of the accident. * * * Whether or not there was malpractice had to be determined in the action against the doctor. Given this determination, it remains to be determined what aggravation of the original injury resulted from the malpractice. The amount of [the insurance carrier's] lien is equal to the amount of compensation paid or payable, including medical expenditures not covered by the award, that was attributable to the malpractice. In other words the amount of the [insurance carrier's] lien is limited to the amount that he is required to pay because of the malpractice."

[4] In line with these authorities, plaintiff objects to the insurance carrier's lien allowance as including these items: (1) Moneys paid to a medical examiner appointed by the Industrial Accident Commission to determine the extent of plaintiff's continued disability; (2) moneys paid for medical treatment of a low back pain, an independent disabling injury suffered by plaintiff; (3) moneys paid for telephone calls and guest trays as shown by the hospital records; (4) moneys paid as the result of unnecessary prolongation of plaintiff's stay in the hospital and disallowed by the court; and (5) moneys paid to various doctors consulted not for the purpose of treating plaintiff, but for advice as to any liability the insurance carrier owed plaintiff by reason of his finger injury. An examination of the reporter's transcript of the trial in the malpractice action discloses that these items were not deemed properly recoverable therein though, as the insurance carrier maintains, they constituted a part of its liability under the compensation award in favor of plaintiff. However, the record evidence submitted in this case does not establish with any degree of certainty the precise amounts of these challenged medical expenses and they remain a matter for proof upon a retrial of the issue, at which time "the amount of the [insurance carrier's] lien" should be "limited to the amount that [it was] required to pay because of the malpractice." Heaton v. Kerlan, supra, 27 Cal.2d 716, 723, 166 P. 2d 857, 861.

[5] Turning now to the second point of dispute on this appeal, plaintiff protests the disallowance of attorney fees for his counsel from that amount of the judgment payable to the insurance carrier in satisfaction of its lien. It is plaintiff's position that the malpractice action was "a representative suit," brought by him on his own behalf and on behalf of the insurance carrier, for the benefit of both, and to obtain a common fund. Upon this basis he cites "a well-established doctrine of equity jurisprudence" that "where a lawyer has rendered * * * service" of such value "as to make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed." Winslow v. Harold G. Ferguson Corporation, 25 Cal.2d 274, 284, 153 P.2d 714, 715; see, also, Estate of Marre, 18 Cal.2d 191, 192, 114 P.2d 591. Here plaintiff urges that the insurance carrier failed to bring an independent action

to recover from the negligent doctors its "expenditures for compensation" by reason of the malpractice but simply filed notice of its claim of lien upon such judgment as plaintiff might obtain; that the insurance carrier rendered no assistance to plaintiff or his counsel in the prosecution of the malpractice action; that recovery was had solely by virtue of the legal services of plaintiff's counsel and that the insurance carrier benefited by the judgment in that its lien will be paid, whereas it otherwise would have no value; that certain court expenses have been incurred by plaintiff that are not taxable as costs in the malpractice action; that plaintiff has agreed to pay his own counsel thirty per cent of any judgment obtained in the malpractice action; and that it would be equitable to order the insurance carrier to pay a like percentage of the amount of its lien to plaintiff's counsel for recovering its "expenditures for compensation."

In opposing plaintiff's classification of the malpractice action as a "representative" or "class" suit, the insurance carrier cites these matters of record: that plaintiff included it as a defendant in the malpractice action; that its defense necessitated the preparation, filing and argument of certain pleadings, and ultimately separate trial on the special issue of the jurisdiction of the court over plaintiff's claim of liability against it; and that upon the filing of findings of fact and conclusions of law, a formal judgment of dismissal was entered in its favor in the malpractice action. The insurance carrier further refers to the independent status of its interest in plaintiff's action by its own counsel proceeding with the timely assertion of its lien claim therein, with which legal services plaintiff's counsel "had nothing whatever to do" and for which it alone was responsible. But irrespective of these factual considerations indicating the "adverse position" of the parties in the initial stages of the litigation and the independent legal procedure required of the insurance carrier as lien claimant, the latter correctly maintains that the rights of the parties are wholly governed by statute (Labor Code, secs. 3850–3862; Limited Mutual Compensation Ins. Co. v. Billings, 74 Cal.App.2d 881, 883, 169 P.2d 673) and that thereby its lien is not subject to the reduction suggested by plaintiff.

[6, 7] The Workmen's Compensation Act, as carried into the Labor Code, gives the employer or its insurance carrier, upon paying or becoming obligated to pay compensation to the employee for disability suffered in the course of employment as the result of negligence of a third party, the right of reimbursement for such expenditure. This right the employer or its insurance carrier may exercise in any one of three ways: It may bring an independent suit (Labor Code, sec. 3852); it may join in an action brought by the injured employee (Labor Code, sec. 3853); or "if [it] has not joined in the action or has not brought action, or if [its] action has not been consolidated," it may claim in the employee's action "as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of [its] expenditures for compensation. * * *" Labor Code, sec. 3856. The choice of procedure is at the option of the employer or its subrogated insurance carrier (Chase v. Southern Pacific Co., 6 Cal.App.2d 273, 277, 43 P.2d 1108) but whether it chooses (1) to sue, (2) to intervene as a party in the employee's suit or (3) to file a lien claim in the latter's litigation, the statute clearly envisages that it shall recoup the full amount of its lien out of the entire amount of the judgment recovered. Thus, where the employee brings his action for damages for negligently inflicted injuries and the employer or its insurance carrier timely asserts its lien therein, the employee takes "the position of statutory trustee for his employer [or its insurance carrier] to the extent of the compensation, etc., paid." Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 269, 84 P.2d 313, 318. The employee may sue but he must do so without prejudice to the statutory right of reimbursement granted to the employer or its insurance carrier. Jacobsen v. Industrial Accident Comm., 212 Cal. 440, 448, 299 P. 66.

[8] Plaintiff concedes that there is no statutory provision for the allowance of

attorney fees from the specified reimbursement lien in the employee's action, but he cites in favor of such deduction the considerations prevailing when the employer or its insurance carrier brings an independent suit against the negligent third party. But these precise differences in the statutory regulations only serve to emphasize the plain distinctions made by the legislature in this regard. Thus by section 3854 of the Labor Code, "if the action is prosecuted by the employer [or its insurance carrier] alone, * * * after recouping for [its] special damages, *together with a reasonable attorney's fee* fixed by the court, [it] shall pay any excess to the injured employee * * *." (Emphasis added.) In contrast to such authorized deduction of attorney fees from the amount which would otherwise be payable to the employee in the course of the employer's or insurance carrier's accounting to the employee (see State Compensation Insurance Fund v. Dalton, 13 Cal.App.2d 284, 289, 56 P.2d 962), the employee is not allowed such item when he prosecutes the damage action and the claim of the employer or its insurance carrier for "the amount of [its] expenditures for compensation" is made "a first lien against the entire amount of [the] judgment * * * recovered by the employee." Labor Code, sec. 3856. In view of these express provisions making the disposition of the proceeds in the damage recovery dependent on whether (1) the employee or (2) the employer or its insurance carrier brings the action and emphasizing that in either event the statutory recoupment right in favor of the employer or its insurance carrier has first consideration, there is no basis for classifying the action as a "class suit" and apportioning litigation expenses between the parties benefiting from the recovery. If such analogy were followed so as to impress a proportionate liability for attorney fees upon the employer's or insurance carrier's lien for "expenditures for compensation," its full reimbursement as accorded by statute would be to that extent nullified. Cf. Hudson v. Union Indemnity Co., 9 La.App. 257, 119 So. 462; Spinner v. Fidelity & Casualty Co. of New York, 245 Ky. 519, 53 S.W.2d 946.

Other statutory provisions pertinent to the rights of the employee and the employer or its subrogated insurance carrier in workmen's compensation matters strengthen the conclusion that the lien here in question is not subject to such deduction as suggested by plaintiff. Thus, section 3858 of the Labor Code provides that "after payment of the employer's [or the insurance carrier's] lien, [it] shall be relieved from the obligation to pay further compensation to or on behalf of the employee * * * *up to the entire amount of the balance of the judgment,* if satisfied, *without any deduction.*" (Emphasis added.) Section 3860 provides that "no release or settlement * * * after action and before judgment is valid and binding without notice * * * and opportunity to the employer [or its insurance carrier] to recover the amount of compensation [it] has paid or become obligated to pay" and "the *entire amount* of such settlement, or of any settlement without suit, is subject to the employer's [or the insurance carrier's] *full claim for reimbursement* for [its] compensation expenditures and liability." (Emphasis added.) And section 3861 requires the Industrial Accident Commission to allow "as a credit to the employer [or its insurance carrier] to be applied against [its] liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to reimburse the employer [or its insurance carrier]."

These several statutory provisions clearly define the rights of the parties and completely cover the field. They emphasize the separate and distinct interest of the employer or its insurance carrier in the avails of the damage recovery for its full protection and leave no room for the evaluation of the rights of the parties in a manner inconsistent with the legislative plan. If there is to be any change in these statutory provisions defining the rights of the parties, the suggestion for such change should be addressed to the legislature rather than to the courts.

The order granting the Liberty Mutual Insurance Company a lien in the sum of $4,494.81 is reversed, with directions to the trial court to determine the amount of the lien allowance in accordance with the views herein expressed. The order denying plaintiff's application for attorney fees is affirmed. The parties will bear their own costs on these appeals.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I do not agree with that portion of the majority opinion which holds that the injured employee is not entitled to have his employer (when the word "employer" is used herein it indicates the employer's insurance carrier) bear a share of the expenses (including attorney's fees) incurred in the employee's action for damages where he recovers from the third party tort feasor expenditures made by the employer as the result of injuries suffered by such employee by reason of the negligence of such third party tort feasor, or the holding that if the *employer* sues the third party tort feasor on behalf of himself and such employee *he may have his attorney's fees* and expenses paid out of the judgment recovered against such third party. We have here a simple case where an employee has suffered an injury compensable under the workmen's compensation law, but the injury was due to the negligence of a third party tort feasor. In such a case the employee may recover from the third person but the employer is entitled to a lien against any judgment so recovered as reimbursement for amounts paid as compensation and medical and hospital treatment to or on behalf of the injured employee.

At the outset it should be noted that the majority opinion holds (as I have above stated) that the workmen's compensation law, properly interpreted, provides that the *employer* may have his attorney's fees paid from the judgment against the tort feasor when he brings the action, but the *employee* may not when he brings the action, and that means not only that such fees come out of the judgment, but they come out of the portion of the surplus that would be payable to the employee after the employer is reimbursed; that is, the employer would be entitled to have *all of the fees paid out of the employee's share of the judgment.* There is not even a sharing of those fees between the employer and the employee. On the other hand when the employee sues he is not entitled to subject the recovery on behalf of the employer to the payment of any portion of such fees. He must pay them all. Suppose the compensation paid to the employee was $4,000, the attorney's fee a 25% contingency, and the recovery from the tort feasor was $4,000. The employer would be made whole and the employee would suffer a total loss of $1,000 or his attorney would receive no fee. *If the provisions of the workmen's compensation act are so construed they are clearly discriminatory and violate the privileges and immunities and equal protection provisions of the 14th Amendment to the Constitution of the United States.* In Builders' Supply Depot v. O'Connor, 150 Cal. 265, 268, 88 P. 982, 983, 17 L.R.A.,N.S., 909, 119 Am. St.Rep. 193, 11 Ann.Cas. 712, this court declared unconstitutional a provision in the mechanics lien law allowing attorney's fees to the lien claimant in an action to enforce his lien but denying this right to the defendant or other persons similarly situated. The court stated: "This provision is, in our opinion, violative both of the federal and the state Constitutions—of the 14th amendment of the former, which guaranties to every person 'the equal protection of the law,' and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed. That said law is violative of the fourteenth amendment to the federal Constitution was established by the Supreme Court of the United States in

Gulf, C. & S. F. Co. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666."

In the instant case there is no basis for a constitutional classification or distinction between the employer and employee with reference to the allowance of attorney's fees. The employer or his insurance carrier is bound to pay the compensation and the employee is entitled to receive it. Either the employer or the employee may sue the tort feasor for the total damages incurred by the employee including expenses for medical and hospital treatment furnished by the employer or his insurance carrier. The action is for the benefit of both regardless of which one sues. The employer is entitled to reimbursement because he was required to pay a law imposed obligation arising out of a tort for which he was in nowise at fault. The real wrongdoer is the tort feasor. The employee is entitled to recover damages because workmen's compensation benefits do not include all the elements of damage involved in his injury and the tort feasor is liable for all damages suffered by him. Basically there is no distinction whatsoever between their positions, hence there is no basis for allowing the employer to recover his attorney's fees and the employee not, when each is protecting his own rights and the rights of the other in the action.

If the provision authorizing attorney's fees to the employer but not to the employee is invalid, then we have no provision in either case and the equitable principle (hereafter discussed) requiring a sharing of the fees must be enforced. On the other hand, I would be disposed to hold that while the statute would be unconstitutional if construed as allowing attorney's fees to the employer only, in view of the rule that a statute must be construed to avoid invalidity if possible, it would be reasonable to construe this statute to authorize both the employer and employee to share the attorney's fees regardless of who prosecutes the action, thus avoiding discrimination and the denial of equal protection to the employee.

Turning to the question of the construction of the provisions of the workmen's compensation statute it is clear that there is no authority for either granting or denying the employee the right to require the employer to pay his share of the attorney's fees. After providing that either the employer or employee may bring the action against the tort feasor, and for notice by the one bringing the action to the other, it is stated: "The court shall first apply, out of the *entire* amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on his application shall allow, as a first lien against the *entire* amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation." Labor Code, sec. 3856. [Emphasis added.] And that: "After payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division up to the *entire* amount of the balance of the judgment, if satisfied, without any deduction." Labor Code, sec. 3858. [Emphasis added.] The only basis for asserting that those provisions prohibit the sharing of attorney's fees is the reference to the lien as being against the *entire* judgment for damages. Obviously that does not refer to the judgment without having first deducted attorney's fees incurred in the prosecution of the action. Such phraseology was used for the sole purpose of having the lien attach not only to the portion of the judgment which represented the amount of compensation paid but also to the balance thereof including allowances for pain and suffering and other items not compensable under workmen's compensation laws. It was adopted by amendment to meet cases reaching a contrary result. See, Jacobsen v. Industrial Accident Comm, 212 Cal. 440, 299 P. 66. That is succinctly stated in Heaton v. Kerlan, 27 Cal.2d 716, 723, 166 P.2d 857, 861: "The employer's lien attaches to the *'entire amount' of a judgment 'for any damages.'* Labor Code, § 3856. *The Legislature so defined the lien* (Stats.1931, p. 2370, Deering's Gen.Laws, 1931, Act 4749) *after this court held that the lien of the employer under the former statute did not attach to that part of a judgment representing damages for the employee's pain and suffering,* and suggested that the difficulties of segregating the elements of the employee's recovery 'might well call for further legislative action on the subject.' Jacobsen v. Industrial Accident Comm, supra, 212 Cal. 440, 449, 299 P. 66, 69. Under the statute as amended, it is clear that the employer's lien attaches to the *entire judgment* and that it is no longer necessary to segregate the part thereof that represents damages for pain and suffering. Pacific Gas & Electric Co. v. Industrial Accident Comm, 8 Cal. App.2d 499, 504, 47 P.2d 783." [Emphasis added.]

The majority opinion argues that because attorney's fees are allowed to the employer expressly that the absence of a similar express provision for the employee shows an intent that attorney's fees shall not be shared. I have pointed out the invalidity or doubtful validity of such a provision on the assumption that such was the law of this state.

Thus we have no provision one way or another on attorney's fees or the sharing thereof. Hence the equitable principle that when expenditures are incurred to recover a common fund (the judgment against the tort feasor which inures to the benefit of both employer and employee) the beneficiaries of the fund must share those expenditures or, as said in Winslow v. Harold G. Ferguson Corporation, 25 Cal.2d 274, at page 277, 153 P.2d 714, at page 715: "It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them. 14 Am.Jur. § 74, p. 47; Trustees of Int. Imp. Fund v. Greenough, 105 U.S. 527, 26 L.Ed. 1157; Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; see, also, notes 49 A.L.R. 1149; 107 A.L.R. 749." And 25 Cal.2d at page 283, 153 P.2d at page 719: "[The] long prevailing rule in equity which allows such charge as a proper means of securing contribution from those entitled to participate in the benefits of the litigation. And such counsel fees are customarily made senior to other claims against the fund. Scott v. Superior Court, 208 Cal. 303, 281 P. 55. * * * Where a lawyer has rendered such valuable service as to make available a fund for a class, *even though he appeared for only one claimant,* it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184. Counsel's right to compensation under such circumstances arises from the benefit conferred upon those who would have suffered loss but for his timely intervention, and not by reason of an agreement to pay his fees. * * * As is stated in Estate of Marre, 18 Cal.2d 191, 192, 114 P. 2d 591, 592: 'Plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys.' This principle is derived from the equitable concept that where one of a group has borne the cost of litigation resulting in benefit to the entire group, the latter should contribute to such expenses. Nolte v. Hudson Nav. Co., 2 Cir., 47 F. 2d 166; O'Hara v. Oakland County, 6 Cir., 136 F.2d 152.

"Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but *there is created in favor of the attorney who renders the service an equitable lien against the fund so preserved.* Central Railroad & Bkg. Co. v. Pettus, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915; Colley v. Wolcott, 8 Cir., 187 F. 595, 109 C.C.A. 425; Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., D.C., 274 F. 836.

"These equitable considerations sustain appellant's position as to the *priority* of his claim against the trust fund. * * * Nor on equitable considerations should the claim of the federal government for income taxes accrued before the commencement of this action stand on a distinguishable level in relation to appellant's allowance for counsel fees for preservation of the fund. *The latter,* viewed as an expense of judicial administration in making the trust assets available for distribution to claimants should properly *take priority.*" [Emphasis added.]

In my opinion the equitable principle discussed above is applicable to the facts of this case. It has been applied in many cases involving similar factual situations. See Hardware Mut. Casualty Co. v. Butler, 116 Mont. 73, 148 P.2d 563; Ellis v. Atlantic Refining Co., 309 Pa. 287, 163 A. 531; Appeal of Harris, 323 Pa. 124, 186 A. 92, 96; Wilson v. Pittsburgh Bridge & Iron Works, 85 Pa.Super. 537.

The order denying plaintiff's application for attorney's fees should be reversed.

SCHAUER, J., concurs.

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81 Cal.App.2d 210

AVILLA v. AVILLA.

Civ. 3664.

District Court of Appeal, Fourth District, California.

Aug. 13, 1947.

1. Exemptions 🔑1, 76

The primary purpose of a statute of exemption from execution is to secure the exempted property to the use and benefit of the debtor and those dependent upon him, and as a part of that purpose a decree for alimony stands on a different basis than an ordinary debt and in such a case, unless the statute clearly provides to the contrary, the exemption will not apply.

2. Exemptions 🔑76

An order for support of divorced wife and child of commercial fisherman on the high seas incorporated in divorce decree, and order of execution on wages of the fisherman for delinquent payments of support, constituted an "order by any court" within exception of the exemption statute, and exemption from execution was properly denied where allowance thereof would interfere with the support order. 46 U.S.C.A. § 601.

See Words and Phrases, Permanent Edition, for all other definitions of "Order of Any Court".

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge. Affirmed.

Action by Mary Avilla against Carl S. Avilla wherein a decree of divorce was entered in favor of plaintiff. From an order denying a claim of exemption from execution, defendant appeals.

Order affirmed.

Ruel Liggett, of San Diego, for appellant.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a claim of exemption by a maritime fisherman.

A decree of divorce was entered in this action in favor of the plaintiff, giving her custody of a minor child. In accordance with an agreement of the parties, incorporated in that decree, the plaintiff was further awarded $150 per month for the support of herself and the child. The defendant having become delinquent in these payments to the amount of $2,639.23, and the matter having been properly presented, the court ordered an execution to issue in the amount of the delinquency.

The defendant was employed on a fishing vessel engaged in commercial fishing on the high seas. His earnings consisted of a proportionate share of the proceeds of the "catch." The execution thus issued was served upon the captain of this fishing vessel, who responded that he was indebted to the defendant in the amount of $2464.72. The defendant filed a notice and an affidavit claiming exemption under the provisions of section 601, Title 46 U.S.C.A., in that he was earning his living by fishing on the high seas, and also claiming exemption under the provisions of section 690.10 and 690.11 of the Code of Civil Procedure. Thereafter, the defendant moved the court to release the money tied up by the service of this execution, on the ground of such an exemption. After a hearing, the court entered an order releasing $300 to the defendant, and denying his motion as to all amounts over that sum. From this order the defendant has taken this appeal.

The appellant contends that his earnings as a maritime fisherman constitute wages as that term is used in section 601 of Title 46, U.S.C.A., and that the levying of the execution here in question does not constitute an "order by any court" within the meaning of the exception provided in the last sentence of section 601. That sentence reads: "Provided, That nothing contained in this (or certain other sections) shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children."

Although the matter is open to question it will be assumed, for the purposes of this opinion, that the remuneration received by the appellant for his services as a fisherman constitutes "wages" within the meaning of section 601. The controlling question here is whether the allowance of the exemption here claimed would "interfere" with a court order "regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children." This question must be answered in the affirmative.

[1] The primary purpose of such an exemption statute is to secure the exempted property to the use and benefit of the debtor and those dependent upon him. Holmes v. Marshall, 145 Cal. 777, 79 P. 534, 69 L.R.A. 67, 104 Am.St.Rep. 86, 2 Ann.Cas. 88. As a part of that purpose a decree for alimony stands on a different basis than an ordinary debt and in such a case, unless the statute clearly provides to the contrary, the exemption will not apply Willen v. Willen, 121 Cal.App. 351, 8 P.2d 942; Rankins v. Rankins, 52 Cal.App.2d 231, 126 P.2d 125; Schlaefer v. Schlaefer, 71 App.D.C. 350, 112 F.2d 177, 130 A.L.R. 1014. In Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953, 957, 106 A.L.R. 580, it is said: "We have shown that the judgment against defendant is a judgment for alimony. One of the characteristics of such a judgment is that as against said judgment the judgment debtor's earnings are not exempt from execution."

[2] Not only are those principles in accord with public policy in this regard, but the last sentence of section 601 expressly provides that the exemption of wages contained in that section shall in no way interfere with the order of any court regarding the payment by a seaman of any part of his wages for the support of his family. The original support order was a court order within the exception provided by this statute. The order for an execution and the execution itself were also such orders. There can be no question but that to allow this exemption would "interfere" with these orders made in a divorce case for the express purpose of requiring the appellant to support his family. The situation was clearly within the exception provided in the exemption statute upon which the appellant relies, and clearly supports the court's order in refusing to give effect to that exemption. This view is supported by one of the cases relied on by the appellant. Cunningham v. McCullough, City Ct.N.Y., 22 N.Y.S.2d 739, 740. While the exemption was there upheld for the reason that the order there in question was not such an order the court, in referring to the last sentence of section 601, said: "That provision refers to orders such as might be made in a matrimonial action or by a court having jurisdiction to make similar orders, such as the Domestic Relations Court of the City of New York."

The order appealed from is affirmed.

GRIFFIN, J., concurs.

81 Cal.App.2d 266

HOWARTH v. HOWARTH.

Civ. 15603.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1947.

Hearing Denied Oct. 16, 1947.

1. Husband and wife 🔑280

Where Utah divorce decree merely approved "property settlement agreement" entered into between the parties, and did not order either party to do anything with respect to the agreement, and no part of agreement was contained in decree, agreement was not merged in decree and hence obligations imposed by agreement were enforceable only by civil action upon the contract.

2. Divorce 🔑245(1)
Husband and wife 🔑280

The power to change, modify, or revise support provisions in divorce decree is dependent upon such provisions being incorporated in decree, and, where such provisions are stipulated to by parties in form of agreement, it is only when agreement is incorporated in decree that former is superseded by the latter and that obligations cease to be those imposed by contract and become enforceable because of their imposition by the decree. Comp.Laws Utah 1907, § 1212; Civ.Code Cal. § 139.

3. Husband and wife 🔑280

Divorced wife was not precluded from recovering sums due under property settlement and separation agreement on ground that husband could not be deprived of right to have support provisions of Utah divorce decree modified as provided by laws of Utah without denying to him the rights guaranteed by state and federal constitutions, where separation agreement was not incorporated in decree. Comp.Laws Utah 1907, § 1212; Civ.Code, Cal. § 139; Const. Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

4. Divorce 🔑247

The legal obligation imposed by law to support wife by payment of permanent alimony terminates upon death of either party.

5. Husband and wife 🔑281

In action by divorced wife to recover sums due under property settlement and separation agreement, conclusion of law that payments were not in nature of alimony but were by way of property settlement was not erroneous because of provision in agreement that weekly payments "are for the support of the wife", where quoted language was followed by provision that upon death of husband during period in which wife was entitled to payments his estate should continue such payments to extent of assets, whereas obligation to pay alimony terminates upon death of either party.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Mae K. Howarth against Fred J. Howarth to recover sums alleged to be due under a property settlement and separation agreement. From a judgment for plaintiff, defendant appeals.

Affirmed.

L. M. Cahill, of Los Angeles, for appellant.

Riccardi, Webster & Donahue and William J. Donahue, all of Pasadena, for respondent.

WHITE, Justice.

Plaintiff brought an action in the Superior Court of Los Angeles County against her former husband to recover sums alleged to be due under the terms of a property settlement and separation agreement. From a judgment in favor of plaintiff for the sum of $2640 defendant prosecutes this appeal.

By her complaint, entitled "Complaint for Money Due Under Terms of Written Contract," plaintiff alleged that the defendant was awarded an interlocutory decree of divorce on June 2, 1943, in the District Court of the Third Judicial District, Tooele County, Utah, which interlocutory decree became final six months thereafter; that on July 3, 1941, the parties entered into a "property settlement and separation agreement," which provided among other things that:

"The husband shall pay to the wife upon the execution of this agreement the sum of Five Hundred Seven Dollars and Fifty Cents ($507.50), and he shall thereafter pay to the wife the sum of Thirty-Five Dollars ($35.00) on Friday of every calendar week beginning with Friday the 4th day of July, 1941, and continuing during the remainder of her life time; provided that in event the marriage between the parties hereto is subsequently dissolved by divorce or death of the husband, and the wife remarries, the weekly payments provided in this paragraph shall terminate upon such remarriage."

Plaintiff further alleged that she had not remarried; that she had performed all things required of her under the agreement; and that there remained due and unpaid thereunder the sum of $2640.

By his answer defendant admitted the execution of the agreement and the entry of the decree of divorce, and alleged that the agreement was presented to the Utah court "for adjudication in said action and that it was by said Court incorporated in and made an operative part of said decree of divorce." A copy of the agreement was annexed to the answer. Defendant further alleged:

"That said 'Property Settlement and Separation Agreement' provided that plaintiff herein would retain the custody of the two minor children of the parties and that she maintain and support them until the expiration of the period of minority of each of said children and that this answering defendant would pay the sum of $35.00 weekly to plaintiff for her support and for the support of said children and that this answering defendant would not be otherwise liable for the support of said children except for medical attention or services of dentists, physicians or surgeons rendered for or to said children, or either of them, during minority, and also all liabilities incurred as tuition charges or extra costs in connection with the further education might be mutually agreed upon. That the oldest of said children reached the age of majority on December 4, 1942, and the youngest of said children who would have reached the age of majority on February 29, 1945, married during the month of August, 1943. That plaintiff herein is possessed of independent means and income *for* more than sufficient for her maintenance and support and has been so possessed and enjoyed such income at all times from December 4, 1942, and August 1943."

At the opening of the trial defendant objected that under the pleadings the court lacked jurisdiction of the defendant or the cause of action as the monies sought to be recovered were for the support of the wife and the agreement providing for payment of the same, having been incorporated in the Utah decree of divorce, had become merged therein, and that therefore a complaint based upon the agreement rather than the Utah judgment did not state a cause of action. This objection was overruled, and at the court's suggestion the judgment roll in the Utah divorce action was offered in evidence by the defendant.

By its conclusions of law the trial court held that the property settlement agreement was not "incorporated in, nor made an operative part" of the Utah decree of divorce; that the payments provided to be made by the husband under the agreement were for the support of the wife and no other person; and "That said payments were not in the nature of alimony, but were by way of property settlement."

Appellant, relying chiefly upon Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15, to which further reference will hereafter be made, contends that the property settlement agreement here in question was incorporated and merged in the decree of the Utah court, and that it thereby lost its independent entity, leaving "no remedy of enforcement on the contract." The record before us discloses that by their agreement, described as a "property settlement and separation agreement," entered into in July, 1941, in Los Angeles County, the parties declared their intention "to settle, by these presents, their property relations." The wife was given the home of the parties, an automobile, and a bank account of $100. The husband retained an automobile, 190 shares of stock in a real estate development company, an exclusive contract for the sale of certain land, and $500 cash. The husband agreed to pay off a mortgage on the home retained by the wife. The wife agreed to care for the minor daughters, and the husband agreed to pay for medical care and education of the children. It was further agreed that the husband pay to the wife $507.50, and that "he shall thereafter pay to the wife the sum of Thirty-Five Dollars ($35.00) on Friday of every calendar week * * * and continuing during the remainder of her lifetime," with a provision that such payments should terminate upon remarriage of the wife. It was further agreed that: "The weekly payments provided by paragraph 12 are for the support of the wife and such payments shall terminate upon her death, and her rights under said paragraph shall not be assignable to any person or persons during her lifetime, and in the event of the death of the husband during the period in which the wife is entitled to said payments his estate shall continue such payments to the extent of the assets of said estate, and the claim of the wife against said estate shall be treated as preferred." By another paragraph each party waived all right to participate in the estate of the other, "except as in this agreement otherwise provided, and each party hereto hereby expressly waives and relinquishes any right to receive alimony or separate maintenance from the other and any right to claim from the other any court costs or attorney fees in any proceeding whatsoever, except as in this agreement otherwise provided."

Upon the question of whether the agreement was "incorporated in and made an operative part of" the Utah decree, the judgment roll in the Utah action discloses the following: By his complaint for divorce filed in 1943 the husband alleged the making of the property settlement agreement and prayed that the court "confirm the agreement of the plaintiff and defendant hereto attached as Exhibit A." The wife appeared only by filing a waiver of time to answer, and her default was entered. After trial, the Utah District Court made findings of fact, which included a finding "that the parties to this action entered into an agreement *as to the division of their community property* (emphasis added), a copy of which is attached to the complaint herein, and is by reference made a part of these findings of fact, and that such agreement is just and proper in its terms and has been completely complied with by the plaintiff up to the date of the hearing of this action." Among its conclusions of law the court stated: "That the property settlement agreement entered into by and between the parties hereto and attached to the complaint herein be and is hereby confirmed and approved." The interlocutory decree contains the following with reference to the agreement: "That the property settlement and agreement attached to the complaint on file herein which has been entered into by and between the parties hereto *relative to their property* is hereby confirmed and approved."

[1] Appellant's contention that the agreement was incorporated in the decree of the Utah District Court, was merged therein, and that therefore no right of action exists on the agreement itself, cannot prevail. As appears from the facts hereinbefore recited, the decree did not order either party to do anything with respect to the agreement. No part of the agreement was actually contained in the decree itself. The husband was not ordered to pay the wife the sums specified in the agreement. The court by its findings of fact found that the parties had entered into the agreement, which by reference was made a part of the findings of fact, and by its decree the court "confirmed and approved" the agreement. In none of the cases cited by appellant was it held that upon a record such as the one now before us the agreement had been merged in the decree or that the complaining party had a right of action on the decree or could enforce compliance therewith by contempt proceedings.

The case of Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15, 17, holds that if a separation agreement "is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree." The court further said, "And it should logically and justly follow therefrom that thereafter there is no right of action on the agreement incorporated in the decree." The facts in the cited case, however, were that the provisions of the agreement as to payments by the husband to the wife were incorporated in the decree, not merely by reference, but by adopting the language of the agreement in the form of a direct order. Moreover, the trial court had there found that the monthly payments to the wife were in the nature of alimony and not in the nature of a property settlement, and hence the order for such payments was subject to modification in the same manner as an order based solely upon the statutory power of the court. The following language in the Hough case indicates that the Supreme Court did not hold that a merger is effected in a situation such as is presented in the case at bar:

"An award of alimony in a divorce decree may be modified under appropriate circumstances (Civ.Code, § 139; Leupe v. Leupe, supra [21 Cal.2d 145, 130 P.2d 697]; Puckett v. Puckett, supra [21 Cal.2d 833, 136 P.2d 1]), and the incorporation of an agreement in the decree for the payment of support as long as it is not a property settlement agreement does not prevent a modification of the decree under appropriate circumstances. * * * (Citing cases.) * * * In Lazar v. Superior Court, 16 Cal.2d 617, at page 620, 107 P.2d 249, at page 250, the agreement authorized its incorporation in the decree, but this court in determining whether the agreement was sufficiently incorporated in the decree to justify a contempt citation for disobedience, stated [16 Cal.2d at page 620, 107 P.2d 249, at page 250.]:

"'If a property settlement agreement is complete in itself and is *merely referred* to in a divorce decree or approved by the court *but not actually made a part of* the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, if the agreement is actually incorporated in the decree, then *such provisions become a part of the order of the court and may be enforced as such.*' (Emphasis added.) The essence of that statement is that the agreement becomes merged in the decree. It is not vital that the agreement so provides. The action of the parties and the court in the divorce proceeding may be determinative."

The interlocutory decree entered in the instant case, which became final on December 5, 1943, does not mention the subject of alimony. It simply confirms and approves a "property settlement agreement" entered into between the parties. Such a decree does not contain any direction or order for the payment of any sum of money, nor does it direct the plaintiff to perform the terms of the agreement. The decree herein is therefore not only legally insufficient to warrant the docketing of any money judgment against the plaintiff, but is wholly insufficient to support contempt proceedings because by the decree no duty or obligation whatever is imposed thereby on the plaintiff in the divorce action. The duty or obligation imposed upon the plaintiff in the Utah divorce action was not at all ascertainable from the decree itself, and the defendant wife's rights were dependent upon an action to enforce the provisions of the agreement itself. It must therefore be held that the conclusion of law arrived at by the trial court herein that the property settlement agreement was not "incorporated in, nor made an operative part" of the Utah decree of divorce was correct. While the property settlement agreement was presented to the court in the divorce proceeding for adjudication, it was not in its entirety nor in part incorporated in the decree, consequently, it was not wholly nor in part merged in the decree. Therefore, the obligations imposed by the agreement are not enforceable other than by a civil action upon the contract.

Appellant's contention that he may not be deprived of the right to have the support provisions of the Utah court decree modified as provided by the laws of the State of Utah without denying to him the rights guaranteed him by the provisions of section 13, Article I of the Constitution of the State of California and by subdivision 1 of the 14th Amendment to the Constitution of the United States, cannot be sustained.

[2, 3] It is true, as urged by appellant, that section 1212, Compiled Laws, 1907, of the State of Utah, confers upon the courts of that state powers in reference to support provisions set forth in a divorce decree similar to those provided in section 139 of the Civil Code of California, but the power to change, modify or revise such provisions in a decree of divorce is dependent upon such provision being incorporated in the decree. And where such provisions are stipulated to by the parties in the form of an agreement between them it is only when the provisions of the separation agreement are incorporated in the decree that the former is superseded by the latter and that the obligations cease to be those imposed by the contract and become enforceable because of their imposition by the decree. As was said in Hough v. Hough, supra, 26 Cal.2d at page 610, 160 P.2d at page 17, "When [the agreement] is incorporated in and made an operative part of the decree, there is no longer any occasion for its independent existence." Such is also the holding by the courts of Utah, as evidenced by the cases of Buzzo v. Buzzo, 45 Utah 625, 627, 148 P. 362; Barraclough v. Barraclough, 100 Utah 196, 111 P.2d 792; Jones v. Jones, 104 Utah 275, 139 P.2d 222, 223; Hamilton v. Hamilton, 89 Utah 554, 58 P.2d 11, 13, 14. It is manifest from what we have heretofore stated that the separation agreement of the parties was not "incorporated in and made an operative part" of the decree.

[4, 5] Appellant earnestly urges that the conclusion of law reached by the trial court that "said payments were not in the nature of alimony, but were by way of property settlement," is erroneous because the agreement expressly provides to the contrary. This argument is based on the language of the agreement reading: "15. The weekly payments provided by paragraph 12 are for the support of the wife." However, this quotation from paragraph 15 of the contract is followed by the following language: "And in the event of the death of the husband during the period in which the wife is entitled to said payments his estate shall continue such payments to the extent of the assets of said estate, and the claim of the wife against such estate shall be treated as preferred." The legal obligation imposed by law to support the wife by payment of permanent alimony comes to an end upon the death of either party. The finding of the court that the payments provided for by said paragraph "were not in the nature of alimony, but were by way of property settlement," is amply supported by the contract itself, which was introduced in evidence. The obligation does not rest upon the duty imposed by law upon a husband to support his wife, but upon the contract of the parties thereto. It was an award to her of a life annuity so long as she did not remarry, given to the wife as part of a property settlement contract. Parker v. Parker, 193 Cal. 478, 480, 481, 225 P. 447. In the cases cited by appellant the obligation of the husband to pay alimony for the support of the wife terminated upon his death. Such cases are therefore readily distinguishable from the case at bar.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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SOUTHERN CALIFORNIA TELEPHONE CO. v. DAMENSTEIN et al.

Civ. 15556.

District Court of Appeal, Second District, Division 3, California.

Aug. 14, 1947.

Hearing Denied Oct. 2, 1947.

1. Appeal and error ⚿102

An order overruling a demurrer is not appealable.

2. Execution ⚿73

Affidavit in support of motion for leave to enforce judgment after lapse of five years from entry thereof should show that judgment creditor during five years following entry of judgment exercised due diligence in locating and levying on property owned by debtor or in following available information to point where reasonable person would conclude that there was not property subject to levy within that time. Code Civ.Proc. §§ 681, 685.

3. Appeal and error ⚿983(1)

An order on motion for leave to enforce judgment after a lapse of five years following entry of judgment will not be disturbed on appeal unless it clearly appears that the determination constitutes an abuse of discretion. Code Civ.Proc. §§ 681, 685.

4. Execution ⚿73

Where judgment creditor, seeking leave to enforce judgment, has made prima facie showing of due diligence, debtor must show that creditor's alleged due diligence was not due diligence because debtor did in fact hold title to property which was not exempt from execution, during five years following entry of judgment in such a manner that creditor in exercise of due diligence could have subjected it to execution. Code Civ.Proc. §§ 681, 685.

5. Execution ⚿73

Where affidavit in support of motion for leave to enforce judgment more than five years after entry thereof disclosed that judgment creditor was diligent in obtaining execution within few months after entry of judgment and in obtaining order for debtor's examination on supplementary proceeding, granting of motion to enforce judgment was not an abuse of discretion although creditor did not search public records to ascertain whether any property stood in name of debtor, in view of fact that search of records would have been futile. Code Civ.Proc. §§ 681, 685, 714.

6. Costs ⚿252

Where respondent was permitted to withdraw original reply brief and to file a new one under stipulation which respondent interpreted was precluding the citation of cases decided after respondent's original reply brief was filed, but which appellant construed as precluding the citation of new points and authorities, attorney fees for services necessitated in answering new points in substituted reply brief would not be awarded as costs. Rules on Appeal, rule 26.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Southern California Telephone Company against Harold F. Damenstein and others, wherein the plaintiff obtained a judgment against Harris Damenstein, also known as H. F. Damenstein, also known as Harold Franks. Harris Damenstein died, and plantiff obtained an order substituting the estate of H. F. Damenstein and Ceale Damenstein, administratrix of the estate of H. F. Damenstein, as defendant. From an order granting plaintiff leave to enforce the judgment against the estate of H. F. Damenstein and from an order overruling a general demurrer of defendant to affidavit in support of plaintiff's motion for leave to enforce the judgment, the estate of Harold F. Damenstein, deceased, substituted party defendant by and through Ceale Damenstein, executrix, appeals.

Order granting leave to enforce judgment and order substituting party defendant affirmed and appeal from order overruling demurrer dismissed.

Gilford, Morris & Bragin, of Los Angeles, for appellant.

Lawler, Felix & Hall and Brinton N. Bowles, all of Los Angeles, for respondent.

WOOD, Justice.

The plaintiff obtained judgment in Los Angeles County against Harris Damenstein, also known as H. F. Damenstein, also known as Harold Franks, for $2,584.05 on March 23, 1933. The defendant died September 19, 1945. Ceale Damenstein, his widow was appointed special administratrix of his estate, and later was appointed executrix of the will of said deceased. On April 9, 1946, upon motion of plaintiff, the superior court made an order substituting the "Estate of H. F. Damenstein," and Ceale Damenstein, administratrix of the estate of H. F. Damenstein, as "defendant" in said action in place of H. F. Damenstein. Also on said day, upon motion of plaintiff under Section 685 of the Code of Civil Procedure, the court made an order granting plaintiff leave to enforce the said judgment against the "Estate of H. F. Damenstein" by presentation of a claim against the estate and by bringing an action thereon if it should be rejected. Also on said day the court overruled a "general demurrer of defendant" to the affidavit in support of plaintiff's motion for leave to enforce the judgment. The defendant "Estate of Harold F. Damenstein" appeals from those orders. It will be assumed that the appeal is on behalf of Ceale Damenstein as executrix of the will of Harold F. Damenstein, deceased.

[1] An order overruling a demurrer is not appealable. Hanke v. McLaughlin, 20 Cal.App. 204, 205, 128 P. 772; Pulvermacher v. Los Angeles Co-ordinating Committee, 61 Cal.App.2d 704, 711, 143 P.2d 974.

[2, 3] The judgment-debtor (appellant) contends that the affidavit of the judgment-creditor (respondent) was not sufficient to support its motion for leave to enforce the judgment, in that, it did not set forth sufficient reasons for its failure to proceed, within five years after the entry of the judgment, under the provisions of Section 681 of the Code of Civil Procedure. Said section provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. * * *" Section 685 of the Code of Civil Procedure provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient shall be ground for the denial of the motion." The affidavit should show that the judgment creditor "during the five years following entry of judgment," exercised "due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time." Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205, 209. "Whether he has exercised such diligence is, by the express provisions of the statute, for the trial court to determine in its discretion," and "an order made under such authority will not be disturbed upon appeal unless it clearly appears that the determination constitutes an abuse of discretion." Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 363, 132 P.2d 207, 209. The matter was submitted upon the affidavit in behalf of plaintiff, and the affidavit of Ceale Damenstein.

The affidavit in support of plaintiff's motion for leave to enforce the judgment was made by Mr. Brinton N. Bowles, attorney for plaintiff, and it stated: That the said above-described judgment was entered on March 27, 1933; that on May 11, 1933, the plaintiff caused an execution to be issued and, on May 23, 1933, the execution was returned wholly unsatisfied; that on June 1, 1933, an order was issued that defendant appear on supplementary proceedings on June 28, 1933; that said order was served on defendant on June 2, 1933; that on the date set for the appearance of defendant he failed to appear and a citation in re contempt on the part of the defendant was issued; that the citation was served on defendant thereafter, and on August 10, 1933, the defendant was examined and discharged on the supplementary proceedings; that as a result of said examination it was determined that the defendant did not own property out of which the judgment could be satisfied; that an agent of plaintiff made a search of the records of the county recorder's office for the period from the entry of the judgment to the end of 1944, and said search failed to disclose the ownership of any property by defendant; that according to said records there was no property standing in the name of defendant; that there appeared on said records an abstract of said judgment under the date of May 22, 1934; that other records of Los Angeles County had been searched by the agent of plaintiff, and on information and belief the affiant alleged that eight judgments in the municipal court of the City of Los Angeles, which various plaintiffs had obtained against defendant in the years 1931, 1932, 1933, and 1935, for various sums of money, were wholly unsatisfied; that in four of those municipal court cases the defendant was examined and discharged on supplementary proceedings during the period from 1931 to 1935; that the records of the Los Angeles County Assessor's office had been searched and that in the name indexes the name of defendant does not appear at any time from March 27, 1933 to the end of 1944 except that in 1939 certain furniture of the assessed value of $150 was assessed to one Harold Damenstein, and in 1940 certain furniture and equipment of the value of $285 was assessed to Harold Damenstein; that in the assessment rolls there was no record of property upon which execution could be levied; that the records of the Los Angeles County Clerk's office had been searched to determine the ownership of the Royal Chemical and Disinfectant Company; that said records disclosed that one Raymond Pozen on July 15, 1935, filed a certificate of doing business under said fictitious firm name; that on January 6, 1944 an amended certificate of doing business under said name was filed with the county clerk which discloses that said business was vested in Ray C. Posner and Harold F. Damenstein, as partners; that on March 6, 1944 another amended certificate of doing business under said name was filed which discloses that Harold F. Damenstein was the sole owner; that the first time there has appeared, since the entry of the judgment, any property upon which execution could have been levied was January 6, 1944; that the defendant died September 19, 1945; that Ceale Damenstein, the widow of defendant, filed a petition for the probate of defendant's will, stating that the value of decedent's estate was $30,000, that it consisted of the business known as the Royal Chemical and Disinfectant Company, that she had been the business manager of said company since it was created about July 15, 1935; that she was appointed special administratrix of the estate; that she had withheld filing an inventory in the estate for more than six months, and no inheritance tax appraiser had been appointed, and in her report as special administratrix she had not stated the extent and value of decedent's property; that the widow petitioned the court for the allowance of $600 each month for living expenses and the petition was granted; that there is sufficient property in the estate to satisfy the judgment; that Raymond Pozen is also known as Ray C. Posner, and that said person is either the same person as the defendant or was "an apparent fraud and dummy for" the defendant; that not until 1944 did the defendant appear openly and notoriously as possessing any property out of which the judgment could be satisfied; that defendant had concealed himself under other names for the purpose of defrauding the plaintiff and defeating the payment of the judgment.

The affidavit of Ceale Damenstein stated: that she and Harold F. Damenstein were were married in 1932, and lived together in Los Angeles County until his death; that since 1938 he had been licensed by the State as a member of the pest control board; that he was a member of the Elks Lodge of Burbank (date not stated); that he had been a member of a Masonic Lodge since 1929; that he had been a member of the Scottish Rite and Shrine Lodges since 1942; that their home in Los Angeles was acquired in her name in 1941, and that a statement of identity was filed in the escrow showing that Harold F. Damenstein was her husband; that they had been listed in the city directory since 1933, except 1935 and 1940, and except during the war period, after 1942, when the directory was not issued; that defendant was listed therein in 1936, 1937, 1938, 1939, 1941, 1942, as manager of the Royal Chemical and Disinfectant Company, and under the listing of that company for those years he was listed as its manager; that since July, 1938, he had been a registered voter in Los Angeles County; that since 1941 he had been a customer of the Water and Power Department and the Southern California Gas Company; that he had been a member of the Southern California Automobile Club for 5½ years (dates not stated); that he has had an automobile operator's license since 1929; that he had a war ration book; that in 1944 a dog license was issued to him; that from 1935 to 1944, he was employed as sales manager of the Royal Chemical and Disinfectant Company, and a social security number was issued to him; that on January 1, 1944, he bought a half-interest in said company from his wife's brother, Ray L. Posner, and a certificate showing the purchase was filed in the county clerk's office on January 6, 1944, and in the recorder's office on February 26, 1944; that when defendant bought the house in 1941 it was worth $7,500 subject to a $4,000 mortgage, but since 1943 it has been worth $15,000 and is clear of encumbrance; that in the last five years defendant sold supplies to the plaintiff; that affiant worked at said company from its beginning; that her brother Ray C. Posner, who was known as Ray Pozen, gave her and defendant an opportunity to work up in the business and they eventually took it over; that she is the sole beneficiary of defendant's estate; that the delay in filing the inventory is that the appraiser has not determined the value of the good will of the business; that affiant's name has been in the telephone book for 10 years; that for over 10 years plaintiff has made no effort to obtain an execution; that during their marriage she never knew defendant "to use any other name but his own"; that she had heard him say he had been "left holding the sack" by his partners; that plaintiff had not used any diligence to levy execution; that since 1935 defendant "was on a large salary and received ten to twenty-five per cent commissions" (the amounts were not stated); that during the last 10 years affiant had an automobile in her name of a value in excess of $1,000, and the last car registered in her name was a 1941 Cadillac.

Appellant argues, in support of his contention that the affidavit in behalf of plaintiff was insufficient, that all of the statements in it which were made upon information and belief, that is those relating to an agent's search of the records of the county recorder, assessor, clerk, and the municipal court, are hearsay in that the attorney who made the affidavit had not searched the records. Such statements were hearsay and should not be given consideration. The affidavit of plaintiff after omitting the hearsay, shows that plaintiff, during the five years following the entry of the judgment, obtained an execution; that it was returned wholly unsatisfied; that the plaintiff obtained, and served on defendant, an order for him to appear on supplementary proceedings; that he failed to appear at the time stated, and plaintiff obtained, and served on him, a citation in re contempt; that thereafter defendant appeared and was examined on supplementary proceedings and discharged; and that as a result of such examination no property was located which could be applied in satisfaction of the judgment.

The affidavit of Ceale Damenstein shows that, during the five years following the entry of the judgment (that is from March, 1933, to March, 1938), defendant lived in Los Angeles County and was listed in the Los Angeles city directory except for the year 1935; that under the city directory listing of the Royal Chemical and Disinfectant Company for 1936, 1937, and 1938, he was listed as its manager; that he was sales manager of that company after 1935, and "was on a large salary," and received commission on sales; that an automobile of a value in excess of $1,000 was registered in the name of the wife of defendant in the name of the wife of defendant in the years 1936, 1937, and 1938; that defendant was a member of the Masonic Lodge; and that he had an automobile operator's license. It is to be noted that her affidavit, as to that period of five years, does not state the amount of his salary, nor the amount of his commissions, nor whether the automobile which was registered in her name was free of encumbrance or whether he had any interest in it. Other than the indefinite reference to his salary and his commissions, and the reference to an automobile being in the name of the wife, the affidavit, as to the five years following the judgment, merely recites matters from which it might be ascertained where the defendant resided during those five years. It did not state that any public record during that period showed that any property stood of record in the name of defendant, and it did not state that he owned any property.

It is also to be noted that her affidavit, as to the time after the first five years, that is after 1938, does not state the amount of salary, nor the amount of commissions, nor whether the automobile which was acquired in her name was free of encumbrance or whether he has any interest in it, nor whether the house which was acquired in her name in 1941 was subject to a homestead. Her affidavit as to the period after 1938, in addition to reciting matters from which it might be ascertained where defendant was residing, shows that in 1941 a house was acquired in the name of the, wife and that in 1944, about 20 months before defendant's death, he acquired a half-interest in the Royal Chemical and Disinfectant Company.

The record in the present proceeding does not show that a search of the public records during the five years following the entry of the judgment would have disclosed that defendant owned any property, and the record does not show that defendant owned any property during that time which was not exempt from execution. The plaintiff was diligent in obtaining an execution within a few months after the entry of the judgment, and in obtaining an order for defendant's examination on supplementary proceedings, and was persistent in trying to secure his appearance for said examination after he failed to appear on the date set for the examination. After some inconvenience resulting from defendant's failure to appear, an examination on supplementary proceedings was had and defendant was discharged, it having been determined that he had no property subject to execution. Plaintiff could not have obtained an order for another examination on supplementary proceedings without complying with a rule of the superior court of Los Angeles County (Rule 24, sec. 2) which provides: "whenever a judgment creditor has examined a judgment debtor pursuant to * * * section 714 * * * of the Code of Civil Procedure * * * no order for a further examination of the same person shall be made except it appear by affidavit that the judgment debtor has property not exempt from execution. * * * Such affidavit shall set forth the dates of every previous examination * * * and shall state fully what new facts have been discovered." In Corcoran v. Harris, 94 Cal.App. 19, at page 20, 270 P. 391, 392, it is said: "Though the section [714, C.C.P.], provides that the judgment creditor 'is entitled to' such an order [for supplementary proceedings], it is not designed to permit him to harrass the judgment debtor to no purpose. This would seem to follow from the well-settled rule that a second order of examination * * * should not be made unless new facts are disclosed to the court which were not known to the judgment creditor at the time of the former hearing." It does not appear from the record here that plaintiff could have made such an affidavit, within the five year period, as that required as a basis for obtaining a further examination of defendant on supplementary proceedings, namely that defendant had acquired property which was not exempt from execution.

Although plaintiff did not search the public records to ascertain whether any property stood in the name of defendant, it appears from the record here, that it would have been futile to do so. Appellant argues that plaintiff's affidavit should have shown that the public records were searched, and that Ceale Damenstein's affidavit cannot be relied upon to cure that defect. Irrespective of whether her affidavit can be so relied upon, plaintiff's affidavit shows that plaintiff exercised due diligence in a most important and effective respect in trying to satisfy the judgment during the five years following the entry of the judgment, namely that of obtaining an execution and examining defendant on supplementary proceedings, and Ceale Damenstein, in her affidavit in opposition to plaintiff's showing of such diligence, had the opportunity of showing, if it be a fact, that defendant held title to property, which was not exempt from execution, during those five years, in such a manner that plaintiff in the exercise of diligence could have subjected it to execution. The mere failure of plaintiff to search the public records to ascertain whether title to property stood of record in the name of defendant would not necessarily indicate a lack of diligence. If in fact public records disclose that a judgment debtor has property subject to execution, a failure to search such records would indicate a lack of diligence and an intention not to pursue the collection of the judgment. By such failure under such circumstances a judgment debtor, who would have recourse against other persons if he should be required to pay the judgment, might be prejudiced by such failure to examine the records and levy upon the property, in that, he might be led to believe that the creditor did not intend to collect the judgment and as a result of such belief the debtor might not proceed against the other persons against whom he had recourse. In the recent case of John P. Mills Organization v. Shawmut Corp., 29 Cal.2d 863, 179 P.2d 570, wherein the debtor, a stockholder, would have had recourse against others, and wherein an execution after five years was refused, it was indicated that the failure for many years to proceed to collect the judgment, when the debtor had kept a bank account, cash and bonds in a safe deposit box, for many years sufficient in amount to substantially reduce the judgment, prejudiced him in pursuing his remedy against others and that such prejudice was a factor in arriving at the conclusion not to allow the execution. A judgment debtor should not gain an advantage because a judgment creditor was not active in searching for something which did not in fact exist. In Helvey v. Castles, 73 Cal.App.2d 667, at page 674, 167 P.2d 492, 496, it was said: "The law does not require idle acts and the statute under consideration [Section 685, Code Civ. Proc.] should not be given a construction which would penalize a creditor for inactivity when he in good faith explores the available sources of information. There is no rule of law which requires a creditor to continue a vigorous search for something he believes does not exist and which does not in fact exist. Each case must be judged upon its own facts; the discretion in such matters is with the trial court, not the reviewing court."

[4] In the case of Becutti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207, cited by defendant, wherein an execution after five years was refused, no execution had been issued during the five years, and the affidavit in behalf of the creditor stated that a full investigation had been made concerning the collectibility of the judgment, and the affidavit on behalf of the debtor in opposition to the motion showed that the debtor did own of record unencumbered real property for many years following the entry of the judgment sufficient in value to satisfy the judgment. In the case of Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210, cited by defendant, wherein an execution after five years was refused, no execution had been issued during the five years, and the affidavit in behalf of the creditor stated that neither the debtors nor any property belonging to them could be located until just before making the affidavit. The opposing affidavits therein showed that the debtors owned a lot, and a grocery and mercantile business, for many years following the entry of the judgment. In the case of John P. Mills Organization v. Shawmut Corp., supra, wherein an execution after five years was refused, proceedings in aid of execution had not been had during the five years, and it was shown by the debtor that he had property sufficient in amount to substantially reduce the judgment. A distinguishing point between those cases and the present one is that in those cases no execution was issued or supplementary examinations had, whereas in the present case, as above stated, an execution had been issued and a supplementary examination had; and further, in those cases the debtors showed that assets were available during the five year period, whereas in the present case such showing was not made. When a judgment creditor has made a prima facie showing of due diligence it is incumbent on the debtor to show, if he can do so, that the credi-

tor's alleged due diligence was not due diligence because the debtor did in fact hold title to property, which was not exempt from execution, during the five years following the entry of judgment, in such a manner that the creditor in the exercise of due diligence could have subjected it to execution. Each case is to be determined upon its particular circumstances.

In the present case there was no showing that defendant held any property during the five years following the entry of the judgment upon which an execution could have been levied, or that he held such property at any time until January, 1944, when he acquired a half-interest in the chemical business. As to that interest of defendant, he had acquired it about 20 months before his death, and when plaintiff learned of such interest through the probate proceedings it promptly made the motion herein for leave to enforce the judgment. As to the automobile which was registered in the name of the wife, there was no showing, as above stated, that it was free of encumbrance or that defendant had any interest in it. As to the house which was purchased in 1941 in the name of the wife, there was no showing that there was no homestead on it, and no showing that defendant had any interest in it. As to his salary and commissions, there was no showing as to their amounts or whether they were exempt from execution. As to the use of aliases by defendant, the affidavit of Ceale Damenstein did not say he did not use different names, but assorted equivocally that she never knew him "to use any other name but his own," and she did not state what name he did use. The trial court could have inferred in view of the close business relationship of Posner, the alleged owner of the chemical business, and the defendant and Ceale Damenstein in the operation of that business, and in view of the aliases of Posner and Damenstein, and in view of the fact that the automobile, the house, and the telephone were in the name of the wife, that defendant was trying to make it difficult for plaintiff to satisfy its judgment.

"[E]ven though the creditor may have satisfied the court that he has proceeded with due diligence to enforce his judgment under section 681, the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now entitled to collect his judgment." John P. Mills Organization v. Shawmut Corp., supra, 29 Cal.2d at page 865, 179 P.2d at page 571. The wife is the sole beneficiary of the $30,000 estate of defendant. The Cadillac automobile and the house are in her name, and she is taking $600 a month from the estate as a family allowance. Comparatively, the amount of the judgment is small. It does not appear that circumstances have arisen since the five-year period which would make it a hardship on her or inequitable to enforce the judgment.

[5] The trial court did not abuse its discretion in granting the motion to enforce the judgment.

The appeal from the order substituting the "Estate of H. F. Damenstein" and Ceale Damenstein, administratrix, as defendant" is not argued specially on appeal. It is mentioned at the beginning of the argument concerning the motion to enforce the judgment. The appeal from that order is without merit.

[6] A matter incidental to this appeal will now be considered. Prior to the time of oral argument on this appeal, appellant filed a document herein entitled, "Notice of Motion for Costs for Appellant's Reply Brief." The notice stated that appellant would make a motion on June 18, 1947 (which was the date of oral argument herein), "for costs to be awarded Appellant for the reasonable legal fee incurred by Appellant for the preparation of said Appellant's Reply Brief." The asserted basis for the motion, as shown by the affidavit of Mr. Gilford, one of the attorneys for appellant, is as follows: that after Mr. Bowles, who originally was the only attorney herein for respondent, had filed a reply brief for respondent, he requested Mr. Gilford to stipulate that he might file a new reply brief for respondent in order to make several references therein to the clerk's transcript, which references had been omitted in the reply brief on file; that Mr. Gilford replied that he would so stipulate, but he did not

want any new points and authorities cited in the new brief because he had pratically completed a rough draft of appellant's reply brief; that Mr. Bowles said that was satisfactory; that a new reply brief was filed which, according to appellant, violated the stipulation in that it contained new points and authorities; that counsel for appellant had to write a reply brief for appellant; that the reasonable value of his legal services in preparing appellant's reply to respondent's original reply brief was $500.

Based upon a written stipulation filed herein, which provided that a new reply brief might be filed "without inserting additional authorities other than" cited in respondent's brief then on file, this court granted respondent permission to withdraw its original reply brief and to file a new one.

The attorneys for respondent state that they understood that the only restriction which was imposed in regard to filing the new brief was that cases decided since respondent's original reply brief was filed should not be cited; that such understanding seems reasonable in view of Mr. Gilford's letter, which was written at the time the stipulation was made and was quoted in his affidavit in support of his motion. The letter stated: "I have redrawn your stipulation in order to set forth more definitely our understanding. In view of the fact that my rough draft is completed and I do not wish to impose any additional work on my office, nor do I wish to take advantage of any law of such recent vintage that might be to your advantage. I think such law, if you have any to cite, can be presented on the oral argument." Mr. Bowles stated in his affidavit that Mr. Gilford said he did not want respondent to cite cases in the revised brief which were decided subsequent to the filing of respondent's original brief. Respondent also asserts that such later cases were not cited; that there was no restriction against making new points; and that there was no violation of the order of court permitting the filing of the brief.

It appears that the new brief was in accordance with the stipulation as the attorneys for respondent understood it. Cases decided after the original brief was filed were not cited. Three new points were stated—one relating to re-examination of debtor, another relating to curing defects in an affidavit by another affidavit, and another relating to waiving alleged errors which are not pointed out in the briefs. Citations in support of those points were given. The draft of appellant's proposed original reply brief is not before the court for comparison with her reply brief which was filed. There is no showing as to how much additional time was required to answer respondent's new reply brief.

Appellant cites, in support of her motion, Rule 26 of the New Rules on Appeal to the effect that the reviewing court may award or apportion costs, and where any party has been guilty of any unreasonable infraction of the rules governing appeals the court may impose upon the offending attorneys such penalties, including the withholding or imposing of costs, as the circumstances may require. Appellant also cites cases to the effect that the matter of determining what costs shall be allowed is largely one regulated by the Appellate Court in the absence of statute; and that the court has wide discretionary powers as to the division of costs on appeal.

The motion here is, in effect, to award attorneys' fees as costs. Attorneys' fees for services of the nature here involved are not to be regarded as costs. If this court had power to make such an award, the circumstances here are not such that the award should be made.

The order granting leave to enforce the judgment, and the order substituting parties defendant, are affirmed. The appeal from the order overruling the demurrer is dismissed. The motion to award attorneys' fees is denied.

SHINN, Acting P. J., and KINCAID, J. pro tem., concur.

81 Cal.App.2d 161

SCARBOUROUGH et al. v. BRIGGS et al.

Civ. 15776.

District Court of Appeal, Second District,
Division 3, California.

Aug. 4, 1947.

Hearing Denied Oct. 2, 1947.

1. Judgment 🔑567

Since fact that consolidated judgment upholding sale of realty by corporation was allegedly rendered by consent of directors and officers of corporation, purchaser, and corporation, was not conclusive as showing collusion, directors and officers, purchaser, and corporation, as defendants in subsequent stockholders' derivative action to restrain the sale of the realty, were not precluded from setting up defense of res judicata on ground that there was collusion in rendition of the judgment.

2. Corporations 🔑206(5)

Only where a stockholder affirmatively shows that governing directors or trustees refused to act or are guilty of fraud in the maintenance or defense of an action may the stockholder be allowed to become a party and defend in behalf of the corporation, and then only when he first shows that he cannot induce those in control to do what is fair and right.

3. Judgment 🔑701

Since corporation, being ultimate beneficiary of stockholders' derivative action to restrain sale of realty by corporation, was "real party plaintiff," and stockholders were mere nominal parties, and are in privity with corporation and, in absence of fraud, are bound by all judgments rendered against the corporation, stockholders could not contend that previous consolidated judgment upholding sale of realty by corporation was not res judicata as to them because they were not parties and that the parties were not the same.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party Plaintiff".

4. Judgment 🔑956(2)

On a plea of res judicata, allegations of complaint in prior action and prayer may be consulted in determining the character of the case and the issues raised.

5. Conspiracy 🔑6

Conspiracy, in and of itself, is not actionable, and it must additionally appear that some right has been violated by a claimed tortious or wrongful act on the part of the defendant before conspiracy can be made the subject of a civil action.

6. Judgment 🔑587

Where questions as to validity, fairness and reasonableness of contract for sale of realty by corporation were expressly placed in issue, stockholders in subsequent stockholders' derivative action against directors and officers of corporation, purchaser of realty, and corporation, to restrain sale of realty, could not circumvent defense of res judicata merely by casting the action in the form of allegations for a conspiracy without alleging that some right had been violated by a claimed tortious or wrongful act on the part of the defendants.

7. Judgment 🔑701

Where consolidated judgment upholding sale of realty by corporation was on the merits and had long since become final, stockholders of corporation were estopped to maintain a subsequent stockholders derivative action involving the same parties and concerning substantially the same issues.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Stockholders' derivative action by John Scarbourough and others against Arthur Briggs and others, Security Homes Estate, a cooperative corporation, and N. A. Ross, Jr., to restrain the sale of realty by Security Homes Estate to N. A. Ross, Jr., wherein a cross-complaint was filed by Arthur Briggs and others, which the plaintiffs answered as cross-defendants. From a judgment in favor of all defendants on the special defenses of res judicata, the plaintiffs appeal.

Judgment affirmed.

Chas. L. Nichols and George Acret, both of Los Angeles, for appellants.

Reynolds & Painter and Louis Miller, both of Los Angeles, for respondent N. A. Ross, Jr.

Charles E. McGinnis and Arthur E. Briggs, both of Los Angeles, for respondents Security Homes Estate, Arthur E. Briggs, Willard Harper, Earl A. Robinson, M. H. Braden, Charles L. Beatley, Laura Freeman Klyce, Otto Newdoll, Ralph Kanode, and Frank A. Merak.

KINCAID, Justice pro tem.

Plaintiffs appeal herein from a judgment rendered after a trial of the special defenses of res judicata as set up in the separate answer of the defendant N. A. Ross, Jr., and the answer of the other defendants. By stipulation of the parties it was agreed that these issues should be first tried.

The first of these prior actions was filed on November 8, 1945, entitled "Security Homes Estate, a co-operative corporation, plaintiff, v. Charles T. Beatley," et al., defendants, being No. 507324 of the records of the Superior Court of Los Angeles County. Defendant N. A. Ross, Jr., was likewise joined as a defendant in said action. The complaint was verified in the name of the plaintiff corporation, hereinafter referred to as "Security," by Henry H. Hayden, as president, and N. B. Stadley, as secretary. It was entitled "Complaint for Declaratory Relief, Injunction and other Equitable Relief" and charged, among other things, that numerous named defendants, referred to therein as the Briggs Group, were shareholders, directors and officers of plaintiff corporation, were engaged in a conspiracy to control the membership of such corporation, direct its corporate affairs, obstruct its management, and to unlawfully dispose of its corporate assets; violations of its by-laws were claimed and it was charged that the Briggs Group, by the use of illegal members and unauthorized meetings, had recalled Stadley and one Baughman and elected successors for these men, and had removed and concealed corporate books and records. It was further charged that the Briggs Group had rejected an advantageous offer for the purchase of some 462 acres of land belonging to plaintiff corporation and were endeavoring, without authority, to sell the same to defendant Ross. It was also alleged that another agreement entered into by Security with a different purchaser for the sale and purchase of said land had been disregarded by the Briggs Group; that the Ross sale contemplated a deferring of the payments of the purchase price over a period of two years, while two proposed sales were for cash. The prayer of the complaint, among other things, was for a declaration of the rights of the corporation, its officers, directors and membership, as to who were its legal officers, directors and members, that records of the corporation in possession of defendants be restored, and that an injunction restraining the sale of the property to Ross issue.

The separate answer of Ross denied the material allegations of the complaint as to lack of authority on the part of the corporate officers to enter into the sale of the 462 acres with him, admitted the execution of the agreement of purchase of such property by him with plaintiff, the payment of $10,000 on account of the purchase price, and prayed for a judgment against plaintiff. An answer was also filed in behalf of the defendants referred to as the Briggs Group setting forth allegations to the same general effect.

On November 13, 1945, another action was filed, being No. 507430 of the records of the Superior Court of Los Angeles County, and entitled "N. A. Ross, Jr., plaintiff, v. Security Homes Estate, a corporation," defendant. In this complaint Ross alleged the making of the contract with Security for the purchase of the 462 acres for the sum of $175,000, that this sum represented its fair and reasonable value, the failure of Security to perform the contract, and specific performance of such contract was demanded. Two answers were filed to this complaint, both in behalf of defendant Security. In one answer, verified by Willard W. Harper, as president of Security, the material allegations of the complaint were admitted excepting that it was denied that Security refused to perform its obligations under the contract. This answer was filed in behalf of the so-called Briggs Group. The other answer was verified by Henry H. Hayden, also as president of Security, and was filed by attorneys L. G. Hayford and Harrie R. Collins as attorneys for the corporation; it was denied therein that the execution of the contract between Ross and Security was a corporate act; the allegations of the complaint as to the reasonableness of the purchase price and the fairness of the contract were likewise denied. It was alleged that the persons who had negotiated a contract were without power or authority so to do on behalf of the corporation.

Thereafter, these two actions, Nos. 507324 and 507430, were consolidated for trial, a trial was had, and a consolidated judgment was rendered in favor of Ross on his specific performance action, and in favor of the Briggs Group in the other case.

Subsequent to the rendition of the consolidated judgment Hayford and Collins, in the name of Security, filed a notice of appeal from such judgment as rendered in both actions. Thereafter, Arthur E. Briggs, as attorney for Security, gave notice to such attorneys that a motion would be made in each of said cases for his substitution as attorney for Security in their place and stead, and for an order terminating all proceedings taken on the appeals so filed. This notice was supported by an affidavit of Earl A. Robinson, secretary of Security, stating that a resolution of the board of directors of the corporation had been adopted directing Briggs to procure a substitution of himself as attorney for Security in place of Hayford and Collins and to take all steps and proceedings necessary to effectuate a dismissal of the appeals. The motion having come on for hearing and no counter affidavits having been filed, the court made its orders substituting Briggs as attorney for Security in place of opposing counsel and further ordered that all proceedings on the appeals be terminated. No appeals were taken by Security, any shareholder of Security, Hayford or Collins, from the order substituting Briggs or from the order terminating all proceedings on appeal. A stipulation for abandonment of appeal was thereupon executed by counsel for Ross and by Briggs as attorney for Security in the specific performance action.

On March 20, 1946, the instant action was commenced by plaintiff shareholders of Security as a derivative or representative action on behalf of the corporation against the Briggs Group, Ross and the corporation. It was alleged that the Briggs Group were shareholders and acting as directors and officers of Security and had excluded plaintiffs as stockholders from participation in the affairs of the corporation. It was further alleged that the 462 acres hereinbefore referred to and owned by Security had a then market value of more than $200,000, could be sold for such sum in cash, and that the Briggs Group conspired to sell such property to Ross for the sum of $175,000 on deferred payments, to the loss and disadvantage of the corporation, thus causing a breach of trust by the Briggs Group. An injunction was prayed for restraining the sale, together with a declaration by the court that such sale be declared void. Answers to this complaint were filed both by Ross and the Briggs Group denying the material allegations of the complaint and alleging by way of affirmative defenses pleas of res judicata of the issues involved in the previous judgments in said actions Nos. 507324 and 507430, and estoppel. A cross-complaint was likewise filed by the Briggs Group which plaintiffs answered as cross-defendants.

The issues being joined, the present action came on for trial and it was stipulated that the special defenses of res judicata and estoppel should first be tried. Evidence was introduced and the trial court made its findings and rendered judgment in favor of all defendants herein on the special defenses of res judicata.

Plaintiffs contend, by way of appeal, that the consolidated judgment is not res judicata because it is collusive and void upon its face, it does not involve the same parties, it does not involve the same issues, and it is not a judgment on the merits. With these contentions we are unable to agree.

To establish their claim that the consolidated judgment is not res judicata because on the face of the record it is collusive and open to attack by shareholders of Security, plaintiffs apparently rely upon a contention that the recitals contained in the consolidated judgment themselves show that the Briggs Group, as purported directors and officers of the corporation, and the defendant Ross, as buyer of the corporate property, worked together to secure the approval of the court to the very transaction which was under attack by Hayden and Stadley, claiming to be president and secretary respectively of Security, in action No. 507324. No proof by the introduction of any evidence, or offer of proof, was made by plaintiffs herein to show any such collusion. No testimony was offered for the purpose of showing fraud nor does the complaint charge defendants with the perpetration of a fraud. In no manner did plaintiffs seek to sustain their charges with facts.

[1, 2] Assuming that the consolidated judgment was rendered by consent of defendants herein, as claimed by plaintiffs, that fact in and of itself is not conclusive as showing such a collusion. It is only where a stockholder affirmatively shows that the governing directors or trustees refuse to act or are guilty of fraud in the maintenance or defense of an action that he may be allowed to become a party and defend in behalf of the corporation, and then only when he first shows that he cannot induce those in control to do what is fair and right. Eggers v. National Radio Co., 208 Cal. 308, 313, 281 P. 58; Difani v. Riverside County Oil Co., 201 Cal. 210, 215, 256 P. 210; Pourroy v. Gardner, 122 Cal.App. 521, 526, 10 P.2d 815. A reference to the recitals of the consolidated judgment fails to disclose such facts and the record is devoid of any evidentiary showing meeting these requirements.

[3] Plaintiffs next maintain that the consolidated judgment is not res judicata as to them because the parties in the within action are not the same as in the two previous cases. Such judgment reveals it to have been rendered in favor of defendant Ross and against Security Homes Estate, a corporation, and that specific performance by the corporation of the Ross contract of purchase was ordered. The present action is concededly brought by plaintiffs, not individually but as shareholders of Security as a derivative or representative action against Ross, other shareholders and the corporation itself. The corporation, being the ultimate beneficiary of such a suit, is the real party plaintiff, and the particular stockholders who bring the action are mere nominal parties. Klopstock v. Superior Court, 17 Cal.2d 13, 21, 108 P.2d 906, 135 A.L.R. 318; Russell v. Weyand, 5 Cal.App.2d 259, 260, 42 P.2d 381. Under such circumstances plaintiffs herein are brought within the rule that shareholders of a corporation are in privity with it and, in the absence of fraud, are bound by all judgments rendered against the corporation. Baines v. Babcock, 95 Cal. 581, 592, 27 P. 674, 30 P. 776, 29 Am.St.Rep. 158; Difani v. Riverside County Oil Co., supra, 201 Cal. at page 215, 256 P. 210; Lamb v. Wahlenmaier, 144 Cal. 91, 93, 77 P. 765, 103 Am.St.Rep. 66; 13 Am.Jur. 471, par. 418.

The plaintiffs herein were stockholders of Security against whom judgment was rendered in the consolidated cases, which judgment is interposed here as res judicata. Plaintiffs were and are in privity with such corporation and the judgment is conclusive against them with respect to the issues adjudicated.

[4-6] In contending that the consolidated judgment does not relate to the issues of the within action so as to justify the imposition of the plea of res judicata plaintiffs argue that the gist of the instant case is a conspiracy between the Briggs Group, as officers of the defendant corporation, and defendant Ross, to sell the corporate property to the latter at a price below its market value. Upon a plea of res judicata the allegations of the complaint in the prior action and the prayer may be consulted in determining the character of the case and the issues raised. Papineau v. Security-First Nat. Bank, 45 Cal.App.2d 690, 694, 114 P.2d 629. In the first case (507324) brought by Security through Hayden and Stadley, as well as the second (507430) brought by Ross against the corporation for specific performance, the questions as to the validity, fairness and reasonableness of the contract for the sale of the involved real property by Security to Ross were expressly placed in issue. In the present action the same issues are again presented and an injunction against consummation of the sale is again demanded. By casting the within action in the form of allegations for a conspiracy

plaintiffs cannot thereby circumvent the defense of res judicata. Conspiracy in and of itself is not actionable. It must additionally appear that some right has been violated by a claimed tortious or wrongful act on the part of the defendant before conspiracy can be made the subject of a civil action. Bentley v. Mountain, 51 Cal.App.2d 95, 99, 124 P.2d 91. No such additional allegations are found in this complaint. The same basic issues are again sought to be relitigated herein. As was said in Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 510, 258 P. 387, 390: "'If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject-matter of the two actions be different.'"

And again at page 511 of 201 Cal., at page 390 of 258 P.: "Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto. This rule has been aptly stated as follows: 'It is important to note in this connection, however, that even tho the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.' Freeman on Judgments (5th Ed.) § 677, p. 1432. To the same effect see Sullivan v. Triunfo Gold [& Silver] Min. Co., 39 Cal. 459. Numerous California cases may be found where this rule has been applied.

"This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them. The rule has been stated as follows: 'The defendant in an action is ordinarily required to set up all his defenses which do not constitute separate causes of action, and if he neglects to do so is concluded by the judgment rendered in such action. The judgment operates as res judicata, not only in regard to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded. The reason for this rule lies in the principle that there must be an end to litigation, and, where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences.' 15 Ruling Case Law, § 446, pp. 969, 970."

[7] The consolidated judgment is one on the merits and, having long since become final, estops plaintiffs from maintaining this subsequent action between the same parties and concerning substantially the same issues.

Certain defendants filed a cross-complaint against plaintiffs and others alleging the institution by cross-defendants of various actions against cross-complainants which had terminated in favor of the latter. Upon allegations of fraud, malice and want of probable cause, they prayed for actual and punitive damages, damages for personal injury and slander of title and for equitable relief. Cross-defendants answered. In their brief cross-complainants say, "We request the court in whatever decision it may make in this matter that it clearly distinguish the issues before the court on this appeal from those which may be involved in the further trial of as yet untried issues between the plaintiff-appellants and these defendants." The judgment before us obviously does not purport to determine the issues raised by the cross-complaint and answer thereto. The parties proceeded under section 597, Code of Civil Procedure, to try, separately, the issues raised by the special defense of res judicata. Defendants have prevailed and the question whether they may try the issues made by the cross-complaint and answer and have another judgment is not presented on this appeal.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

81 Cal.App.2d 258

In re LARSON et al.

LARSON et al. v. LARSON.

Civ. 15712.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1947.

Hearing Denied Oct. 2, 1947.

1. Army and navy 🔑34

Provision in the Soldiers' and Sailors' Civil Relief Act permitting reopening of judgment against person who was prejudiced by reason of military service is to be liberally construed so as to insure to those in the armed services a state of mind relatively at peace as far as the burdens of civil litigation are concerned. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A.Appendix, § 520.

2. Army and navy 🔑34

Divorced father though not a necessary party to proceedings by mother for change of child's name was an interested party and as such interested party had status of a "defendant" within provision of the Soldiers' and Sailors' Civil Relief Act authorizing the opening of a judgment against a person who has been prejudiced by reason of his military service. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A.Appendix, § 520.

See Words and Phrases, Permanent Edition, for all other definitions of "Defendant".

3. Army and navy 🔑34

Decree changing name of minor child was a "judgment" within provision of Soldiers' and Sailors' Civil Relief Act permitting opening of judgment against one who has been prejudiced by reason of military service. Code Civ.Proc. §§ 1276–1279; Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A.Appendix, § 520.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

4. Army and navy 🔑34

Where custody of minor child was awarded to wife by divorce decree and thereafter wife applied for and obtained entry of a decree changing child's name but at that time husband was a prisoner of war in Germany and wife did not file an affidavit showing husband to be in military service, husband was entitled on motion timely filed to have decree changing name vacated under Soldiers' and Sailors' Civil Relief Act, in order to permit him to present his objections and contest wife's petition. Code Civ.Proc. § 1275 et seq.; Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A.Appendix, § 520.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Proceeding in the matter of the application of Gaylynn Evon Larson, a minor under the age of 18 years, and Marion Armstrong, mother of the minor, for change of name, opposed by Austin Gilford Larson. From a decree granting the application and from an order denying motion to vacate the decree, the objector appeals.

Appeal from decree dismissed; order denying motion to vacate decree reversed.

Thomas Morris and Charles R. McCarty, both of Los Angeles, for appellant.

Samuel C. Stoner and Marvin Wellins, both of Los Angeles, for respondents.

WHITE, Justice.

Defendant appeals from a decree of the Superior Court changing the name of his minor daughter and from an order denying his motion to vacate said decree.

On April 22, 1943, the above-named petitioner Marion Armstrong, mother of the aforesaid minor, obtained a final decree of divorce from the defendant Austin Gilford Larson. Under the provisions of the interlocutory decree of divorce, respondent herein, Marion Armstrong, was awarded the care and custody of the above-named minor child with the right of "reasonable visitation" to appellant. On April 13, 1944, respondent was married to Weir P. Armstrong. On August 15, 1945, appellant also remarried.

On April 10, 1945, respondent mother of said minor child filed on behalf of herself and her child Gaylynn Evon Larson, in the superior court of Los Angeles County, a petition to change the name of said minor to Gaylynn Evon Armstrong. In her petition for a change of the minor's name, respondent mother assigned as reasons therefor, her divorce from appellant, the award to her of the custody of said minor, her remarriage to Weir P. Armstrong, and that said minor "is now a member of the household of her mother, the said Marion Armstrong, and her stepfather, the said Weir P. Armstrong, and another child is about to be born to her mother and her stepfather; and it will be to the best interests of said child, Gaylynn Evon Larson, that she have and bear the surname of her mother".

Upon the filing of the aforesaid petition for change of name, an order to show cause was issued, which was published and an affidavit of publication filed. On May 15, 1945, the matter came on for hearing, at which time no person appeared to object, evidence was presented, and the court accordingly rendered its decree changing the name of said minor as prayed.

On May 13, 1946, appellant filed a notice of motion to set aside the aforesaid decree of May 15, 1945, together with an affidavit in support thereof. On May 15, 1946, respondent mother filed her affidavit in opposition to such motion. On the same date, appellant's motion came on for hearing, and on May 27, 1946, the court made its order denying the same. This appeal was then taken by appellant.

By his affidavit filed in support of his motion to vacate the decree changing the name of his minor daughter, appellant set forth that at the time of filing the petition for change of name he was a member of the Army Air Force of the United States. "That during the time of the publication of the petition I was a prisoner of war in a German prison camp and subsequently I was released from the prison camp wherein I had been a prisoner of war for some sixteen months and I did not return to the United States until sometime in June, 1945, and did not return to the state of California until the 27th day of June, 1945 * * *; that had I known * * * that the above proceedings were pending, we would have appeared in court with our attorney and would have objected to the same and would have shown good cause against such change of name". While admitting that his former wife had told him that his daughter's name had been legally changed, appellant asserts that on May 11, 1946, as a result of an investigation made by his attorney, he learned for the first time "that the proceedings above had actually been filed and that a judgment and order changing the name of my daughter * * * is a matter of record, as I hesitated to believe that Marion Larson Armstrong would institute such an action * * * without first informing me so that I could be properly represented at such a hearing". As a reason for not sooner making his motion to vacate the order changing his daughter's name, appellant asserts that he was "unacquainted with the procedure of changing names as a matter of record, and did not know that the changing of the name of my daughter could be made or attempted without personally notifying me by summons or otherwise". Appellant then sets forth in his affidavit the objections he had to such change of name.

In her affidavit in opposition to the motion to vacate the decree, respondent mother makes no denial of appellant's averments concerning his military service, but asserts that on June 30 and July 3, 1945, within six months from the date of the decree changing the name of said minor, she informed appellant that the child's name had been legally changed, that he made no objection thereto, stating in the conversation of July 3, 1945, "Oh, the name doesn't actually matter, I don't care about the name so much but my folks have been objecting. I just wanted to know if it was legal."

It may be conceded as claimed by respondent mother, that in filing her petition and securing the decree of May 15, 1945, changing the name of the minor child, she proceeded in accordance with the applicable statutes of this state (Code Civ.Proc. secs. 1276, 1277, 1278, 1279), and that said order is as claimed by her, "valid and regular". But the question presented to us is whether appellant properly attacked the validity of the order pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act, 54 Stats. 1180, sec. 200, Tit. 50 U.S.C.A.Appendix, § 520, on the ground that he was prejudiced by reason of his military service in making his objections to respondent mother's petition to change the name of the minor child. Allen v. Allen, 30 Cal.2d 433, 182 P.2d 551. Subdivision (4) of section 520, Title 50 U.S.C.A.Appendix, reads as follows: "If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

Appellant's motion to vacate the order in question was timely, and made in accordance with a remedy expressly provided by federal statute, a statute lawfully adopted by Congress in the exercise of its constitutional power, the declared purpose of which is to afford protection to those in the military service and to guard against their civil rights suffering injury during the term of such military service by reason of judicial proceedings instituted or prosecuted against them during their absence. As was said by the Supreme Court of this state in Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 282, 153 P.2d 714, 718: "Such act is the supreme law of the land. U.S.Const., art. VI, § 2; Cal.Const., art I, § 3; Annotation, 130 A.L.R. 774."

[1] While the aforesaid federal statute speaks largely of "plaintiffs", "defendants", "judgments" and "proceedings", it is to be liberally construed so as to insure to those in the armed services a state of mind relatively at peace so far as the vexations and burdens of civil litigation are concerned.

[2] While it may be true, as contended by respondent mother, that appellant was not a necessary party to a proceeding under section 1275 et seq. of the Code of Civil Procedure, for the change of name of a minor child, he was certainly, as the father of such child, "an interested party", whose interests would be materially affected by the proceeding in question. And if the broad and sweeping relief provisions of the Soldiers' and Sailors' Civil Relief Act are to be liberally construed to effectuate its purpose (Royster v. Lederle, 6 Cir., 128 F.2d 197), appellant as such "interested party" must be held to have the status of a "defendant" under the terms of the Act.

[3, 4] The cited federal statute refers to any "judgment" rendered against any person in military service and who was prejudiced by reason of such service, in making his defense thereto. If we are to effectuate the aims and purposes of the aforesaid federal statute, we are persuaded that the decree changing the name of the minor child must be classified as a "judgment" under the definition of that term, because it was a final determination of the rights of all persons interested. Regardless of the merit attached to respondent mother's grounds for changing the name of the minor child, appellant father, certainly was entitled to an opportunity to assert his primary right to have his child bear his name in accordance with the usual custom of succession to paternal surname. This right was denied him because he was in military

service. We are disposed to hold that under the facts here present the case was one wherein, under section 200(1) of the Act, 54 Stats. 1180, 50 U.S.C.A.Appendix, § 520(1), respondent mother should have filed an affidavit showing that appellant was in the military service, thereby preventing the court from entering the decree for change of name without appointing an attorney to represent appellant and protect his interests. No such affidavit was filed, although in her petition for the change of the minor's name, respondent mother alleged that such minor was the daughter of appellant "whose last-known address was ASN 0801290, 534 Bombing Squad, 381 Bomb. Group, APO 634, care of Postmaster, New York City, New York." Appellant, however, was not notified of the hearing, nor was he therein represented within the meaning of the Act. However, as heretofore noted, the failure to appoint an attorney to represent appellant does not render the order void. Section 200 of the Federal Act which protects the serviceman before the entry of the order also contains a provision empowering the trial court to vacate or set aside its judgment in any proceeding when it is made to appear that by reason of his military service, the serviceman was prejudiced in making his defense. Appellant's motion to vacate the decree herein made was filed within the time prescribed by the Act, and he was unquestionably prejudiced by reason of his military service, in asserting his objections to respondent mother's petition for a change of name of the minor daughter. He now seeks the opportunity to present his objections and contest respondent mother's petition. In so doing he is asking for the very relief contemplated by the Act. The trial court, therefore, abused its discretion in refusing to permit him to defend.

The appeal from the decree of May 15, 1945, changing the name of Gaylynn Evon Larson, is dismissed. The order denying the motion of appellant to vacate the decree of May 15, 1945, changing the name of Gaylynn Evon Larson, is reversed.

YORK, P. J., and DORAN, J., concur.

COBORN v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 15949.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1947.

Rehearing Denied Aug. 22, 1947.

Hearing Granted Sept. 29, 1947.

1. Workmen's compensation 🔑416

"Dependency" within workmen's compensation law is a present existing relationship between two persons where the one is sustained by, or relies on, the aid of other for his means of living, and courts will not deprive applicants of rights accorded total dependents, when otherwise entitled thereto, merely because of minor considerations which do not substantially affect status of applicant toward deceased employee. Labor Code, §§ 3501, 3502.

See Words and Phrases, Permanent Edition, for all other definitions of "Dependency".

2. Workmen's compensation 🔑1483, 1484

Evidence disclosing that deceased employee's mother went to work as a temporary matter to obtain money for her contemplated operation and hospitalization, that she saved $209 for such purpose out of a net of $233 which she earned in temporary employment, that she was 61 years of age, and that deceased employee had been contributing $70 per month for her support established total dependency and award as partial dependent was not sustained by evidence. Labor Code, §§ 3501, 3502.

◆

Proceeding by Bessie D. Coborn to review and annul an award of the Industrial Accident Commission of the State of California to petitioner as partial dependent of Allen G. Coborn, an employee of Northern Transportation Company, of which Pacific Indemnity Company was insurer.

Award of partial dependency annulled and cause remanded to the commission with directions.

Haight, Trippet & Syvertson and Roy A. Gustafson, all of Los Angeles, for petitioner.

* Subsequent opinion 192 P.2d 959.

R. C. McKellips, of San Francisco, and John A. Rowe, Jr., of Los Angeles, for respondent Commission.

Herlihy & Herlihy, of Los Angeles, for other answering respondents.

YORK, Presiding Justice.

Petitioner as the sole dependent of decedent employee, Allen G. Coborn, who was killed as the result of an accident arising out of and in the course of his employment, seeks the review and annulment of an award to her as the said employee's partial dependent, she claiming total dependency and as a consequence entitled to a higher award.

She here urges that the findings of fact and award of the Industrial Accident Commission are unlawful because (1) the commission acted without or in excess of its jurisdiction in determining that she was partially dependent; and (2) the award is not supported by the evidence.

It appears from the record herein that the applicant is the mother of the deceased employee and is 61 years of age; that she has worked nearly all of her adult life, her husband having died in 1908; that for the past several years she has lived alone in a small apartment for which she pays $25 per month rent; that prior to V-J Day, August 14, 1945, she worked at the Norris Stamping & Manufacturing Company, earning about $40 per week; that when the war ended she was discharged from that position and had $1,000 in the bank; that from August, 1945, to April 23, 1946, applicant was unemployed and that during that period she lived on the money her son gave her and also collected and used $460 unemployment insurance; that she had no other income until after April 23, 1946, when she went to work for the Quality Cafeteria as a food server; that she quit this position on the day of her son's death, to-wit: July 13, 1946, at which time she still had a balance of $235 in the bank from her war work earnings, and had set aside $209 from her cafeteria wages.

Said applicant testified that her son gave her on an average of $70 per month, but that the amount varied; that her son earned more than $500 per month; that her house expenses, including doctor's bills and medicine, but excluding clothing, "runs me about $130 a month"; that during the period of August 14, 1945, to April 24, 1946, whenever her son came to the house "he always left me money". In answer to the question "Why did you go to work in April, 1946?" applicant stated: "The reason I went to work is because he (her son) was selling his car to put me in the hospital. He had a standing offer from $1200 to $1400 for the car and he was going to sell that. * * * I went to work. I wanted a new mattress and some pillows and to buy my gowns, slippers and kimonas and things I needed for the hospital. I thought I could help out that way. Q. What did you do with the money that you earned at your work at Quality Cafeteria? A. I saved that. My son did not know I was working up until a month before he died"; that she saved $208 or $209 from her earnings; that her son did not want her to work; "He told me he didn't want me to work; that I wasn't able to work; that he would take care of me. * * * I only intended to work there (cafeteria) long enough to get the money for the things I wanted to buy for my operation * * *. I intended to quit work before the first of August."

At the conclusion of the hearing, the Referee made his report as follows:

"The facts in this case indicate that the applicant herein is totally dependent upon her son, unless applicant's employment from April 25, or a few days before, to and including the date of injury precluded her from being a total dependent. During that period of time, applicant earned a total of $230.17 net. Her gross earnings were $288.62. A perusal of the payroll report would show that applicant's work was steady, although the amount earned varied.

"Applicant's testimony indicated that she went to work in April as a temporary matter to obtain money to buy a new mattress, gown, slippers, etc., that she would need for hospitalization which she planned; that she had been in ill health for about nine months, and that she had made up her mind around April that she would need surgery; that she had planned to quit work very soon because she had almost enough money to obtain the things she needed, and because she almost fainted on the job the week before. However, during the actual employment of the applicant, the deceased was injured and killed. * * * The Referee feels that in this particular case, the amount of the earnings (of applicant) were consequential, and in fact were going toward the keeping up of a standard of living above that which the son provided. * * * and that applicant's dependency is partial only. Her testimony would indicate that she received an average of $70.00 per month from the deceased."

The wife, and children under 18 years or older, but physically or mentally incapacitated from earning, are conclusively presumed to be wholly dependent for support upon a deceased employee. Sec. 3501, Labor Code. "In all other cases, questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee." Sec. 3502, Labor Code.

[1] As stated in 1 Workmen's Compensation by Campbell at page 767, section 863: "Dependency is a present, existing relation between two persons where the one is sustained by, or relies on, the aid of the other for his means of living. This does not mean absolute dependency for the necessities of life, but rather that the dependent looks to and relies upon the contributions of the injured employee in whole or in part as a means of supporting and maintaining such dependent in accordance with his accustomed mode of life."

"It is but a truism to say that total dependency exists where the applicants subsist entirely on the earnings of the deceased employee, but in applying this rule courts will not deprive applicants of the rights accorded total dependents, when otherwise entitled thereto, merely because of minor considerations or benefits which do not substantially affect or modify the status of the applicants toward the deceased employee. Bloomington-Bedford Stone Co. v. Phillips, 65 Ind.App. 189, 116 N.E. 850." Peterson v. Industrial Accident Comm., 188 15, 18, 204 P. 390, 391.

[2] It was established by uncontradicted evidence that the applicant herein "went to work in April as a temporary matter to obtain money" for a specific purpose, i.e., her contemplated operation and hospitalization; that she saved $209 for such purpose out of a net of $233 which she earned in such temporary employment; that she was then 61 years of age and had been in ill health for a period of some months; that her son, the deceased employee, had been contributing an average of $70 per month to her support ever since V-J Day in August of 1945, and that he had expressed his desire to take care of her, had told her not to work any more, that he would give her as much as she needed. From this it would appear that a case of total dependency has been proved and that the findings and award of the Commission that appellant was partially dependent upon the deceased employee are not supported by the evidence.

The factual situation in London Guarantee, etc., Co. v. Industrial Accident Comm., 57 Cal.App.2d 616, 618, 135 P. 2d 7, 8, cited in support of the award herein is clearly distinguishable from that of the instant case. There the dependent was 18 years of age, was permanently employed earning $80 per month which she expended upon herself alone for clothing, meals taken outside the home, "carfare, taxifare, cosmetics and amusements, including dancing, bowling and ice-skating." In other words, she was young, in good health and had every prospect of an increase in her earning power, and as stated by the court: "was maintaining a standard of living which required the contributions of both the deceased and herself."

In the instant case, the applicant is advanced in years and in ill health. Moreover, she was maintained by her son from the time she quit working at the end of the war until his death, and the money which she earned while working at the Cafeteria from April 23 to July 13, 1946, was never spent at all but was set apart and saved for a specific purpose. As a result, applicant's standard of living was not changed in any respect by this temporary employment in that she was subsisting almost entirely on the contributions received from the earnings of her son.

For the reasons stated, the award of partial dependency is annulled, and the cause is remanded to the respondent Commission which is hereby directed to find that petitioner was totally dependent upon deceased and to enter an award on that basis.

DORAN and WHITE, JJ., concur.

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81 Cal.App.2d 201

WEINBERG v. BELOND et al.

Civ. 15677.

District Court of Appeal, Second District, Division 3, California.

Aug. 6, 1947.

Hearing Denied Oct. 2, 1947.

1. Master and servant 🔑80(10)

In action by salesman to recover 6 per cent commissions for sales of merchandise manufactured and jobbed by defendants, wherein defendants contended that salesman was to receive only 3½ per cent, evidence sustained finding that agreed commission was 6 per cent.

2. Accord and satisfaction 🔑12(2)
Estoppel 🔑92(2)

Salesman was not estopped or barred by accord and satisfaction to recover 6 per cent commissions for sales of merchandise manufactured and jobbed by defendants, though salesman had accepted commissions from time to time at rate of 3½ per cent, where salesman continued to insist, while accepting commissions of 3½ per cent, that he was entitled to receive 6 per cent.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by S. B. Weinberg against D. J. Belond and others to recover commissions for the sales of merchandise manufactured and jobbed by defendants. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

Henry Haves, of Los Angeles, for appellants.

L. H. Phillips and Samuel Mirman, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Plaintiff Weinberg sued Los Angeles Knitwear Co., a corporation, and others, to recover commissions for sales of merchandise manufactured and jobbed by defendants; he recovered judgment for $3,084.70 against appellants D. J. Belond, Los Angeles Knitwear Co., a corporation, and Morris P. Kaplar. The sole contention on the appeal is that there was an insufficiency of evidence to justify the material findings.

[1] Plaintiff was employed by Belond and Kaplar while they were doing business as Los Angeles Knitwear Company; the corporation of the same name later took over the business and assumed its obligations. The court found that plaintiff sold for and on behalf of Belond and Kaplar $224,515 worth of merchandise; that defendants delivered $123,678.55 net of merchandise to customers solicited and sold by plaintiff, for which defendants agreed to pay plaintiff $7,420.71; that $4,336.01 had been paid, leaving a balance of $3,084.70, for which judgment was given. Plaintiff's earnings were computed upon the basis of six percent of the value of merchandise delivered and the amount for which judgment was given represents the difference between six percent and three and one-half percent of sales and deliveries of merchandise to J. C. Penney Company and another customer, upon orders admittedly solicited and sold by plaintiff. The dispute was whether plaintiff was to receive three and one-half percent or six percent on such sales. The evidence was conflicting on this point. Sufficient of the evidence will be mentioned to make clear that such conflict existed. While it is admitted by defendants that plaintiff was employed by oral agreement for a compensation of six percent of the price of goods

delivered, it is contended that upon the sales in question there was a special agreement for a commission of three and one-half percent. It is not denied that plaintiff obtained orders in the amount found by the court. Defendant Belond testified that when the Penney order came in, for some 5,000 dozen sweaters, there was some question whether it would be accepted and that plaintiff agreed to accept three and one-half percent commission on that order. Plaintiff testified that the Penney Company had forwarded labels which, according to their purchase order, were to be sewed onto the sweaters which they were purchasing, and that he, plaintiff, offered to accept three and one-half percent commission upon the condition that the labels would be affixed as ordered. It is conceded that defendants declined to affix the labels but used "pin tickets" instead, and that the labels were returned to the Penney Company. Belond testified that the refusal of defendants to pay the full six percent commission was due to the fact that the Penney sales were made outside of the agreed territory in which plaintiff was to sell. Plaintiff denied there was such limitation of his territory and in this he was corroborated by the testimony of defendant Kaplar, given by deposition. In view of this conflict in the evidence upon that point and of plaintiff's positive testimony that he did not agree to reduce his commission to three and one-half percent on deliveries made to Penney Company, without labels attached, the finding that plaintiff's commission agreement on the Penney sales was six percent is supported by the evidence. The evidence was equally conflicting as to whether plaintiff agreed to accept a smaller commission on sales to another customer. It is conceded by defendants that the sales upon which they refuse to pay six percent commission were made at the prices charged upon all other sales. Plaintiff's commissions were properly computed at the six percent rate.

[2] At the conclusion of the trial defendants amended their answer to plead an accord and satisfaction. In an attempt to prove that plaintiff had been paid in full they produced a number of checks payable to plaintiff, and cashed by him, which bore notations "commission in full to date" and wording of like import. These checks, it is contended by defendants, and not denied by plaintiff, represented some commissions at three and one-half percent. Defendants also produced a letter written by plaintiff mentioning a shipment to Penney of $1,200 worth of goods and asking for his commission thereon of $420, and they produced another letter in which plaintiff had figured commissions on shipments at three and one-half percent. It is the contention that by the receipt of these payments plaintiff became estopped to claim a greater commission than three and one-half percent on the orders in question, and that the payments constituted an accord and satisfaction. Plaintiff testified that when he found the sweaters were being shipped to Penney without labels he refused to consent to the two and one-half percent reduction in his commissions, demanded full commissions of six percent and that defendants said, "We will settle up with you at the end of the year. We are not going to cheat you," and that defendant Kaplar said, "It is just a matter of record I am not going to cheat you when I give you a statement you will get everything that you have coming to you." From the evidence as a whole the court was justified in finding that although plaintiff accepted commissions from time to time at the rate of three and one-half percent, he continued to insist that he was entitled to receive six percent on all deliveries and that defendants led him to believe that they would pay him the difference of two and one-half percent at the end of the current year. The findings against the defenses of accord and satisfaction and estoppel are therefore supported by the evidence.

The judgment is affirmed.

WOOD, J., and KINCAID, J. pro tem., concur.

81 Cal.App.2d 254

GARGANO et al. v. HOME INS. CO.

Civ. 15683.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1947.

Insurance ⚿665(2)

In action to recover on policy of "cargo" insurance, evidence was insufficient to establish an agreement whereby insured agreed to make the coverage of the "cargo" policy available to third person thereby impairing insurer's right of subrogation in violation of terms of policy.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by L. M. Gargano and Ted Gargano against the Home Insurance Company, a corporation, to recover under a "cargo" insurance policy issued by defendant. From an adverse judgment, the plaintiffs appeal.

Judgment reversed.

McBain & Morgan and Angus C. McBain, all of Los Angeles, for appellants.

Stanley A. Phipps, of Los Angeles, for respondent.

YORK, Presiding Justice.

By the instant action, plaintiffs seek to recover under a policy of so-called "cargo" insurance issued by defendant company on June 6, 1944, whereby the latter agreed to insure plaintiffs up to $5,000 for loss of property upon any one automobile, truck, trailer, or vehicle, or any one semi-trailer operated by plaintiffs, whether owned, leased or rented by them, against loss resulting from plaintiffs' liability to others for loss or damage to general merchandise caused by various perils enumerated in the policy, including collision or overturning of said vehicles, while such goods and merchandise were in the custody and control of plaintiffs and in due course of transit.

The loss for which plaintiffs seek recovery arose from an accident occurring on August 18, 1944, in Lake County, California, on the road between Kelseyville and Yuba City, when a tractor and a semi-trailer owned by one E. W. Brown and leased from him by plaintiffs under an oral agreement, went out of control and overturned on a curve, thereby damaging to the extent of $2,160 a cargo of pears which was being carried on said semi-trailer. The pears were being shipped by plaintiffs from Kelseyville to Yuba City under contract with the shipper, Kelseyville Packing Company.

Following the accident, plaintiffs paid the shipper for the loss of the pears and made claim therefor against defendant insurer under the policy of cargo insurance heretofore mentioned. Defendant denied liability on the sole ground that plaintiffs had breached the insurance contract and forfeited their right to recover thereunder, for the reason that they had agreed with E. W. Brown to make the protection afforded by such policy available to him, thus impairing defendant's right of subrogation against said E. W. Brown.

The trial court found with respect to this issue as follows: "It is true that three or four weeks before said accident and damage to said pears which occurred on August 18th, 1944, the plaintiffs and E. W. Brown made, executed and entered into an oral agreement wherein and whereby the plaintiffs promised and agreed to make available to the said E. W. Brown the protection, benefits and insurance coverage afforded by said policy of liability insurance No. TM 330197 issued by The Home Insurance Company on or about June 6, 1944. It is further true that as part of said agreement, said E. W. Brown promised to pay to plaintiffs the premiums required for said policy of insurance, in consideration of the plaintiffs' promise to make the protection, benefits and insurance coverage of said policy available to said E. W. Brown.

"It is true that said E. W. Brown paid to the plaintiffs the said premiums required by the terms of said policy of insurance and that the plaintiffs received the same by deducting the amount of such premiums, as such, from the sums paid by plaintiffs to the said E. W. Brown for the use of his tractor and semi-trailer."

This appeal is prosecuted from the judgment which followed, it being urged that there is no evidence that the benefits of the insurance policy were conferred upon E. W. Brown by agreement, express or implied, and there is "no evidence to support a finding that such breach had occurred or that plaintiffs had thereby forfeited their right to recover."

Appellant Ted Gargano testified that three or four weeks prior to August 18, 1944, he met Mr. Brown in Los Angeles, at which time Mr. Brown said he had heard that appellant had "this pear haul or pear contract" in Lake County. "He asked if I could use his truck up there on that haul of mine and I said yes, and naturally he wanted to know what the pay was * *. I told him it paid ten cents a box net to him less insurance and unloading and driver's wages, fuel, and maintenance of the truck he had to pay for. The reason for that was he could not come up there himself. * * * I told him I would take care of it. I would pay the driver and service station there for gasoline and repairs he needed up there and deduct it from his check at the end of the season." In answer to the question: "Now, in this conversation you said something about deducting insurance. Will you tell us, to the best of your recollection, exactly what was said in this conversation about insurance?" said witness stated: "That I was to deduct one and one-half per cent for cargo insurance, which I did. * * * A dollar and a half per $100 that was deducted from his earnings * * * For cargo insurance to protect me and the shipper.

"Q. Did you tell him that? A. Yes, sir.

"Q. Was anything said in that conversation about cargo insurance to protect him, Brown? A. No, it was not brought up.

"Q. Did Brown say anything to you about getting cargo insurance to protect himself in that conversation? A. No. * * *

"Q. Did you discuss with him or talk with him in any way about the exact nature of the insurance or the extent of the insurance or the amount of the insurance you intended to carry? A. No."

On cross examination, said witness was asked: "Mr. Gargano, did you say anything to Mr. Brown in your conversation about insurance for him at the time you were discussing and talking about that one and one-half per cent? A. For his protection, you mean?

"Q. Yes. A. No."

Obviously, there is nothing in the testimony of appellant Ted Gargano, who was the only witness produced at the trial herein, tending to establish that appellants agreed with E. W. Brown that the latter should be protected by the policy of cargo insurance issued by respondent.

In this connection, respondent asserts that "Although it is true that the appellant Ted Gargano testified that in his conversation with E. W. Brown he told the latter that the cargo insurance was for the protection of appellants and the owners of the cargo, the Court did not find that this was the agreement between the parties. The Court had the following evidence before it that such was not the agreement. The affidavit of the appellant Ted Gargano, admitted in evidence as Defendant's Exhibit 'A', makes no mention that the cargo insurance which Brown was to pay for was to be for the *sole* benefit of the Garganos and the owners of the cargo." (Emphasis added.)

The affidavit referred to was made by appellant Ted Gargano shortly after the accident occurred and states: "We paid Mr. Brown a straight fee of ten (10¢) cents per box of pears hauled for the rental of this equipment. * * * From this ten (10¢) cents per box fee, I deducted the wages and fuel costs which were charged back to Mr. Brown, and I also deducted the premiums on the cargo insurance carried on this equipment. This is the arrangement we had with Mr. Brown and we have made no agreement with him and have said nothing to change this arrangement. I further certify I have done nothing to prejudice, waive, or interfere with any rights of subrogation the company may have as a result of this loss. Dated November 22, 1944."

No inconsistency exists between this affidavit and the direct testimony of appellant Ted Gargano hereinbefore recited. Neither supports the trial court's finding that appellants and Brown "entered into an oral agreement wherein and whereby the plaintiffs promised and agreed to make available to the said E. W. Brown the protection, benefits and insurance coverage afforded by said policy of liability insurance" issued by respondent. The record discloses no evidence to support a finding that appellants breached the contract of insurance or forfeited their right to recover thereunder.

For the reasons stated, the judgment is reversed.

DORAN and WHITE, JJ., concur.

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81 Cal.App.2d 189

BARNWELL et al. v. CITY COUNCIL OF CITY OF BEVERLY HILLS et al.

Civ. 15956.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1947.

Rehearing Denied Aug. 29, 1947.

Hearing Denied Oct. 2, 1947.

1. Municipal corporations 🔑220(9)

Where contract of 1941 between city and Board of Administration of the State Employees' Retirement System, making employees of city members of the state system, was executed pursuant to 1939 statute, provisions of that statute as it then stood became a part of the city's contract with the board. Government Code, § 20450.

2. Municipal corporations 🔑220(9)

Employees of city who became members of State Employees' Retirement System pursuant to contract between city and Board of Administration of the State Employees' Retirement System in 1941, and who retired before effective date of 1946 amendment of contract providing for increased retirement pay, were not entitled to increased retirement pay in view of statutory provision that an employee ceased to be a member of the retirement system upon retirement. Gen.Laws, Act 5847, §§ 38c(7), 40; Government Code, §§ 20012, 20013, 20390, 20450, 20461.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus proceeding by O'Neill Barnwell and others, retired employees of the City of Beverly Hills, against the City Council of the City of Beverly Hills, Cal., and the Board of Administration, California State Employees' Employment System, to compel payment to the plaintiffs of retirement benefits to which they asserted they were entitled and which defendants refused to pay. From a judgment in favor of defendants, plaintiffs appeal.

Judgment affirmed.

Clyde Thomas, of Los Angeles, for appellants.

Richard C. Waltz, City Atty., and Richard L. Sieg, Jr., Asst. City Atty., both of Beverly Hills, for respondents.

WILSON, Justice.

Plaintiffs, who are retired employees of the City of Beverly Hills, brought this mandamus proceeding against the City Council of the city and Board of Administration, California State Employees' Retirement System, to compel the payment to them of retirement benefits to which they assert they are entitled and which defendants refuse to pay. From a judgment in favor of defendants, plaintiffs have appealed.

The State Employees' Retirement Act was adopted in 1931 (Stats.1931, ch. 700, p. 1442, Gen.Laws, Act 5847) establishing a retirement system applicable only to employees of the state. In 1939 section 38c was added to the statute authorizing any municipal corporation to participate in the State Employees' Retirement System and to make its employees members of the system by contract entered into by the representative body of the municipal corporation and the Board of Administration of the retirement system. Stats.1939, ch. 927, pp. 2605, 2608. Prior to this amendment the City of Beverly Hills, a city of the sixth class, was without power to provide pensions for its employees. Frisbee v. O'Connor, 119 Cal.App. 601, 7 P.2d 316.

On July 1, 1941, plaintiffs as employees of the City of Beverly Hills became members of the State Employees' Retirement System pursuant to contract between the city and the system's Board of Administration. The contract provided (1) that benefits on account of service rendered to the city prior to the effective date of the contract should be allowed to the city's employees only as percentages of the respective average salaries specified in the Retirement Act for each year of such service and (2) that such percentages should be equal to 50 per cent of the analogous percentages then used under the retirement system in calculating benefits on account of prior service allowed to employees of the state. By amendment effective as of March 1, 1946, the contract was so modified as to provide that percentages to be paid retired employees of the city should be 100 per cent of the analogous percentages used under the retirement system. After the execution of the original contract in 1941, and prior to the amendment in 1946, plaintiffs retired from the city's service. Thereafter each of them was awarded retirement pay from the state employees' retirement fund in accordance with the original agreement. This proceeding was instituted to compel defendants to place plaintiffs on the rolls of persons entitled to receive payments and retirement benefits in accordance with the contract as amended.

The contentions of defendants are (1) that the amendment to the contract did not affect the rights of plaintiffs but that such rights were fixed by the original contract which was in force at the time of their retirement; (2) that plaintiffs were members of the retirement system only when they were in the employment of the city, which had terminated upon their retirement. A review of the pertinent statutes necessitates an affirmance of the judgment.

Section 40 of the original retirement act provided that "Any person * * * who is retired, ceases to be a member." There was no alteration of that language in either the amendment of 1933 or that of 1935. Stats.1933, ch. 473, pp. 1238, 1240; Stats.1935, ch. 152, pp. 783, 784. Neither had it been changed at the time of the first contract, July 1, 1941. See sec. 20390 Government Code, Stats.1945, ch. 123, pp. 535, 584.

[1, 2] Inasmuch as the contract of 1941 was executed pursuant to the amendment of 1939 (now in section 20450, Government Code) the provisions of the statute as it then stood became a part of the city's contract with the Board of Administration. Brown v. Ferdon, 5 Cal.2d 226, 231, 54 P.2d 712; Wood v. Lehne, 30 Cal.App.2d 222, 226, 85 P.2d 910; Gally v. Wynne, 96 Cal.App. 145, 148, 273 P. 825. Section 38c was so amended in 1943 by the addition of subdivision 7 (Stats.1943, ch. 640, pp. 2259, 2263) as to provide that by suitable resolutions of contracting parties errors in any contract may be corrected and employees who had been excluded may be included so as to confer upon them "additional benefits on account of prior service." Government Code, sec. 20461, Stats.1945, ch. 123, pp. 584, 586. By authority of section 20461, the amendment of 1946 to the contract of 1941 became effective March 1, 1946. However, since plaintiffs had retired from their employment prior to that date, their retirement pay is limited to the percentage specified in the original contract.

Plaintiffs rely on a statement in Sweesy v. Los Angeles County Peace Officers' Retirement Board, 17 Cal.2d 356, 361, 110 P.2d 37, 39, that "*unless the contrary intention plainly appears* persons having a pensionable status are entitled to receive any increase of benefits which may be provided." (Emphasis added.) Conversely, it must be true that if a contrary intention does appear such persons are not entitled to receive an increase of benefits.

Section 4 of the statute of 1931 establishing the retirement system defines "employee" to be "any person in the employ of the State of California * * *." The section was amended (Stats.1933, ch. 473, p. 1238; Stats.1937, ch. 806, p. 2281) without substantial change and was again amended (Stats.1939, ch. 927, p. 2605) without modification except the addition of a provision including persons in the employ of any contracting city who are included by contract under the retirement system. The same definition is now found in section 20012 of the Government Code.

Section 5 of the original act defined "member" as any person included in the membership of the retirement system as set forth in the sections therein mentioned. Section 5 was amended in 1935. Stats. 1935, ch. 850, pp. 2276, 2277. The amendment does not affect this proceeding. The definition of "member" is now in section 20013 of the Government Code.

We have referred to section 40 of the original statute and to the various amendments, including section 20390 of the Government Code, providing that any person who is retired ceases to be a member of the system. Giving that provision and the definitions of "employee" and "member" the construction to which they are entitled, it is clear that a person is a member of the retirement system only while he is an employee of the state or of a contracting city, and that he ceases to be a member of the system upon his retirement. The construction contended for by plaintiffs would be at variance with the accepted meaning of the words employed in the statute.

While a person is an employee he is entitled to the salary applicable to his position. When he retires he can no longer claim the salary because he has passed from his position of employment into the pensionable status and has become entitled to retirement pay provided by statute for a retired state employee, or by contract for a retired employee of a contracting city.

Subdivision (7) of section 38c added in 1943 did not and section 20461 of the Government Code does not actually or by inference permit the granting by amendatory contract of additional benefits to persons who retired after the original contract was executed. Their rights were determined as of the date of their retirement.

Furthermore, looking to the contract between the City of Beverly Hills and the Board of Administration of the retirement system, we find the provision that the city shall participate in the system "making its *employees* members of said System, from and after July 1st, 1941." The contract further provides that *employees* of the city in certain specified classes shall "become members of said Retirement System * * *." By the contract, which was the means by which plaintiffs entered the system, only employees of the city and not retired persons were members of the system. The amendatory contract recited the execution of the original agreement providing for the percentages to be used in calculating prior service benefits "of persons who are *members* under said contract." It therefore appears both from the original agreement and from the amendment that only *employees* of the city became or remained members of the system and that it was not the intention of the contracting parties to include or to retain any person in the system who was not an employee. The contract referred to members and provided future benefits to members and not to persons who had ceased to be members by reason of their retirement.

Since (1) the statute provided that a person ceased to be a member of the system upon retirement, (2) the provisions of the statute are deemed to be a part of the contract, and (3) the contract clearly expresses the same intention as that stated in the statute, we conclude that plaintiffs ceased to be employees of the city and therefore ceased to be members of the system upon their retirement; that when they retired they became pensioners entitled to the amount of retirement pay provided by the contract in force at the time their employment ceased, and that the amendment to the contract did not increase the amounts of their pensions.

The plaintiff in the case of Sweesy v. Los Angeles County Peace Officers' Retirement Board, supra, and the plaintiffs in the cases cited therein, all derived their rights solely from statutes; the statutes did not contain provisions or definitions similar to those to which we have referred, and none of the plaintiffs were dependent upon contracts for the determination of their rights.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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81 Cal.App.2d 213

SMITH et ux. v. WARD TRANSP. CO. et al.

Civ. 15348.

District Court of Appeal, Second District, Division 3, California.

Aug. 14, 1947.

1. Appeal and error 🔑979(2)

An order granting a new trial for insufficiency of evidence to sustain judgment will not be disturbed on appeal unless there is a clear showing of abuse of discretion.

2. Appeal and error 🔑854(6), 933(1)

All presumptions are in favor of order granting new trial and it will be affirmed if it is sustainable on any ground.

3. New trial 🔑71

Trial court in considering a motion for a new trial is not bound by conflict in evidence and has not abused its discretion in granting new trial when there is any evidence which would support judgment in favor of moving party.

4. New trial 🔑71

On motion for new trial, even if evidence is uncontradicted, trial judge may draw inferences from it contrary to those made by jury, and it is his duty to resolve such conflicts in determining whether issues should be retried.

5. Appeal and error 🔑1005(2)

Only when, as a matter of law, there is no substantial evidence to support a contrary judgment may an appellate court reverse an order granting a new trial.

6. New trial 🔑71

In action by automobile occupants for injuries sustained in collision between automobile and on-coming truck on three-lane highway, where evidence was sharply conflicting as to point of impact and whether automobile and truck left their respective right-hand lanes to progress into or over center lane but jury returned verdict for defendants, granting occupants a new trial was not an abuse of discretion.

7. New trial 🔑71

On motion for new trial, trial court must weigh and consider evidence for both parties, even though conflicting, and determine for itself the just conclusion to be drawn from it.

◆

Appeal from Superior Court, Los Angeles County; Ranse R. Sischo, Judge pro tem.

Personal injury action by Thomas E. Smith and wife against Ward Transportation Company, a copartnership, and others. Judgment for defendants. From an order granting a new trial, defendants appeal. Affirmed.

C. F. Jorz, of Los Angeles, for appellants.

Winthrop O. Gordon, of Santa Ana, for respondents.

KINCAID, Justice pro tem.

Plaintiffs, husband and wife, instituted this action to recover damages for personal injuries sustained by them on August 12, 1944, as a result of a collision occurring between an automobile driven by her and a truck owned and operated by defendant partnership and driven by their employee, defendant Liles. Following a verdict and judgment in favor of defendants a new trial was granted upon the grounds of insufficiency of the evidence to sustain the verdict and misconduct of counsel for defendants prejudicial to plaintiffs which prevented them from having a fair trial. The appeal is taken from that order.

The accident occurred on Firestone Boulevard (Alternate U. S. Highway 101) at a point about 800 feet east of Center Street in Los Angeles County, at about 11:30 p.m. The weather and visibility were good and the highway dry. At the place of collision the highway was divided into three lanes, marked with white lines, each lane being some 12 feet in width. The plaintiffs' car had entered the highway at Center Street, turning right and proceeding in an easterly direction to the point of impact. The defendants' truck, with a trailer attached, was loaded with approximately 14 tons of loose oranges and was proceeding in a westerly direction.

The evidence is sharply conflicting as to the point of impact and whether the automobile and truck left their respective right-hand lanes to progress into or over the center lane, thus causing the collision.

[1-5] "An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465, 467. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689; Mazzotta v. Los Angeles Ry. Corp., supra." Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722, 723; see Imperial-Yuma Production Credit Ass'n v. Shields, 74 Cal. App.2d 932, 169 P.2d 671; Hunt v. Pacific Electric Ry. Co., 51 Cal.App.2d 11, 124 P. 2d 89.

[6, 7] There is substantial evidence which would support a judgment in favor of the moving party. Plaintiff Thomas Smith, who was a passenger riding in the right front seat next to his wife, the driver, testified that plaintiffs' automobile at all times from the point of entry onto Firestone Boulevard to the place of impact was traveling in an easterly direction in the southerly or right-hand lane. He saw the two lights of the approaching vehicle and it was traveling in a westerly direction in the center of middle lane of the highway until, within a point about 100 feet away, they seemed to be getting very close and came right at plaintiffs; that the automobile never changed its direction until it was struck by the truck, on its left front and side. As evidence concerning the point of impact he further testified to observing, immediately after the accident, two areas of broken glass and dirt knocked off the car in the collision. One of these areas was in the southerly lane of the highway, the other about 15 feet distant in the center lane. The location of this glass and dirt, and that of plaintiffs' car as being in the southerly lane and defendants' truck as approaching in the middle lane, was corroborated by Elmer Gillespie, a passenger in plaintiffs' automobile. Had a verdict and judgment been rendered in favor of plaintiffs it would have been supported by such evidence. Even though the record might disclose a preponderance of conflicting evidence, it is only where there is a manifest and unmistakable abuse of discretion by the trial court that the granting of a new trial on the ground of insufficiency of the evidence will be disturbed on appeal. It is the duty of the trial court to weigh and consider the evidence for both parties, even though conflicting, and determine for itself the just conclusion to be drawn from it. There being substantial evidence to support a contrary judgment the order granting the motion for new trial must be sustained. In view of this fact, it is unnecessary for us

to consider the second ground on which the new trial order was based.

The order granting plaintiffs a new trial is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

81 Cal.App.2d 234

PEOPLE v. BERRY.

Cr. 4111.

District Court of Appeal, Second District, Division 3, California.

Aug. 14, 1947.

1. Criminal law 🔑1159(2)

It is not a reviewing court's function to determine the weight of the evidence, but only to determine the legal sufficiency of the evidence.

2. Criminal law 🔑508(2), 742(2)

In prosecution for kidnapping and forcible rape, testimony of defendant's companion, who testified for the people, that he testified against defendant because he hoped to obtain leniency, did not thereby render his testimony inadmissible or unworthy of consideration, and the weight, if any, to be given his testimony was for the trier of the facts.

3. Kidnapping 🔑5
Rape 🔑51(4)

Evidence sustained convictions for kidnapping and forcible rape, committed while defendant was armed with a revolver.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambroso, Judge.

James Berry was convicted of kidnapping and forcible rape, committed while he was armed with a revolver, and he appeals.

Judgment affirmed.

H. L. Richardson, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and Gilbert P. Nelson, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was accused of the crime of kidnapping and forcible rape, committed while he was armed with a revolver. Trial by jury was waived. He was convicted on both counts, and the court found that the allegation in each count that he was armed with a revolver was true. The sentences were ordered to run concurrently. Defendant appeals from the judgments upon the ground of insufficiency of the evidence. His argument is that the evidence on behalf of the People is inherently improbable. Upon stipulation, a part of the People's case was submitted on the transcript of the preliminary examination.

Esther Gutierrez, the prosecutrix, testified that on August 11, 1946, about 11:50 p. m., she and her husband, on their way home after having attended a theater, alighted from a streetcar at a place near their home, and while they were walking on the sidewalk an automobile, in which there were two men, went a little in front of them and stopped near the curb; that defendant, who was driving the automobile, got out of it, went around in front of the automobile and pointed a gun toward her and her husband and told them to stop; that they stopped and then defendant, pointing the gun at them, told her husband to start walking, and she asked defendant to let them go, and he told her to shut up and get in the car; that meanwhile the other man in the car, Leroy Casmas, moved to the driver's seat; that her husband started walking, and she got in the car and asked Casmas to tell defendant to let them go and he told her to keep quiet; that defendant, after standing by the car door about a minute watching her husband and telling him to keep walking, got in the car, and Casmas drove away; that the car was a small 1931 coupe, and she sat between the men; that while they were riding in the car defendant held the gun on her, and kept telling her to tell her husband to keep away from Connie

Moro, a girl with whom defendant said he (defendant) used to live; that she (prosecutrix) asked defendant to let her go because she had a small baby; that they drove to a ranch near Wilmington and Rosecrans Avenues and stopped the car; that defendant, continuing to hold the gun on her, told her to be quiet if she wanted to get back to her baby, and told her to kiss him, and she kissed him; that defendant then got in front of her, kneeled down and unbuttoned his pants; that she told him she was menstruating; that he told her to keep quiet or he would kill her, and then he had sexual intercourse with her; that Casmas then had sexual intercourse with her; that defendant, stating that he would take her home, backed the car out of the ranch and drove to Central Avenue, and while driving he said he knew the police and her husband would be waiting for him and that if she should tell the police anything he would kill her and her husband; that he drove on to Compton Avenue and then she saw bright lights (from another car) back of the car, and Casmas told him to get on some other road and he truned on 116th Place and the bright lights followed close to defendant's car; that persons in the car which was following them "hollered to stop," and defendant stopped, and two police officers came to the side of defendant's car, and she ran to the officers' car; that when the officers came up defendant threw the gun "to the back of the car" at a "sort of shelf over the back seat"; that she told her "story to the police then"; that she had never seen defendant prior to the time he stopped her and her husband that night; that she had been a friend of Connie Moro since they were in school together; that she was not bruised or scratched, nor was her clothing torn, in the altercation with defendant; and that she was scared.

The husband of the prosecutrix testified that on August 11, 1946, about 11:50 p. m., he and his wife alighted from a streetcar near their home and walked on the sidewalk toward home when an automobile passed them and stopped, and the driver got out, went around the front of the car, about 14 feet from him and said "stop"; that that man was the defendant, and he had a gun, apparently a revolver, in his hand; that he pointed the gun at him (the husband) and told him to start walking and told the wife to get in the car; that he started walking; that when the car stopped another person who was in the car shifted to the driver's seat; that he (the husband) had been with his wife all of the afternoon and evening of that day.

Leroy Casmas, called as witness by plaintiff testified that he was 16 years of age; that he had known defendant a short while before August 11, 1946, and on that day about 10 p. m., while the witness was in front of a cafe, defendant came along and asked him to go with him to his girl friend's house; that he got in defendant's car with him and after they had driven about 5 blocks he saw Mr. and Mrs. Gutierrez walking on the street; that defendant drove to the curb, stopped, got out and pulled a gun out of his pocket and told Mrs. Gutierrez to get in the car and told Mr. Gutierrez to walk up the street; that she got in the car, and he (witness) drove the car away; that he drove to Rosecrans Avenue, and out into an open field; that after she was in the car she said she wanted to go home to her baby; that after they were in the field defendant got down on his knees on the floor of the car and had intercourse with her, and then the witness had intercourse with her; that during those acts the defendant had the gun in his hand; that before the act was committed she asked him not to do it because she was sick; that after they left the field they drove about a mile before the officers came up and flashed a light "in back for us to stop"; that when they came and opened the door she ran to the police car and hollered, "They raped me." He testified further that he is in the custody of the Youth Authority; that the officers, in talking to him about being a witness against defendant, told him that if he would tell the same thing the complaining witness told his sentence would be much lighter; that the reason he was telling the story against defendant was that he believed the officers when they said if he did that he would be assisting himself in the matter of the sentence.

A police officer testified that he first saw defendant on August 12, 1946, about 12:45

a. m., near 116th and Compton; that they followed defendant's car a short time and then stopped it; that he found a revolver, with five cartridges in it, on the floor of the car in front of the driver's seat, and found some cartridges in defendant's pocket; that defendant said he had seen Mrs. Gutierrez in a cafe and she asked him to take her home.

It was stipulated as follows: That a physician would testify that on August 12th he took certain substance from the vagina of prosecutrix and put it on slides and gave them to a chemist; that the chemist would testify that he examined the slides and found that the substance was impregnated with spermatozoa and menstrual blood; that the officer who arrested defendant took defendant's pants at the time of the arrest and turned them over to the chemist; that the chemist examined the pants and found on the front of them a place impregnated with menstrual blood.

Defendant testified that he had known the prosecutrix about a year, and that he sees her quite often when she catches a streetcar; that he met her in the back yard at Connie's; that he had been to parties with her and Connie; that on August 11, 1946, between 10:30 and 11:30 p. m., he went alone into a beer joint at 110th and Wilmington and there he saw the prosecutrix who was alone; that he asked for sandwiches, and then went over to the prosecutrix and she said she was afraid to go home and asked him to take her there; that he was in the place about 10 minutes and then they left the place together and got in his car; that he told her he was looking for sandwiches and he was going to drive to some cafes about 4 blocks away; that on the way he saw Casmas, who got in the car with them; that he stopped at another place but could not get any sandwiches, and then when he was about to stop for sandwiches at another place, on the way to take her home, the officers stopped him; that when the officer came to the car she said, "They raped me"; that the officers took a gun from the floor under the seat on the driver's side of the car; that he did not hold the gun on the prosecutrix at any time; that he did not have sexual intercourse with her, and he did not see Casmas have sexual intercourse with her; and that he never saw Mr. Gutierrez at any time before the preliminary hearing.

Mr. Diggs, called by defendant, testified that on August 11, 1946, about 10:35 or 11:00 p. m., he saw defendant in a cafe at 110th and Wilmington talking to the prosecutrix, and saw them leave the cafe together, and he also saw him coming down the street with her. Mrs. Robinson, called by defendant, testified that on the day in question about 11:00 p. m. she was sitting in an automobile with Mr. Diggs and she saw defendant come out of the cafe with a girl, who appeared to be the person who was later pointed out in court as Mrs. Gutierrez.

As above stated, appellant asserts that the evidence is inherently improbable. His counsel argues in support of that contention as follows: That it is significant that the prosecutrix stated that defendant threw the revolver into the back part of the car and that the officer stated he found it in the front part of the car, and that since the question of force, coercion and intimidation depends upon whether the gun was used, this difference in the testimony should be taken into consideration in determining whether the prosecutrix told the truth as to what occurred that evening; that defendant's testimony is corroborated by two witnesses of good reputation who had no motive to testify falsely and consequently they were entitled to full credence; that it is not logical that a man would commit such crimes upon someone he knew and then take her home so that he could be arrested; that if one were going to commit such crimes he would do so in a manner that he would not be apprehended, and that her testimony as to the circumstances, "particularly with reference to where the gun was found," is so inherently improbable the judgment should be reversed.

[1-3] That argument relates to the matter of determining the weight that should be given to the evidence, which matter was for the determination of the trial court. It is not the function of the reviewing court to determine the weight of the evidence,

but only to determine the legal sufficiency of the evidence. The evidence is not inherently improbable. The difference in the testimony of the prosecutrix and the officer as to the place where the gun was in the car does not indicate that the testimony of the prosecutrix was inherently improbable. Various factors enter into a consideration of the testimony in that respect, including whether or not the gun might have been moved by the defendant, or might have fallen from the "shelf" after the prosecutrix allegedly saw it thrown "to the back of the car" or to the "shelf over the back seat" of the coupe. As to Casmas testifying as he did because he hoped to obtain leniency in his own case, his testimony was not thereby necessarily rendered inadmissible or unworthy of consideration. Even though he may have expected to aid himself by so testifying, it cannot properly be concluded that his testimony was untrue merely because he had such expectation. The weight, if any, to be given his testimony was for the trial court. The evidence was legally sufficient to support the judgment without the testimony of Casmas.

The judgment is affirmed.

SHINN, Acting P. J., KINCAID, Justice pro tem., concur.

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80 Cal.App.2d 898

Lucille COYNE, Petitioner, v. THE SUPERIOR COURT, IN AND FOR COUNTY OF SANTA CLARA, Respondent.

Civ. 13466.

District Court of Appeal, First District, Division 1, California.

Aug. 20, 1947.

On petition for rehearing.

Rehearing denied.

Prior opinion, 183 P.2d 36.

Jerome F. MacDonald, of Redwood City, for petitioner.

Owen D. Richardson, of San Jose, for respondent.

PER CURIAM.

In the opinion in this case it is stated that no demand was made by petitioner upon the superior court for the relief requested, and that the averment in the petition to the contrary was not true. Such statement was based on the facts as disclosed by the record then before us, and is in accordance with such record. The record shows that on October 17, 1946, the superior court transferred the case to the justice's court. The minutes of the court show that counsel for petitioner then made no objection to the order of transfer and that on that date and prior thereto no request to quash the writ of possession was or had been made. Based on these facts, this court pointed out that the averment in the petition for a writ of mandate that relief had been requested of the trial court was not supported. Counsel for petitioner, in his petition for rehearing, strenuously objects to the implication that he filed a petition containing a false averment and contends that his admission that the averment was not supported made on oral argument was simply for purposes of argument, it being his contention that no demand was necessary. He attaches to his petition for rehearing an affidavit of his client filed in the superior court on October 18, 1946 (the day after the superior court had transferred the case to the justice's court), in which affidavit, among other things, the affiant requests that the writ of possession be quashed. It thus appears that the averment in the petition for a writ of mandate that such relief had been demanded of the superior court is in accordance with the facts, as now for the first time disclosed to us. But this does not require that the petition for a rehearing be granted. The opinion heretofore filed was not based on the ground that relief had not been requested in the trial court but on the ground that the entire proceeding is moot, for reasons fully discussed in the opinion. Nothing said in the petition for rehearing has convinced us that such ground is not sound.

The petition for a rehearing is denied.

81 Cal.App.2d 131

FALKENSTEIN et al. v. POPPER.

Civ. 13412.

District Court of Appeal, First District, Division 1, California.

July 31, 1947.

1. Landlord and tenant ⚷92(1)

A five year lease which gave lessee for period of two years the exclusive option to purchase the property for $8,500, and for the remaining three year period of the term gave lessee the first opportunity to purchase the property for that price granted an option to lessee to purchase during the remaining three year period only in the event that lessor desired to sell.

2. Landlord and tenant ⚷92(1)

The words "first privilege", "first right", etc., do not give lessee an absolute right to purchase or renew a lease.

See Words and Phrases, Permanent Edition, for all other definitions of "First Privilege" and "First Right".

3. Landlord and tenant ⚷92(1)

Provision in 5 year lease which first gave lessee the exclusive option for two years to purchase the property for $8,500, and then provided that for remaining three year period of term, lessee should be given first opportunity to purchase the property at that price was unambiguous, and statutory rules of construction were not applicable. Civ.Code, §§ 1636–1638, 1641, 1647, 1649, 1654; Code Civ.Proc. § 1860.

4. Trial ⚷136(1)

The meaning of plain and ordinary words in common use is a question of law.

5. Contracts ⚷346(6)

Where a contract is clear and unambiguous, one who claims the parties intended something different from what the words would seem to mean must put the fact of such intent into issue before he can introduce parol evidence.

6. Pleading ⚷350(3)

Where terms of option to purchase contained in lease were unambiguous, and there was no offer of proof or reference to any available parol evidence that would show that parties intended something different from what clear words of lease appeared to mean, interpretation thereof was a question of law and trial court properly interpreted lease on motion for judgment on pleadings.

◆

Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Action by A. M. Falkenstein and W. A. Smith against Hulda M. Popper for specific performance of an option to purchase. From a judgment for defendant on the pleadings, plaintiffs appeal.

Affirmed.

Terence J. Boyle, of San Francisco, for appellant.

Franklyn M. O'Brien, of San Francisco, for respondent.

BRAY, Justice.

The trial court granted defendant's motion for judgment on the pleadings in an action for specific performance of an option to purchase, on the ground that the complaint did not state a cause of action.

On April 25, 1942, the parties entered into a five year lease of certain business property in San Francisco. The only part of the lease pertinent to this appeal is paragraph 23, subdivisions (a) and (b):

"Lessor hereby gives to Lessee an opportunity to purchase the real property and improvements known as No. 4116 Geary Boulevard Street, in the City and County of San Francisco, State of California, at and for the agreed price of Eight thousand, five hundred (8,500.00) Dollars, lawful money of the United States, upon the following terms and conditions, to-wit:

"(a) For the period of two (2) years, Lessee shall have the exclusive option to purchase said property for said price; said option shall expire May 1, 1944.

"(b) *For the remaining period of said term, to-wit, three (3) years, Lessee shall be given the first opportunity to purchase said property for said price, and in the event that Lessee shall not avail himself of said opportunity and shall not desire* *to purchase said property, Lessor shall then be free to sell said property to any other person for any price agreeable to her.*" (Emphasis added.)

Subdivision (a) is not involved on this appeal (except as it relates to the construction to be given subdivision (b), as the plaintiffs did not demand a conveyance of the property until February 8, 1946, almost two years after the expiration date given in subdivision (a).

[1] Plaintiffs contend that subdivision (b) is ambiguous and therefore the court should not have granted judgment on the pleadings but should have permitted the introduction of evidence to explain the alleged ambiguity. The court held that subdivision (b) is not ambiguous, and shows on its face that it grants an option to plaintiffs to purchase only in the event that defendant desires to sell. The complaint contains no allegation that defendant desires to sell. The theory of the complaint is that plaintiffs had an exclusive option to purchase under subdivision (b).

A study of all of the provisions of paragraph 23 shows that the court was clearly right. Plaintiffs, to sustain their contention, completely ignore the relationship of subdivision (a) to subdivision (b)—"we claim we are in the same position now as we were during the first two years." In construing the agreement here, the court must give some meaning to subdivision (a) in its relation to subdivision (b), for if the parties intended that the plaintiffs were to have an exclusive option to purchase for the entire five year term of the lease there would have been no reason for subdivision (a) which expressly gives an "exclusive option to purchase" for only two years. It is obvious that after giving the limited exclusive option in subdivision (a), the lessee in subdivision (b) was given the first opportunity to purchase in the event that during the balance of the leased term, the lessor decided to sell.

Plaintiffs rely upon certain cases construing words similar to "opportunity" and "first opportunity" used here. In none of the cases was there a situation where there was involved, as here, two clauses in an option to purchase, and hence the cases are not in point. Moreover, the cited cases follow the minority rule on this subject. These cases are: Tantum v. Keller, 1924, 95 N.J.Eq. 466, 123 A. 299, 300, where the court construed "first privilege * * * to purchase * * * at any time" as an exclusive option. In R. I. Realty Co. v. Terrell, 1930, 254 N.Y. 121, 172 N.E. 262, the Tantum case was noted as following the minority rule. Schroeder v. Gemeinder, 1875, 10 Nev. 355, in considering a similar phrasing to the Tantum case, followed its rule. In De Rutte v. Muldrow, 1860, 16 Cal. 505, "the privilege of purchasing * * * during the continuance of this lease * * * in preference to any other persons" was held to grant an unconditional right to buy. In Wells v. Fisher, 1923, 205 App.Div. 212, 199 N.Y.S. 594, 595, the provision read: "* * * the first privilege of purchasing * * * on the 1st day of October of any year during the term * * *." This case was expressly disapproved in R. I. Realty Co. v. Terrell, supra, as was the case of Stetler v. North Branch Transit Co., 1917, 258 Pa. 299, 101 A. 980, 981, where the provision was "if at the expiration of this lease [the lessees] * * * shall desire to re-lease * * * they shall have the first privilege of re-leasing." Plaintiff there contended that the words "first privilege" meant that at the end of the term, the lessee had only a first right to release, provided the lessor was willing at that time to lease to any one. In holding that it was an absolute right in the lessee, the court stated as follows: "The court below, however, held that it was apparent from the provisions of the lease that the parties contemplated the use of the land for a park for the entertainment of the public, and that considerable expenditure for improvements would be necessary. Under these circumstances, when the lease was executed the parties evidently felt that a renewal or extension would probably be desired, otherwise the clause in question would not have been inserted. It was clearly intended for the benefit of the lessee, and it should be so construed as to preserve that benefit, if it be possible to do so. But as the court below well says: 'If the plaintiff's theory as to the meaning of the paragraph is to be accepted, it would, so far as the lessee is concerned, become wholly meaningless, and might as well have been omitted.' " 101 A. at page 981.

Plaintiffs contend that the reasoning in the last sentence above quoted should be applied in the instant case. However, applying that language here, if the plaintiffs' theory that subdivision (b) granted them the same exclusive option as did subdivision (a) is to be accepted, subdivision (a) would "become wholly meaningless, and might as well have been omitted."

In Butt v. Maier & Zobelein Brewery, 1907, 6 Cal.App. 581, 92 P. 652, the provision was far removed from that under consideration here. After providing in clause 1 that the lessor at the end of the period of a lease could terminate it upon payment to the lessee of the cost of improvements made by the latter, the agreement, in clause 2, continued as follows: "At the expiration of this lease the said second party shall have the prior right to lease the same, said premises, for a further term of five years, for the rental sum of", etc., fixing terms of payment. It further provided that should the lessee avail itself of the renewal, the lessor, at the end of the second five year term, could take the property back without paying for improvements. Obviously, the word "prior" as used therein does not qualify the right of renewal, but it is used with entirely different language than is the word "first" in the provision here in question. "Prior" as used could only mean that the lessee could defeat the termination of the lease after the first five year period provided for in clause 1, by exercising the right of renewal provided for in the second clause, and should he so choose, his rights under the latter clause would be prior to, and nullify, the rights of the lessor under the former clause.

In none of the cases cited by plaintiffs did the option clause vary the conditions of purchase at stated periods, as in our case where the conditions for the first two years are in definite contract with the conditions for the balance of the term.

[2] Moreover, the weight of authority holds that the use of such words as "first privilege," "first right," etc., do not give the lessee an absolute right to purchase or renew a lease. In R. I. Realty Co. v. Terrell, supra, 172 N.E. 262, the clause in a lease of real property read: "Said party of the second part is given first privilege to buy said property" for a stated sum. The lessee elected to purchase and the lessor refused to convey. The contentions of the parties were identical with those of the instant case, the lessee claiming an absolute right to purchase and the lessor claiming that this right was dependent upon his willingness to sell, in which case the former would have prior right over other prospective buyers. The court held that the clause did not give the lessee a valid option requiring the lessor to convey at any time during the term of the lease upon demand and payment by the lessee, but rather that the right to purchase depended upon the lessor's desire to sell at the price named, in which event the lessee would have the "first privilege" to buy. The interpretation of the words is as follows: "In construing the clause in question, the court is required to give some meaning to all the words used. To construe the clause in accordance with the contention of the respondent (lessee) would require that the word 'first' be eliminated. With that word eliminated, the privilege to buy would be absolute and enforceable. Sandberg v. Reilly, 223 App. Div. 57, 227 N.Y.S. 418, affirmed [Sanberg v. Reilly] 250 N.Y. 547, 166 N.E. 319. Therefore, it must have been used to prevent the agreement from constituting an absolute option to sell. The phrase 'first privilege to buy' and the words 'privilege to buy' have an entirely different meaning; one is conditional and the other absolute." The court further pointed out and disapproved of Wells v. Fisher, supra, as being the only New York case holding to the contrary. The Stetler and Tantum cases, supra, were also noted as contrary decisions in other jurisdictions. The court cited and followed the rule of numerous New York decisions to the same effect as that rendered therein.

In Buddenberg v. Welch, 1933, 97 Ind. App. 87, 185 N.E. 865, the lease provision read that the lessor granted to the lessee "the first and prior right and option to release said premises for an additional term of five (5) years from the expiration of this lease" on the same terms. After quoting from Blythe v. Gibbons, 141 Ind. 332, 35 N.E. 557, to the effect that in the interpretation of agreements first resort is to the natural significance of the words employed and if such words embody a definite meaning, without contradiction or absurdity, there is no room for construction, that meaning controls, and neither the courts nor legislatures can detract therefrom, the opinion continues: "Applying this principle of construction, we hold that the words '*first and prior*' mean that if the lessor decides to re-lease the premises for a further term, the lessee shall have a first and prior option to re-lease the same. To give this language any other interpretation would do violence to the common rules of construction of written instruments. We cannot say that the parties to this lease put the words 'first and prior' into this lease intending that they mean nothing. If the lessor had intended to give the lessee the right at his option to re-lease said premises, he would have positively said so; and he would not have used the words 'first and prior,' for there would have been no necessity for such language. Ordinary usage of the English language could not permit any other interpretation. We are sustained in this view by the greater weight of authorities."

A clause providing that the lessee should have the "'first right to re-lease'" for a further term of three years on the same conditions and terms was held not to give an absolute right to re-lease, but merely a preferential right in the event lessors desired to lease. Cloverdale Co. v. Littlefield, 240 Mass. 129, 133 N.E. 565. To the same effect is Landowners Co. v. Pendry, 1940, 151 Kan. 674, 100 P.2d 632, 633, 127 A.L.R. 890, where the lease provided: "The parties of the second part shall have the right to the first option in case they may desire to continue to occupy said premises under a new lease after the expiration of the present term." In Hill v. Prior, 79 N.H. 188, 106 A. 641, the lessor agreed to give the lessee at the expiration of the lease "the first right to a further lease." This was held to give the lessee only the right to a further lease if the lessor should desire to lease the property. To the same effect, as to "first privilege of a renewal," Holloway v. Schmidt, 33 Misc. 747, 67 N.Y.S. 169; Walsh v. Ft. Schuyler Brewing Co., 83 Misc. 488, 146 N.Y.S. 160.

[3, 4] The provisions of subdivision (b) are clear and unambiguous. To hold otherwise, or that they have the exact meaning of the provisions of subdivision (a), would make subdivision (a) meaningless. Subdivision (a) gives an absolute option to purchase for the first two years of the term, while subdivision (b) gives a qualified right or "first opportunity" to purchase for the balance of the term, the latter right being subject to the lessor's determination of whether or not she desires to sell.

As the paragraph in question is not ambiguous, the rules of construction in the cited sections of the Civil Code, 1636, 1641, 1647, 1654, and 1649, and section 1860 of the Code of Civil Procedure, are not applicable. "The meaning of plain and ordinary words in common use is a question of law for the court." 13 C.J. 788. See also 17 C.J.S., Contracts, § 620. "For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied." Civil Code, sec. 1637. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civil Code, sec. 1638.

[5, 6] We do not find it necessary to decide whether oral evidence is admissible to create an ambiguity in a contract which, as here, appears to be unambiguous. See majority, concurring and dissenting opinions in Universal Sales Corporation v. California etc. Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319. Whatever the proper rule may be, it would seem to be quite clear that, where the contract is clear and unambiguous, before the party who claims the parties intended something different from what the words would seem to mean, can introduce parol evidence, he must put the fact of such intent into issue. In the present case the plaintiff simply

pleaded the terms of the contract, and did not plead any intention different from the express terms of the lease, nor that parol evidence was available to show an intent contrary to its clear meaning. The reporter's transcript contains the argument on the motion for judgment on the pleadings. It contains no offer of proof nor any reference to any available parol evidence. No contention is made in the briefs on appeal that plaintiff has available any parol evidence that would show that the parties intended something different from what the clear words of the contract appear to mean. This being so, it is quite clear that, under the circumstances of this case, the question of interpretation was one of law, and that the trial court properly interpreted the contract on the motion for judgment on the pleadings.

The judgment appealed from is affirmed.

PETERS, P. J., and OGDEN, J. pro tem, concur.

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81 Cal.App.2d 275

THOMPSON et al. v. HELD et al.
Civ. 15602.

District Court of Appeal, Second District, Division 3, California.
Aug. 18, 1947.

1. Automobiles 🔑245(6, 72)

In action for death of pedestrian who was struck by automobile on November 29, 1942, at about 8:45 p. m., during period that dim-out regulations were in effect, negligence and contributory negligence were questions of fact.

2. Automobiles 🔑160(1), 216

Under extremely hazardous conditions of travel for both motorists and pedestrians during period that dim-out regulations of the army were in effect, motorist and pedestrian were required to be exceedingly cautious.

3. Automobiles 🔑160(4), 217(3)

Motorist would have been guilty of negligence as a matter of law if he had failed to yield right of way to pedestrians crossing in crosswalk but the duty to yield right of way was reversed if pedestrians were crossing at place other than crosswalk.

4. Automobiles 🔑244(6, 49)

In action for death of pedestrian who was struck by automobile on November 29, 1942, at about 8:45 p. m. during period that dim-out regulations were in effect, evidence was sufficient to justify implied findings that motorist was free from negligence and that pedestrian was guilty of contributory negligence.

5. Appeal and error 🔑999(3)

Where, under the circumstances, jury were not required to hold motorist solely responsible for accident in which pedestrian was killed, reviewing court could not justly interfere with judgment in favor of defendant.

6. Automobiles 🔑243(9)

In action for death of pedestrian who was killed during period that dim-out regulations were in effect, objection to question asked of motorist whether he had had his lights tested was properly sustained.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Lillian V. Thompson and others, heirs at law of Emmitt Grant Thompson, deceased, against Arthur Held and others, to recover damages for the alleged wrongful death of the deceased. Judgment for defendants and plaintiffs appeal.

Affirmed.

Gordon M. Gale, of Bell, for appellants.

Spray, Davis & Gould, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Plaintiffs, heirs at law of Emmitt Grant Thompson, deceased, brought this action in damages for the alleged wrongful death of Mr. Thompson, who was killed when struck by an automobile driven by defendant Arthur Held. They appeal from a judgment after verdict in favor of defendant. The principal ground of the appeal is the contention that the evidence was insufficient to justify either of the implied findings that defendant was free from negligence and that decedent was guilty of contributory negligence, as pleaded in defendant's answer.

On November 29, 1942, there were in force in the city of Redondo Beach dim-out regulations of the Army which limited the power of lights of automobiles to not more than 250 candle power. At about 8:45 p. m. defendant was driving south at 25 miles per hour on Elena Street, which was a four lane marked highway. He was traveling in the lane immediately adjoining on the west the center line. His dim lights were on and the only other illumination was from a hanging light, portions of which were painted brown and which cast little light on the roadway. Mr. Thompson, with his wife and daughter, had parked his car on the west side of Elena south of the intersection of Garnet, had walked northerly on the sidewalk with his daughter, plaintiff Dequetta A. Thompson, until they approached a crosswalk at the south side of Garnet. They then started across Elena and when they had reached the center line, or thereabouts, Dequetta saw the lights of defendant's car approaching and she testified that her father called attention to approaching lights. Apparently because a car was approaching from the south she and her father stepped back toward the west, she reached for her father in order to assist him but he had been struck by defendant's car, which was stopped some 15 feet beyond the point of the accident. There was testimony by a police officer and others that the point of the accident was about 25 feet south of the south crosswalk of Garnet Street. Dequetta was not able to testify whether defendant's car passed to the east or west of her nor as to how far her father stepped back, but is is quite obvious that he stepped directly into the path of defendant's car. Defendant testified that he saw no one in the intersection or the crosswalk but that shortly after he had passed over the crosswalk he saw a woman standing to the right or west of his car but that he did not see deceased before striking him. Defendant also estimated that with his dim lights he could see but six or eight feet in front of his car.

[1-5] It will appear from this statement of the material facts that the questions of negligence and contributory negligence were purely questions of fact. Under the extremely hazardous conditions of travel for both motorists and pedestrians, defendant and decedent were required to be exceedingly cautious. Dequetta testified that they were crossing in the crosswalk, and if that had been the fact defendant would have been guilty of negligence as a matter of law if he had failed to yield the right of way, but there was persuasive evidence that the accident happened some 26 feet south of the crosswalk where the duty to yield the right of way was the reverse. While defendant's lights were so dim as to afford him slight opportunity to see pedestrians in the street they were bright enough to be seen at a far greater distance and, in fact, were seen by the daughter, and perhaps by the father, in time for them to have reached a place of safety. Had it not been for the unfortunate mistake of Mr. Thompson in stepping into the path of defendant's car he would have escaped injury, as his daughter did. Certainly under these circumstances the jury were not required to hold defendant solely responsible for the accident, and this being true, a reviewing court may not justly interfere with the judgment.

[6] Appellants also complain of a ruling sustaining an objection to the question asked defendant whether he had had his lights tested. We are referred to no requirement of law that automobile lights be tested. The Army regulations fixed no minimum candle power for lights, and if defendant's lights exceeded the allowed power, which is not claimed to be the fact, the case of the plaintiffs would not have been strengthened thereby.

The trial was had without error and the verdict has ample support in the evidence.

The judgment is affirmed.

WOOD, J., and KINCAID, J. pro tem., concur.

81 Cal.App.2d 195

VINCENT et al. v. LOS ANGELES TRANSIT LINES et al.

Civ. 15528.

District Court of Appeal, Second District,
Division 3, California.
Aug. 6, 1947.

1. Street railroads ⚿114(6, 21)

Evidence that southbound motorist, who was unfamiliar with intersection and did not know, and because of darkness could not see, that one set of streetcar tracks turned from north to west across southwest quarter of intersection, after making stop and observing streetcar standing beyond south line of intersection, proceeded southerly across center of intersection and collided with streetcar which had started, without sounding bell, and was turning west, was sufficient to support finding that streetcar company was negligent and that such negligence was a proximate cause of collision.

2. Appeal and error ⚿927(3)

Reviewing court, on appeal from an order granting a nonsuit, must view evidence in light most favorable to plaintiffs.

3. Street railroads ⚿90(2), 99(1)

The duties of a streetcar motorman and a motorist while approaching and traversing an intersection are reciprocal, and each is required to proceed with due regard for the rights of the other.

4. Street railroads ⚿90(2)

Streetcars have no absolute or pre-eminent right of way over intersections, but must use the same with due regard to the safety and rights of the general public.

5. Appeal and error ⚿1008(1)
Negligence ⚿65

Contributory negligence must be determined upon the circumstances of each particular case and is ordinarily a question for trier of fact.

6. Negligence ⚿136(9)

Where there are different inferences that may be drawn, one for and one against contributory negligence, the one against will be followed, and before it can be held as a matter of law that contributory negligence exists the evidence must point unerringly to that conclusion.

7. Negligence ⚿67

Contributory negligence is not imputable to a plaintiff for failing to look out for danger which he had no reason or cause to apprehend or to a plaintiff who was deceived by appearances calculated to deceive an ordinarily prudent person.

8. Negligence ⚿10

A decisive consideration in determining whether act was negligent is whether surrounding circumstances made it reasonably foreseeable that there was a risk of injury.

9. Street railroads ⚿99(10)

Where one set of streetcar tracks continued across intersection and other set of tracks turned left "cutting the corner", on question of whether motorist was contributorily negligent for failure to maintain reasonable alertness in looking in direction from which danger might be anticipated and colliding with streetcar which was turning left in front of motorist, motorist's ignorance of presence of tracks and inability because of darkness to see them were factors to be considered.

10. Negligence ⚿136(9)

Contributory negligence is a matter of law only when from the facts reasonable men can draw but one inference.

11. Street railroads ⚿117(29)

Under the evidence, whether motorist, after entering intersection, should have again looked toward streetcar which made a left turn in front of motorist after motorist had passed center of intersection, was a question upon which reasonable minds might draw different conclusions so that motorist could not be held contributorily negligent as a matter of law.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Florence R. Vincent and Rocco Vincent against Los Angeles Transit Lines and others, to recover for damages allegedly sustained in a collision between plaintiffs' automobile and named defendant's streetcar. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Eugene E. Sax, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Carroll W. Harlan, all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiffs, husband and wife commenced this action to recover damages allegedly sustained as the result of a collision between an automobile, which the wife was driving, and a streetcar owned by the defendant Los Angeles Transit Lines. Trial was without a jury. After the wife had testified on direct examination, and before the plaintiffs had rested their case, defendants made a motion for a nonsuit on the ground that plaintiff was guilty of contributory negligence as a matter of law, and the court granted the motion. Plaintiffs appeal from the "judgment," which in this case is the order granting the motion for nonsuit.

The accident occurred about 6:30 a.m., before daylight, on November 19, 1944, at a street intersection on Figueroa Street, when plaintiffs' automobile collided with defendant's streetcar as the streetcar was making a left turn. Figueroa Street extends in a general northerly and southerly direction, and at the place where the accident occurred it is intersected by a highway which extends in a general easterly and westerly direction. The part of that highway which extends east of Figueroa Street is known as Pasadena Avenue, and the part of the highway which extends west of Figueroa Street is known as York Boulevard. Figueroa Street is paved, is about 72 feet wide at the southern entrance to the intersection, and is about 62 feet wide at the northern entrance thereof. The west curbs of that street on both sides of the intersection are in line with each other, but the east curb on the north side of the intersection is about 10 feet farther to the west than the east curb on the south side. The York Boulevard entrance to the intersection is about 81 feet wide and the Pasadena Avenue entrance is about 80 feet wide. There is a marked pedestrian crosswalk at each entrance to the intersection, and a boulevard stop sign on each corner. Mechanical traffic signals at the intersection were not in operation at the time of the collision. There are two streetcar tracks on Figueroa Street which, on both sides of the intersection, are approximately in the middle of the street, and those tracks as they extend across the intersection, from the wider south entrance to the narrower north entrance of the intersection, swerve about 10 feet to the west. At a point on those tracks on Figueroa Street about 52 feet south of the intersection two streetcar tracks branch off from the Figueroa streecar tracks and curve to the west around the southwest corner of the intersection onto York Boulevard. The distance from the center of the intersection to its southwest corner is about 60 feet. The innermost rail of the curved tracks is about 13 feet from the southwest corner of the intersection, and the outermost rail is about 30 feet from that corner and about 30 feet from the center of the intersection. In other words, the curved tracks branch from the Figueroa tracks about 100 feet south of the center of the intersection, and do not go near the center of the intersection, but miss it about 30 feet as they cut across the middle of the southwest quarter of the intersection. There are no eastbound or westbound tracks in the middle of the intersection, and there are no tracks on Pasadena Avenue.

The evidence shows that Florence Vincent, hereinafter referred to as plaintiff, accompanied by her mother, was driving from her home to a hospital where she was employed as a nurse. The headlights of her automobile were lighted, and she was proceeding in a southerly direction on Figueroa Street, about 5 feet from the western curb line. The pavement was dry, the weather was clear, and it was "practically dark." She came to a stop at the northwest corner of the intersection, then looked to her right and to her left, and observed there was no traffic nearby on York Boulevard or Pasadena Avenue. She then looked ahead and observed a northbound streetcar standing by the passenger safety zone south of the intersection. The place where the streetcar was stopped was about 57 feet south of the southern entrance to the intersection. She then proceeded in a straight course to go across the intersection. She did not look again at the streetcar until its headlight "flashed" in her eyes, at which time the front of her automobile was about 4 feet from the front of the streetcar. The streetcar had turned from the northbound track on Figueroa Street and was then proceeding on the curved track toward York Boulevard, going about 18 miles an hour. Plaintiff, who was traveling about 10 miles an hour when the headlight flashed in her eyes, started to put her foot on the brake but the left front of her automobile and the right front of the streetcar collided. Both came to a standstill at the point of impact, and the rear end of the streetcar was in the pedestrian crosswalk at the southern entrance to the intersection, and the front of it was about 30 feet southwest of the center of the intersection. Plaintiff had been in Los Angeles about 3 months, and it was the first time she had driven through that intersection. She did not know that streetcar tracks extended from Figueroa Street to York Boulevard, and testified that due to the darkness and the contour of the street the curved tracks were not visible to her. The streetcar motorman did not ring a bell, or give any signal to warn plaintiff that he was going to make a turn to the left.

[1, 2] The evidence was sufficient to support a finding that defendant was negligent, and that such negligence was a proximate cause of the accident. Viewing the evidence in the light most favorable to plaintiffs, as this court is required to do on appeal from an order granting a nonsuit, it appears that the motorman gave no warning, by the ringing of a bell or otherwise, of his intention to turn left across the path of plaintiff; that before the collision plaintiff had traveled 55 feet into the intersection and had gone beyond the center thereof; that before the collision the streetcar had gone about 30 feet into the intersection, headed diagonally across the middle of the southwest quarter of the intersection about 30 feet from the center of the intersection; that the streetcar was stopped at the time plaintiff started across the intersection; and that plaintiff had no knowledge that streetcar tracks extended from the Figueroa Street tracks to York Boulevard.

Also viewing the evidence in the light most favorable to plaintiff, the trier of facts could reasonably infer: That plaintiff assumed, under the circumstances as she then knew them, that the streetcar, which was stopped many feet south of the intersection when plaintiff proceeded forward, across the intersection on the Figueroa Street tracks; that, owing to the condition of darkness and the contour of the street, she did not see the streetcar tracks which branched from the Figueroa tracks to York Boulevard; that plaintiff, after having crossed the first half of the intersection where she should anticipate the approach of traffic from her left, then looked to her right, while proceeding to cross the last half of the intersection, for traffic approaching from the south side of York Boulevard, since it was her duty to look in the direction from which danger might be anticipated; that while she was crossing the last half of the intersection the circumstances were not such that she should have anticipated danger from vehicles approaching from her left, especially that the circumstances were not such that she should have anticipated that a streetcar would approach from her left cutting diagonally across the middle of the southwest quadrant of the intersection about 30 feet from the center of the intersection.

[3, 4] The duties of a streetcar motorman and a driver of an automobile, while approaching and traversing an intersection, are reciprocal and each is required to proceed with due regard for the rights of the other. See Wright v. Los Angeles Ry. Corporation, 14 Cal.2d 168, 173, 93 P.2d 135, 137. "While street cars must run upon the tracks provided for them, they have no absolute or pre-eminent *right of way over intersections,* but must use the same with due regard to the safety and rights of the general public." Id.

[5-8] The question of contributory negligence must be determined upon the circumstances of each particular case, and is ordinarily one for the trier fact "[C]ontributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that

where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion." Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829; Kirk v. Los Angeles Ry. Corporation, 26 Cal.2d 833, 838, 161 P.2d 673, 164 A.L.R. 1; Pewitt v. Riley, 27 Cal. 2d 310, 316, 163 P.2d 873. "'Contributory negligence is not imputable to a plaintiff for failing to look out for a danger which he had no reasonable cause to apprehend, or to a plaintiff who was deceived by appearances calculated to deceive an ordinarily prudent person.'" Brandenburg v. Pacific Gas & Elec. Co., 28 Cal.2d 282, 287, 169 P.2d 909, 912. "A decisive consideration in determining whether an act was negligent is whether the surrounding circumstances made it reasonably foreseeable that there was a risk of injury. When this question depends on the foresight of another it becomes pertinent whether the other had reason to perceive danger, and whether alertness to the requirements of the situation could be expected of him." Id. 28 Cal.2d at page 285, 169 P.2d at page 911.

[9] Plaintiff did not know that curved tracks branched from the Figueroa tracks to York Boulevard, and could not see those branched tracks as she was crossing the intersection. She was chargeable only with the duty of ordinary care in anticipating the presence of streetcar tracks in the intersection, and it was a circumstance to be considered that insofar as automobile traffic regulation is concerned, those curved tracks were on the wrong side of the street and were "cutting" the center of the intersection by approximately 30 feet. It might be argued that even if plaintiff did not know that the curved tracks were there, and even if she was not required to anticipate their presence, she should have seen the streetcar while it was turning. The question here, however, is whether as a matter of law she should have seen it. In determining that question her lack of knowledge of the presence of the tracks and her inability to see them were important factors in considering whether she fulfilled her legal duty to be reasonably alert in looking in the directions from which danger might be anticipated. If she did not know the curved tracks were there and was not required to anticipate their presence in such a location, it is reasonable to assume that in the exercise of reasonable care she would devote her principal attention in the direction from which danger might be anticipated, which direction in crossing the last half of the intersection would be to her right, rather than her left, since danger might be expected from the approach of traffic on York Boulevard. The condition of the street on the last half of the intersection, as plaintiff knew it or should have known from appearances at the time, was not such that she necessarily had reasonable cause to apprehend danger from the approach of a streetcar or any traffic from her left, and it is not unreasonable to believe that the location of the curved track so far from the center of the intersection might easily deceive an ordinarily prudent person.

[10] In the case of Costerisan v. Los Angeles Railway Corporation, 50 Cal.App. 2d 143, 122 P.2d 598, the facts were similar to the facts in the present case, except that the approaching streetcar therein had not stopped, but was moving slowly, when plaintiff started across the intersection, and there was a question as to whether the motorman made the boulevard stop, and apparently the curved tracks therein were not in an unusual place in the intersection. It was held therein that plaintiff was not guilty of contributory negligence as a matter of law. The court therein, in affirming a judgment for plaintiff, said, 50 Cal.App.2d at page 145, 122 P.2d at page 599: "Contributory negligence is a matter of law only when from the facts reasonable men can draw but one inference. * * * That there was a question for the jury as to whether plaintiff was negligent is clear to any one not a partisan."

In King v. Unger, 25 Cal.App.2d 632, at page 634, 78 P.2d 255, at page 256, the court said: "The plaintiff looked to the left once. It is not the law that he owed a continuing duty to *look to the left.* The law is that he was under a continuing duty to exercise ordinary care. * * * It cannot be said that he was guilty of contributory negligence as a matter of law in not looking again to the left after starting across the street. Whether he acted as a reasonably prudent person was a question of fact for the jury."

[11] In the present case, whether plaintiff under the circumstances here should have looked again toward the streetcar after proceeding into the intersection was a question upon which reasonable persons might draw different conclusions. Plaintiff was not guilty of contributory negligence as a matter of law.

The order granting the motion for a nonsuit is reversed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.

81 Cal.App.2d 328

DIAZ et al. v. SHULTZ et al.

Civ. 15757.

District Court of Appeal, Second District,
Division 1, California.
Aug. 22, 1947.

1. New trial ⇨163(1)

When a new trial is granted on ground of insufficiency of the evidence to sustain the verdict or decision, such order must be in writing and must be filed with the clerk within ten days after the motion is granted. Code Civ.Proc. § 657.

2. Appeal and error ⇨717

Deliberations of courts are conclusively merged in their final orders, decisions and judgments, and oral or even written opinions of trial judges may not be considered for purpose of reversing such orders, decisions or judgments.

3. Appeal and error ⇨664(1)

Where defendants move for a new trial, and court granted motion orally from bench, and stated, in response to question of plaintiffs' counsel, that ground for granting the motion was insufficiency of evidence, and, after further discussion, court stated that it was granting new trial on ground that judgment was improper because an offset of credit had been allowed on judgment, but nine days later court filed a written minute order granting new trial on ground of insufficiency of evidence, written minute order controlled. Code Civ. Proc. § 657.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Edward Diaz, a minor, by Tony E. Diaz, his guardian ad litem, and Tony E. Diaz against Ellwood L. Shultz and others to recover for injuries sustained by the minor when struck by an ambulance owned by the named defendant. From an order granting defendants' motion for new trial, the plaintiffs appeal, and the defendants move to dismiss the appeal.

Motion to dismiss appeal denied, and order affirmed.

Harold D. Geffen, of Los Angeles, for appellants.

Forrest A. Betts, of Los Angeles (Gerald F. Smith, Jr., of Los Angeles, of Counsel), for respondents.

WHITE, Justice.

This appeal arises out of an action instituted on behalf of Edward Diaz, a minor, by his guardian ad litem, Tony E. Diaz, and by Tony E. Diaz on his own behalf, to recover damages for injuries sustained by said minor as a result of his being struck by an ambulance owned by defendant Dr. Ellwood L. Shultz and driven by defendant George Ralph Chatigny, an employe of defendant Shultz, and who was driving the ambulance within the scope of his employment. Also involved in the accident was an automobile being driven by defendant Edward A. Smith.

In view of the sole ground upon which appellants base their appeal, we deem it unnecessary to here set forth the factual background which gave rise to this litigation. Suffice it to say that at the conclusion of the trial the court made findings that the direct and proximate cause of the accident was the careless, reckless and negligent manner in which defendant Chatigny operated the ambulance which he was driving. That as a result thereof, the minor plaintiff, Edward Diaz, suffered damage in the sum of $9,000. That plaintiff Tony E. Diaz "has been deprived of the companionship and earnings of his son Edward Diaz and will continue so to be deprived, all to his damage in the sum of $500.00". The court also found that the defendant Dr. Ellwood L. Shultz, a physician and surgeon, "submitted a bill for the reasonable value of his services rendered in caring for Edward Diaz to the date of trial"; that the reasonable value of such professional services was the sum of $1,567.75; that defendant Dr. Ellwood L. Shultz "may personally offset against said judgment of $9,000.00 the sum of $1,567.75 in full settlement of all claims and demands of said Dr. Ellwood L. Shultz and Angelus Emergency Hospital" (owned and operated by defendant Dr. Shultz) "against Edward Diaz and Tony E. Diaz."

As to defendant Edward A. Smith, the court found in his favor.

Judgment was accordingly rendered that the minor plaintiff Edward Diaz recover from defendants George Ralph Chatigny and Dr. Ellwood L. Shultz the sum of $9,000 and that plaintiff Tony E. Diaz have judgment against the aforesaid defendants in the sum of $500. The judgment further provided that the defendant Dr. Ellwood L. Shultz might offset against the minor plaintiff's judgment of $9,000 the aforsaid sum of $1,567.75.

Defendants Dr. Ellwood L. Shultz and George Ralph Chatigny subsequently filed their notice of intention to move for a new trial, basing said motion, among other grounds, on the ground of insufficiency of the evidence to support the judgment. This motion came on regularly to be heard, was argued by respective counsel and submitted to the court, whereupon the following ensued:

"The Court: The same is granted, and it will be so ordered. You can win this case, Counsel—

* * * * * *

"Mr. Geffen (counsel for plaintiffs): May I have an indication of the basis of your Honor's granting the motion?

"The Court: Insufficiency of the evidence to support the verdict.

"Mr. Betts (counsel for defendants): I suppose that should be indicated in the minutes, is that right?

"The Court: That is right.

"Mr. Betts: Thank you, your Honor. (Mr. Betts leaves the courtroom.)"

Nine days thereafter a minute order was filed by the court in confirmation of the foregoing decision on the motion for a new trial and of the ground upon which said motion was granted.

The record reflects further that after the departure from the courtroom of counsel for the defendants, there was a further discussion between the court and plaintiffs' counsel. In that regard we quote the following from the reporter's supplemental transcript on appeal:

"Mr. Geffen: Would your Honor mind giving the basis of the insufficiency, so that we know the particular factual basis which would make it insufficient, as a matter of law?

"The Court: As a matter of law, I don't think I have the right, in the first place, to deduct what I did, so far as changing the figures.

"Mr. Geffen: Well, your Honor, would it not be proper then to find that the judgment should stand for the amount originally set forth, without the deductions?

"The Court: I don't think so, Counsel. You can win this case.

"Mr. Geffen: Yes, I understand, your Honor, but that means another trial.

"The Court: I know.

"Mr. Geffen: And we felt originally, as I said, that there shouldn't have been an offset credit on the judgment. That was not pleaded, and for that reason it should not be made a part of it. But your Honor has found from the facts as I understand it, from the liability standpoint, that there is liability; that it is simply a matter of the amount. I submit that your Honor has the right, in ruling upon this, to change the judgment to conform to the amount in dollars and cents. That would be proper where your Honor has found liability. I argued before that I questioned that offset in the judgment, but I don't feel, where your Honor has found liability, as a matter of law, and it is simply a question of whether an offset to a certain extent of that judgment should be made—why wouldn't your Honor have the right to correct that portion of the judgment to establish the amount originally found?

"The Court: I am sorry I cannot, Counsel.

"Mr. Geffen: But that is the basis, the offset?

"The Court: Yes.

"Mr. Geffen: May that appear in the record?

"The Court: The reporter has it, yes.

"Mr. Geffen: That is the sole ground, as I understand it, for the record, your Honor?

"The Court: That is right."

From the order granting defendants' motion for a new trial, plaintiffs prosecute this appeal, basing the same upon the sole ground that by virtue of the foregoing conversation between the court and plaintiffs' counsel after the departure of defendants' counsel, "it was an abuse of discretion to grant a new trial rather than to modify the judgment to strike therefrom an offset of the amount of the medical and hospital bills of defendant, Dr. Ellwood L. Shultz." Respondents have also filed a notice of motion to dismiss the appeal on the ground that the same is based on a proceeding "not truly a part of the record".

There can be little, if any, doubt but that if the presence in the judgment of the rights of defendant Dr. Ellwood L. Shultz to offset therefrom the amount of his medical and hospital bills was the sole ground for granting the motion for a new trial there would be considerable merit to appellants' extention that in not proceeding in conformity with the provisions of section 662 of the Code of Civil Procedure and modifying the judgment by striking therefrom the allowed offset, the court abused its discretion.

However, the question confronting us is whether the inconsistencies existing between the expressions of the trial judge made antecedent to the filing of his formal order ruling on the motion for a new trial can be considered by an appellate court to impeach the formal order entered.

[1] When a new trial is granted upon the ground of insufficiency of the evidence to sustain the verdict or decision, section 657 of the Code of Civil Procedure requires such order to be in writing and filed with the clerk within ten days after the motion is granted. In the case at bar the court, nine days after the aforesaid colloquy with appellants' counsel, filed such an order. Appellants earnestly insist, however, that the record above quoted shows that the sole ground for granting the motion for a new trial was because the court was of the opinion that error had been committed in allowing the offset. In support of their claim that in determining the true ground upon which the motion was granted we are entitled to consider the statement made by the trial court prior to the filing of the order granting the motion for a new trial, appellants cite the cases of People v. Driggs, 111 Cal.App. 42, 295 P. 51, and Krebs v. Los Angeles Railway Corp., 7 Cal. 2d 549, 61 P.2d 931. We do not regard these cases as being authority for holding that the written opinion or oral statement of a trial judge may be used to impeach his formal decision, order or judgment. In the first of the cases just cited, we find the following language at page 44 of 111 Cal.App., at page 52 of 295 P.: "* * * it is what the court did, and not what the judge of the court stated during the course of the trial, that determines the course of our inquiry upon this appeal, as there is a vital distinction between what the judge of a trial court may say and what the trial court actually does. In other words, it is the legitimate privilege of a trial court, at the conclusion of an argument upon motion for new trial, to state his views concerning the case, and then, upon fuller and maturer deliberation, come to the conclusion that a different order should be made, and then to enter the same. When the cause is brought to an appellate court, argument as to what the trial court may have thought, as given utterance by the words used before final action is taken, cannot be con-

sidered, unless directly in line with the subsequent orders made. Thus, if an order is made granting a new trial on the ground of insufficiency of the evidence, if the opinion of the trial court points out wherein the evidence is insufficient, it is an aid to the appellate court in determining whether or not the discretion of the trial court has or has not been abused. But, if the opinion contains expressions foreign to the order actually entered, the order entered only is controlling here."

[2, 3] The other case cited is readily distinguishable from the case at bar in that in said case the remarks made by the trial judge at the very time he rendered his order orally from the bench, when considered in the light of what he said on the preceding day, indicated that he had granted a new trial as to both plaintiffs there involved on the ground of excessive damages awarded to only one of them. However, in the case now engaging our attention, the trial judge, at the time he granted the motion orally from the bench, stated that it was granted on the ground of insufficiency of the evidence. And this he confirmed some nine days later when he filed the formal order. Under the circumstances here present we would not be justified in departing from the salutary rule enunciated in a veritable forest of cases that the deliberations of courts are conclusively merged in their final orders, decisions and judgments, and that the oral or even written opinions of trial judges may not be considered for the purpose of reversing such orders, decisions or judgments. Williams v. Kinsey, 74 Cal. App.2d 583, 600, 601, 169 P.2d 487; DeCou v. Howell, 190 Cal. 741, 214 P. 444; Redsted v. Weiss, 73 Cal.App.2d 889, 891, 892, 167 P.2d 735; Southern California Freight Lines v. San Diego Electric R. Co., 66 Cal. App.2d 672, 676, 152 P.2d 470; Wuest v. Wuest, 72 Cal.App.2d 101, 107, 164 P.2d 32. In the instant case, it was the privilege of the trial judge after stating his views to appellants' counsel concerning the ground upon which the motion for a new trial should be granted, upon more mature deliberation, to come to the conclusion that a different order should be made, and then, as he did, to enter the same. To predicate a reversal herein upon the statements of the trial judge, made to appellants' counsel after he had orally ruled upon the motion for a new trial and in the absence of respondents' attorney, would as was stated in DeCou v. Howell, supra, 190 Cal. at page 751, 214 P. at page 448 "open the door to mischievous and vexatious practices".

The motion to dismiss the appeal herein is denied. The order appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

81 Cal.App.2d 138

GRONENSCHILD v. RITZENTHALER et al.

Civ. 7343.

District Court of Appeal, Third District, California.

Aug. 1, 1947.

Hearing Denied Sept. 29, 1947.

1. Mortgages 🔑38(1)

In suit to have deed declared a mortgage, evidence supported findings that one of defendants redeemed realty conveyed from mortgage foreclosure sale purchased redemption right from plaintiff and co-owner of realty, and took absolute deed of conveyance from them, and that deed was not intended as mortgage. Civ.Code, § 2924.

2. Appeal and error 🔑1011(1)

Where evidence was conflicting as to whether parties to deed, with accompanying options to repurchase land conveyed, intended it to be a mortgage rather than absolute deed, judgment, based on trial court's finding supported by evidence that deed was not so intended, must be affirmed on appeal. Civ.Code, §§ 1642, 2924.

3. Mortgages 🔑32(3)

A deed absolute in form may be shown to have been intended as a mortgage to secure payment of debt or performance of obligation. Civ.Code, § 2924.

4. Mortgages ⚷39

Whether deed absolute in form is mortgage is mixed question of law and fact to be determined from all evidence adduced, both written and oral, together with circumstances of entire transaction. Civ.Code, § 2924.

5. Mortgages ⚷36

The presumption of law, independently of clear and convincing evidence to contrary, is that deed absolute in form is what it purports to be and not a mere mortgage. Civ.Code, § 2924.

6. Mortgages ⚷36

The burden of proving that a deed absolute in form is a mere mortgage rests on party asserting such fact. Civ.Code, § 2924.

7. Trusts ⚷89(2)

In suit to have deed declared a mortgage, evidence supported trial court's findings that money, with which one defendant redeemed realty conveyed from mortgage foreclosure sale and purchased it, was furnished by codefendant, to whom purchaser subsequently executed and delivered deed in plaintiff's presence, and that codefendant was owner of and entitled to possession of property, so that title thereto was properly quieted in her on her cross-complaint.

◆

Appeal from Superior Court, Humbolt County; Delos A. Mace, Judge.

Suit in equity by John B. Gronenschild against Violet Ritzenthaler and another to have a deed declared a mortgage, in which named defendant filed a cross-complaint to quiet title to the land conveyed. From a judgment against plaintiff and a decree quieting title in cross-complaint, plaintiff appeals.

Affirmed.

E. S. Mitchel, of Eureka, for appellant.

Harry W. Falk and Irwin R. Lichten, both of Eureka, for respondent.

THOMPSON, Justice.

This suit was instituted by plaintiff for the purpose of having declared a deed to real property to be a mortgage. The defendant, Nora A. Lockard, the grantee, subsequently conveyed the property to her daughter, the defendant, Violet Ritzenthaler. By means of a cross-complaint the last mentioned defendant sought to quiet title to the land in herself. From a judgment which was rendered against plaintiff, and a decree quieting title in Violet Ritzenthaler, the plaintiff has appealed.

Prior to March 4, 1932, the plaintiff, John B. Gronenschild, and one Frank O'Connor owned an auto court in Humboldt County known as "Deer Lodge," subject to mortgage held by Nicodemo Luchessi. For default of payments due, the mortgage was foreclosed on the last mentioned date. The property was sold by the court to the mortgagee, on April 2, 1932, for the sum of $5,920.41, subject to the equity of redemption. July 30, 1932, the plaintiff and Frank O'Connor deeded their entire interest in the property, including their equity of redemption, to Nora A. Lockard, in consideration of the payment to them of the sum of $110. That deed, which the plaintiff sought by this complaint to establish as a mere mortgage, was absolute in form. Upon payment by Nora A. Lockard to the court commissioner in said foreclosure suit of the purchase price and accumulated interest and costs, aggregating the additional sum of $6,157.22, for redemption of the property from foreclosure sale, it was conveyed to her on the last mentioned date. $6,000 of said purchase money was borrowed by Mrs. Lockard from her daughter, Violet Ritzenthaler. Mrs. Lockard executed and delivered to her daughter a deed to the property on August 12, 1932. That deed was not recorded, but was delivered by the grantee to her attorney, Mr. Mitchell, who at her request placed it in his office safe. The plaintiff knew of that deed. He was present when it was executed and delivered to Violet Ritzenthaler.

Mrs. Lockard was engaged in conducting a dancing academy. She had no knowledge of or disposition to conduct the business of Deer Lodge auto court, which she had purchased. She orally consented to plaintiff's taking possession and operating that business, which he proceeded to do on and after July 30, 1932. At the same time she executed a written option to plaintiff and

Frank O'Connor to purchase the property at any time within five years upon payment to her of said sum of $6,157.22, and interest, which option was not exercised. Mrs. Lockard subsequently contributed the further aggregate sum of $7,886.84 to the "maintenance and improvements on the Lodge." December 20, 1934, Mrs. Lockard executed to plaintiff and Frank O'Connor, in consideration of the sum of $500, to be paid on or before July 30, 1937, a two year extension of said option to purchase the property upon the same terms, with the agreement that they should remain in possession and operate the business in consideration of whatever profits were derived therefrom. The last mentioned extension of option was not exercised. July 21, 1939, Mrs. Lockard executed a further extension to plaintiff, only, of said option to purchase the property, expiring April 1, 1940, upon consideration of payment to her of the further sum of $1,000 on or before the last mentioned date. The last extension specifically provides that if the option is exercised and the property is purchased before its expiration, said sum of $1,000 shall be considered as a part of the purchase price, but that, if the option is not exercised before its expiration date of April 1, 1940, plaintiff will, without previous notice, forthwith vacate and deliver possession of the property to the said Nora A. Lockard. The last mentioned option was not exercised nor was the $1,000 paid. Plaintiff remained in possession of the property. On July 14, 1933, Frank O'Connor executed to the plaintiff a conveyance of all his right, title and interest, including his right of redemption from the foreclosure sale, to said Deer Lodge property. Mr. O'Connor died in September, 1937.

After trial of the case, at which oral and documentary evidence was adduced, findings were adopted favorable to the defendants in every essential respect. The court determined that the property was regularly sold in 1932, upon foreclosure proceedings, and that the mortgagee became the purchaser thereof, subject to the equity of redemption; that on July 30, 1932, for a valuable consideration, the plaintiff and Frank O'Connor conveyed by deed absolute, to Nora A. Lockard all their right, title and interest, together with their right of redemption, in and to said property; that the said Nora A. Lockard thereupon redeemed said property from foreclosure sale by paying the purchaser thereof the full amount in the sum of $6,157.22; that Nora A. Lockard thereby became the owner of said property, and that she subsequently conveyed it to her daughter, Violet Ritzenthaler, who is now the owner and entitled to possession thereof; that the challenged deed from the plaintiff and Frank O'Connor to Nora A. Lockard, dated July 30, 1932, was an absolute deed of conveyance of all the right, title and interest, including the right of redemption which the grantors possessed, and that it was not a mere mortgage. The court further found that plaintiff had no title or interest in said property. Judgment was rendered accordingly, to the effect that plaintiff take nothing by his cause of action; that the defendant, Violet Ritzenthaler, is the owner and entitled to possession of said real property; that plaintiff has no right, title or interest therein, and that title to said land be quieted in the said Violet Ritzenthaler. From that judgment the plaintiff has appealed.

The appellant contends that the findings and judgment are not supported by the evidence, and that the deed of July 30, 1932, together with the several options to purchase the property, and the conduct and transactions between the parties, including plaintiff's continued possession of the property, indicate that the said instruments constitute a mere mortgage.

[1] We are of the opinion the findings and judgment are adequately supported by the evidence. There is a conflict of evidence regarding the transactions, but the evidence supports the conclusions of the court that Nora Lockard redeemed the property for its full foreclosure sale amount, and purchased the right of redemption from the former owners in consideration of the sum of $110, taking an absolute deed of conveyance from them. Mrs. Lockard testified that the value of the property at the time of her purchase did not exceed the sum of $8,000; that she did not loan any money to plaintiff,

but paid plaintiff and O'Connor $110 to purchase their equity of redemption, and that the $7,886,84, subsequently paid to plaintiff was for the "maintenance and improvements on the Lodge." There was no antecedent debt due to Lockard for which the deed could be construed to become a mortgage security. The evidence shows that she has invested in the property over $14,000, and that she received no interest or payments from plaintiff during the period of about thirteen years, except $500 which was paid to her for the first extension of option to purchase the place, which was made in July, 1937.

The plaintiff testified that, prior to the suit for forclosure, which he knew was to be filed, and after the decree had been rendered in March, 1932, he tried to persuade Mrs. Lockard to refinance the property for him. He said:

"I had spoken to Mrs. Lockard in regards to re-financing the property. * * * Q. Did you enter anything definite with Mrs. Lockard at that time? A. No, I did not. * * * She said she didn't have the money, but her daughter did have money and when she came up, after school vacation, that she would speak to her and possibly it could be arranged."

The plaintiff did not testify that Lockard ever told him positively that she would loan him the money, or that she would refinance the mortgage. He merely infers that "it was generally understood" between them, that she would refinance the mortgage indebtedness. He was asked:

"At the time you made that deed did you have any conversation with Mrs. Lockard about re-purchasing the property? * * * A. Well, no, that didn't come up in the matter at all; it didn't come up—there was nothing said after the papers was drawn up, there was nothing more said about it. We had our understandings prior to that.

* * * * * *

"Mr. Falk: Now what conversation did you have with Mrs. Lockard on that subject, as to whether she should take title or whether this would be a mortgage or whatever it might have been, what conversation —A. Well, I never had no conversations with Mrs. Lockard in regards to that. Mr. Mitchell was my attorney and that was his advice to me, * * * that was the only thing that could be done under the circumstances. * * *

Q. You say these documents were executed on the advice of Mr. Mitchell? A. Positively. He was my attorney."

Plaintiff testified that Mrs. Lockard consulted with his attorney, Mr. Mitchell. But Mitchell was not called as a witness. It does not appear what conversation, if any, occurred between Lockard and Mitchell. The plaintiff stated that he retained possession of the property and operated the motor court business; that he subsequently received sums of money from Mrs. Lockard with which he constructed improvements and purchased furnishings, but contended that they were for his own benefit. He claimed that Mrs. Lockard told him to "Go ahead and improve it and sell it; all I want is Violet's money out of there."

[2] In view of the conflict of evidence with regard to the intention of the respective parties as to whether the deed of conveyance, together with the accompanying options to repurchase the property, constituted a mortgage, rather than an absolute deed, this court is required to affirm the judgment, since the trial court determined that fact against the appellant, and there is ample evidence to support that finding. 17 Cal.Jur. 757, §§ 59 and 60; Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583; First National Trust & Savings Bank v. Edmonds, 28 Cal.App.2d 26, 81 P.2d 1052; Robinson v. Barnard, 5 Cal.App.2d 396, 42 P.2d 711.

It is true that the deed and accompanying options should be construed as one transaction. (Civil Code, sec. 1642.) But the option and renewals, the latter one of which expired April 1, 1940, and provides that the consideration of $1,000, if paid before the date of expiration, may be considered "as part of the purchase price", indicate that the deed was not intended by the parties as a mere mortgage. That option was not exercised. It expired without the payment of said sum. Clearly the option was to repurchase the property. That instrument provides that if paid before expiration of the option said sum of $1,000 would apply as part of the purchase price of the land. The options and renewals, together with the language contained therein support the finding of the court that the deed was not intended as a mortgage.

[3-6] It is also true that every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage. (Civil Code, sec. 2924.) But the trial court found that the transfer by deed was not a mortgage for the security of an existing debt or for money to be loaned to the grantors, but that it was an absolute deed of conveyance. The rule is established by a multitude of authorities to the effect that a deed which is absolute in form may be shown to have been intended as a mortgage to secure the payment of a debt or for the performance of an obligation. (17 Cal.Jur. 735, § 41.) But the question as to whether the deed, absolute in form, is a mortgage is a mixed question of law and fact to be determined from all the evidence adduced, both written and oral, together with the circumstances of the entire transaction. The presumption of law, independently of clear and convincing evidence to the contrary, is that a deed, which is absolute in form, is just what it purports to be, and not a mere mortgage. Stevens v. Fetterman, 76 Cal.App. 741, 753, 246 P. 102; Goodfellow v. Goodfellow, 219 Cal. 548, 554, 27 P.2d 898. The burden of proving that a deed is a mere mortgage rests on the party who asserts that fact. Kohn v. Parent, 174 Cal. 570, 163 P. 1008; Vitruvian Corporation v. Laubisch, 49 Cal.App.2d 360, 121 P.2d 784; 17 Cal.Jur. 755, sec. 57. In the Beeler case, supra [24 Cal.2d 1, 147 P.2d 587], it is said: "'That a deed purporting on its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence.' * * * But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide. [Citing cases.] In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review on appeal."

We may not hold, as a matter of law, contrary to the findings and judgment of the trial court, that the deed to Lockard, dated July 30, 1932, was intended by the parties to be a mere mortgage. We are bound by the findings in that regard.

[7] The money with which the foreclosed mortgage was redeemed and the property purchased by Lockard, was furnished by her daughter, Violet Ritzenthaler. Lockard subsequently executed and delivered her deed to that property to her daughter. The plaintiff was present and knew of that fact. The court found that Ritzenthaler is the owner and entitled to possession of the property, and therefore quieted title in her pursuant to her cross-complaint. Those findings are adequately supported by the evidence.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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81 Cal.App.2d 153

DONG HAW v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

Civ. 7421.

District Court of Appeal, Third District, California.

Aug. 1, 1947.

Rehearing Denied Aug. 23, 1947.

Hearing Denied Sept. 29, 1947.

1. Conspiracy ⟹47

Conspiracies cannot be established by suspicions or association, and there must be evidence of some participation or interest in the commission of the offense.

2. Indictment and Information ⟹10

Though courts will not inquire into the sufficiency of evidence to support an indictment, if there is some valid evidence to support the indictment, nevertheless the lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning the indictment. Pen. Code, § 921.

3. Indictment and Information ⚷10

An indictment or information based entirely on hearsay or incompetent evidence is unauthorized.

4. Indictment and Information ⚷10

Evidence was insufficient to authorize indictment charging conspiracy to bribe an executive officer of the state.

5. Indictment and Information ⚷196(3)

The rule that one may waive a rule of evidence by failure to invoke timely objection, and that improper evidence thus introduced may be considered and be given whatever probative value it may have as if it in law were admissible, does not apply in a proceeding before a grand jury which returns an indictment, since accused has no opportunity either to object or to strike the incompetent evidence.

◆

Appeal from Superior Court, Sacramento County; Warren Steel., Judge.

Prohibition proceeding by Dong Haw against the Superior Court of the State of California in and for the County of Sacramento, respondent, to restrain the respondent from further proceeding with prosecution for conspiracy to bribe an executive officer.

Writ issued.

Wallace Shepard and Thos. O'Hara, both of Sacranento, for petitioner.

J. Q. Brown, Dist. Atty., and Arthur H. Mundt, Deputy Dist. Atty., both of Sacramento, for respondent.

PEEK, Justice.

Petitioner, together with his daughter Rose and son James, both adults, were jointly charged in the first count of an indictment returned by the grand jury of Sacranento County, with the crime of conspiracy to bribe an executive officer of the State of California, Bartley W. Cavanaugh, City Manager of the City of Sacramento, and in the second count said parties were further charged with the crime of offering a bribe to said officer.

Count One of the indictment sets forth five overt acts alleged to have been committed in pursuance of said conspiracy: (1) The delivery by James Dong to the Cavanaugh home of twelve bottles of assorted liquors together with a letter addressed to Cavanaugh and signed "Dong Haw" in which was $3000 in currency; (2) the writing by Rose Chang of the letter which accompanied the money; (3) the supplying by petitioner to James Dong of the liquor and the money to be so delivered; (4) the directions and authorization given by petitioner to Rose Chang to write the letter, and (5) the attempt by Rose Chang to arrange an interview between the City Manager and her father Dong Haw.

At the time of petitioner's arraignment in the Superior Court he moved to quash the indictment, which motion was denied, and upon his plea of not guilty the matter was set for trial. Thereafter he filed his petition for a writ of prohibition in this court to restrain the respondent Superior Court from further proceeding in said matter.

From our examination of the transcript of the proceedings before the grand jury it would appear that petitioner's contention that said transcript fails to disclose any legal evidence to support the indictment is well founded, and the writ as prayed for should issue.

The portions of the evidence introduced which respondent contends support the indictment against the petitioner may be summarized as follows:

Dong Haw is the owner of certain real property situated in the City of Sacramento, on which is located a grocery store, a liquor store, a restaurant and cocktail lounge, and what is referred to throughout the proceedings as the Chinese Social Club, He is associated in the grocery business with undisclosed persons and is one of three licensees in an off sale liquor license, one of the others being his son James. James was identified as the person who delivered a case of assorted liquors and a letter containing money to the home of the City Manager. The letter mentions that since the new Chief of the Sacramento

Police Department took office the Chinese clubrooms have been closed, thereby throwing out of work many elderly Chinese who had no other means of support. Furthermore it was asserted that such action meant a great deal to the business of Chinatown and it would be a favor if the City Manager would consult with the Chief of Police and permit a reopening. The letter ended wtih a statement that the money was a gift for the City Manager's vacation, and that a similar gift would be made at Christmas time. The name signed to the letter was "Dong Haw". Attached to the money was a business card of petitioner on which, in addition to his own name, appeared the words "Yick Chong & Co." and "Hong King Lum" and the respective addresses. At the time James called at the Cavanaugh residence he stated that the note was from his father who desired to speak to Mr. Cavanaugh. The following day Mr. Cavanaugh, while at the office of the district attorney, received a call from his office asking him to call petitioner at a specified number. Upon calling the number given he was informed by an unidentified woman, whom he believed to be Chinese, that her father wished to talk with him. In a later call at the request of the district attorney, Cavanaugh suggested that Dong Haw call at his office, and was informed by a woman that her father was out of the city. Further efforts by the City Manager to contact petitioner were unsuccessful. In an extra-judicial statement made by Rose to the chief deputy district attorney and Chief of Police she admitted calling Mr. Cavanaugh. She denied writing the letter to Cavanaugh but expert witnesses testified that the handwriting was hers. The Chief of Police also identified certain specimens of her handwriting as having been written in his presence.

The delivery truck used by James was registered in the name of Yick Chong and Dong Haw. The revenue stamps on the liquor bottles bore serial numbers in sequence to the numbers on similar bottles of liquor examined at the liquor store. On the carton in which the liquor was packed the words "Yick Chong Co." were written in pen and ink. At Rose's home police officers found a letter dated August 11, 1945, addressed to a national magazine on which the name of Dong Haw again appeared and which had been written by Rose. A card room license had been issued some time previously by the City of Sacramento to the Chinese Social Club to operate in a portion of the premises owned by petitioner. Police officers examined the Club Room and found various kinds of gambling paraphernalia including lottery tickets showing drawings were held between March 3 and March 17, 1947, and a written receipt reciting that on December 11, 1946, Dong Haw had paid to the Capital Filipino Press $70 as a donation for a Filipino celebration. Also introduced were lottery payoff schedules bearing the address 910 Third Street, Sacramento, an address unrelated in any way to petitioner so far as the record here shows. There was no testimony which referred to actual gambling at the Chinese Social Club other than that several years previously the premises had been used for gambling.

In support of the contention that the evidence so summarized is sufficient to sustain the indictment against petitioner within the rule stated in Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713, 715, that "if there is some evidence to support the indictment, the courts will not inquire into its sufficiency," respondent argues that not only is there *"some evidence* to sustain the indictment but ample evidence so to do." Specifically it is stated (1) that the writing on the carton in which the liquor was delivered and the similarity of serial numbers of the revenue stamps on the bottles "is certainly *some evidence* that the whiskey was supplied by Dong Haw," and that it "came from the Dong Haw establishment"; (2) that the letter written by Rose to a national Magazine "is *some evidence* that Rose Chang had authority to and did sign correspondence for her father"; (3) that the truck was registered in the name of Yick Chong and Dong Haw "is *some evidence* to connect Dong Haw with the commission of the crimes"; (4) that even though Dong Haw had no interest in the Chinese Social Club he did have a financial interest therein since "it must be inferred that he received compensation for the use of those premises in the form of rent"; (5) that as both Rose and James were "irrefutably linked with the conspiracy" it also must be inferred that Rose and James "were acting through and for their father who did have "at least some financial interest in the gambling activity" and therefore such "facts and circumstances are *some* facts and *some* evidence to connect Dong Haw with the offenses charged"; (6) that the business card of Dong Haw which was attached to the money "certainly * * * is *some evidence* to connect the father Dong Haw with the crimes charged"; (7) that the fact that Dong Haw is the father of Rose and James, considered with the other evidence, tends in a degree to "connect Dong Haw with the commission of the crimes charged against him" and "is *some* evidence. Particularly where the crime of conspiracy is charged"; and (8) lastly, that the only reasonable inference to be drawn from the exhibits of paraphernalia taken from the club, pictures taken of its interior and the fact that it was closed is that the premises were actively used for illegal gambling.

The fact that the liquor was delivered in a carton on which was written the name of the store and that petitioner was co-owner of the truck used by James, is not competent to establish the act of conspiracy or offer to bribe. Likewise the similarity of the serial numbers on the revenue stamps is no more competent to connect Dong Haw with the crime charged than any of the other licensees, which fact, by the record is shown to be inconclusive at best. The letter written by Rose in 1945 to which she signed her father's name is wholly incompetent to show any authorization to write the bribe letter here in issue or connect petitioner with the conspiracy. It is an isolated circumstance, completely unconnected with the charges herein. Petitioner's ownership of the premises where the Chinese Social Club is located is wholly immaterial, for nowhere in the record is there any showing of either an actual or circumstantial connection between petitioner and the Club. Even if it be further assumed, as respondent contends, that the Club was closed by police order and therefore it presently was being used for illegal gambling, nevertheless such evidence, whether true or false, would be totally incompetent as against petitioner to support the crimes charged. Nor, as the prosecution argues, does the inference, based upon an inference that as landlord, petitioner must be assumed to have a financial interest in the rental, which amounts to *some evidence* that he therefore had a connection with the Club, which in turn must be taken as an implied authorization to his children to link him with the conspiracy.

[1] However figuratively true it may be that the sins of a father may be visited upon his children, we know of no rule of law that solely because of the circumstances of parantage, the acts of one's children may be visited upon a father, without some competent evidence to connect him therewith. "Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense." People v. Long, 7 Cal.App. 27, 33, 93 P. 387, 390. See also People v. Zoffel, 35 Cal.App.2d 215, 95 P.2d 160; People v. Collier, 111 Cal.App. 215, 295 P. 898.

[2] While the courts will not inquire into its sufficiency if there is some evidence to support the indictment, nevertheless "the lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning the indictment." Greenberg v. Superior Count, supra, 19 Cal. 2d at page 322, 121 P.2d at page 715.

By the use of the phrase "some evidence" the Supreme Court could not have meant "any evidence," whether incompetent, irrelevant or otherwise. We take it to mean valid evidence, not evidence of no probative value but evidence such as that referred to in section 921 of the Penal Code which, if unexplained or uncontradicted, would in the minds of the members of the grand jury warrant a conviction by a trial jury.

While the Supreme Court in the Greenberg case did not explain whether it thought the same rule should apply in the case of an indictment as in the case of an information it at least indicated no severer rule should apply. Davis v. Superior Court, 78

Cal.App.2d 25, 177 P.2d 314. Certainly then, to apply a comparable rule would not be to apply a severer rule.

[3, 4] Therefore since an information which is based entirely on hearsay or incompetent evidence is unauthorized (In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528; see also 7 Cal.Jur. sec. 120, page 984), and since there is no reason why any greater solemnity should attach to an indictment obtained under the same circumstances, it necessarily follows that the indictment herein against Dong Haw was unauthorized and in excess of the jurisdiction of the grand jury.

[5] While one may waive a rule of evidence by failure to invoke timely objection and while improper evidence thus introduced may be considered and given whatever probative value it may have as if it in Law were admissible (In re Plummer, 79 Cal.App.2d 651, 180 P.2d 771, and cases therein cited), it would seem to pervert that rule if our courts were to hold that in the case of a void indictment an accused, who had no opportunity to either object or to move to strike the incompetent evidence and be foreclosed forever from attacking the indictment. Apropos of this situation the words of the Supreme Court in the case of Greenberg v. Superior Court, supra, 19 Cal.2d at page 323, 121 P.2d at page 716, are particularly pertinent:

"Petitioner cannot appeal either from the order denying his motion to quash the indictment or from the overruling of his demurrer. He could not be required to stand trial and to appeal from a possible adverse judgment without being subjected to unreasonable expense, inconvenience, and delay. Bruner v. Superior Court, 92 Cal, 239, 28 P. 341; Terrill v. Superior Court, 6 Cal. Unrep. 398, 60 P. 38; Evans v. Willis, 22 Okl. 310, 97 P. 1047, 19 L.R.A., N.S., 1050, 18 Ann.Cas. 258; see Farraher v. Superior Court, 45 Cal.App. 4, 187 P. 72. The only adequate remedy he may seek therefore, is a writ of prohibition. Ibid. Regardless of the fact that the grand jury is a judicial tribunal from whose decisions there is no appeal (In re Kennedy, supra [144 Cal. 634, 78 P. 34, 67 L.R.A. 406, 103 Am.St.Rep., 117, 1 Ann.Cas. 840]), defendant has the statutory right to restrain the court by prohibition from proceeding in excess of its jurisdiction to try an offense based on a void indictment."

Lastly, the grand jury, at the conclusion of the hearing, was informed by the district attorney that insofar as anyone in his office was concerned there was no doubt but that petitioner had violated the statute. After further stating that he did not feel he should attempt to influence the jury concerning the evidence, he nevertheless proceeded to give the jury what he termed a "thumbnail sketch" of the evidence in which he reviewed all of the evidence herein mentioned as that upon which respondent relies in support of the indictment. The jury, composed of laymen, thus were directly told by the one to whom they naturally looked for legal guidance, that the evidence introduced was legally sufficient to support an indictment, whereas in fact no relevant or competent evidence had been introduced against petitioner. In other words, the prosecution, through the agency of what may be likened to an ex parte proceeding, obtained an indictment upon evidence which, if introduced at a preliminary proceeding, would not be sufficient to hold a defendant to answer (People v. Martinez, supra), and thereby accomplished indirectly that which it would have been precluded from doing directly in a preliminary hearing where a defendant would have the right to appear with counsel and object to that which he believed to be improper.

The action of the grand jury in thus returning an indictment against petitioner Dong Haw at the request or suggestion of the district attorney makes applicable the observation of the Supreme Court in the Greenberg case, that a grand jury "is no Star Chamber tribunal empowered to return arbitrary indictments unsupported by any evidence."

Petitioner therefore is entitled to a writ of prohibition restraining the Superior Court from proceeding with the trial against him. Let the writ issue.

ADAMS, P. J., and THOMPSON, J., concur.

81 Cal.App.2d 263

PEOPLE v. MILTENBERGER.

Cr. 4103.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1947.

1. **Burglary** ⚷41(1)
Robbery ⚷24(1)

Evidence sustained conviction of burglary and robbery.

2. **Criminal law** ⚷778(11), 781(7)

Instructions in the customary form on the subject of flight and accusatory statements were proper in view of the record.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Alex L. Miltenberger was convicted of robbery and burglary, and from the judgment of conviction and an order denying a motion for a new trial, he appeals.

Judgment and order affirmed.

A. Maxson Smith, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged in two counts of an information with the crime of robbery and burglary. Declared guilty by a jury, this appeal is from the judgment that followed and from an order denying a motion for a new trial.

It is contended on appeal that the evidence is insufficient; that certain alleged misconduct of the district attorney was prejudicial and that certain instructions were prejudicial.

The record reveals that three armed bandits wearing dark glasses and handkerchief masks entered Charles Brown's room in the Sterling Hotel and while one stood guard over Brown the other two searched the chiffonier and "rummaged around in the closet". They obtained eighty or ninety dollars. Incidentally, one of the rooms of Brown's apartment was used as an office; this was also entered. Brown testified, "After I got out there, (meaning the office) Betty Hudson, the manager and housekeeper, she was on the lower landing of the stairs, cleaning the stairs.

"Q. That's between the first and second floor? A. Yes, it is the first landing. So then I said, 'Betty' and she looked up and saw these three men masked and let out a scream. Two of them ran down and the next one ran down, so I immediately went back into the apartment, went out on my balcony there and gave an alarm and hollered, 'Police, help' and one thing and another, good and loud. Everybody heard me on the street. Then I proceeded to call the Police Department over the telephone.

"Q. You say you went out on the balcony? A. I did.

"Q. What did you do out there? A. Gave an alarm and hollered 'Police', and so on.

"Q. Did you see anyone in the street at that time? A. Yes, there were quite a few people on the street."

Richard Pingle, a fourteen year old boy, happened to be passing the hotel on a bicycle when Brown gave the alarm. Richard saw the three men in front of the hotel and in that connection testified, "they started to walking and when they got on Speedway they started to running, * * * I just turned my bicycle around and started trailing them. * * * Well, they ran up on Speedway and then they turned and went through the parking lot, through there, and I just kept on going on Speedway and turned around the block. I went around the block and trailed them." The three men separated, Richard continued to follow one of them and with regard to the latter testified as follows:

"Q. Well, what did he do when he got to the end of that street, Richard? A. Oh, when he got to the end he went around there and threw his gun up on the chicken coop there.

"The Court: Threw his gun up on the chicken coop. Is that what you said? A. Yes.

"Q. And then what happened? A. Well, the cops stopped him and they said, 'Is that the man?' and I told them 'Yes' and they looked to see if he had a gun and I showed him where it was, and that's all.

"Q. How was the man dressed, if you remember, Richard? A. Brown, brown suit.

"Q. Now, at any time after you first saw this man in the brown suit, which you say was at the corner of Speedway and Windward near the hotel, from that time until the police placed him under arrest, did you at any time lose sight of that particular man in the brown suit? A. No.

"Q. You kept him in sight at all times; is that right? A. Yes.

"Q. Can you identify the man that you saw that day in this courtroom? A. Yes.

* * * * * *

"Q. Now, when you first saw this man on Windward, did you notice anything unusual about his face or dress? A. I don't know what you mean.

"Q. Did he have anything on his face? A. Yes.

"Q. What did he have on his face? A. Handkerchief on his face.

"Q. A handkerchief. And did he have that handkerchief on his face all the time that you were following him? A. Yes, but he got—he was on Main Street when he took it off.

"Q. He was on Main Street? A. Yes, he stopped right there, if that's Main Street (pointing), but I knew he took it off. I saw him."

[1] Appellant's contention that the evidence is insufficient is without merit.

The contention that the district attorney was guilty of prejudicial misconduct has reference to a motion to strike and the comments in connection therewith. It is also without merit.

[2] The objection to the instructions relates to an instruction on the subject of flight and accusatory statements. The instructions referred to were in the customary form and in the light of the record were proper.

There being no errors the judgment and the order denying a motion for a new trial both are, and each is, affirmed.

YORK, P. J., and WHITE, J., concur.

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81 Cal.App.2d 174

HILLMAN v. HILLMAN LAND CO. et al.

Civ. 15807.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1947.

1. Cancellation of Instruments ⚷37(1)

Complaint, alleging that plaintiff transferred or caused his wholly owned corporation to transfer his options on realty to defendants, that plaintiff and his personally owned corporation assigned priorities for construction materials, to defendants that plaintiff performed services for defendants, that defendants acquired the realty, acquired priorities that they would have been unable to obtain but for plaintiff's assignments, and that they had benefit of plaintiff's services, but that defendants had not performed their obligations to plaintiff, stated cause of action for an accounting and damages and for rescission of agreement and plaintiff should have been allowed opportunity to make certain such allegations, if any, as were uncertain.

2. Pleading ⚷229

Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to obviate objections thereto, it is error to refuse permission to amend.

3. Pleading ⚷225(2)

Where trial judge stated, in making his ruling on demurrer, that plaintiff had cause of action against defendant and would be able to state it, not in present action but in another, denying leave to amend, although permission to do so was not requested during argument, was an abuse of discretion.

4. Pleading ⚷18, 19

In action for accounting and damages, where plaintiff alleged that he transferred or caused his wholly owned corporation to transfer certain options on realty to defendants, allegation that plaintiff had option in writing in name of corporation which was wholly owned by him was certain and unambiguous.

5. Evidence 🔑5(2)

It is common knowledge that for personal reasons many individuals own property which stands in name of a corporation or of another person and which can be transferred at the behest of the true owner.

6. Contracts 🔑278(2)

Where plaintiff alleged that he had options in writing in name of his wholly owned corporation and that he transferred or caused corporation to transfer options to defendants, defendants who received what plaintiff had agreed to transfer could not refuse to perform their part of contract.

7. Joint adventures 🔑5(2)
Partnership 🔑327(2)

In action for accounting and damages and for rescission of agreement, allegations of complaint were not subject to construction that partnership or joint adventure agreement originally entered into between plaintiff and individual defendants was cancelled when corporate defendant was organized, so that there was no longer any individual liability of individual defendants.

8. Corporations 🔑1

A corporation is usually an entity distinct from its stockholders, but when it is necessary to redress fraud, to protect rights of third persons, or to prevent injustice, both law and equity will cast aside legal fiction of individual corporate existence as distinguished from those who own its capital stock and deal with corporation and its stockholders as identical entities with identical duties and obligations.

9. Corporations 🔑1

Looking to substance rather than to form, the law and equity will hold a corporation obligated for acts of sole owners of its stock.

10. Corporations 🔑30(1)

Where individual defendants promised, according to pleading, to pay for corporate stock and to assign one-third of it to plaintiff in consideration for work he had done and agreed to do, if evidence sustained pleading, plaintiff was entitled to have issued to him one-third of capital stock that was originally issued to defendants.

11. Corporations 🔑30(1)

Where it was allegedly agreed that corporate stock would be issued in equal shares to individual defendants, that plaintiff was entitled to one-third of profits, and that defendants agreed to pay for stock and to assign one-third to plaintiff in consideration for what he had done and agreed to do, and only assets corporation possessed were those transferred to it by plaintiff, excepting money paid to corporation or for its benefit by individual defendants, plaintiff was entitled to an accounting and to recover such amount as court found he was entitled to receive as a result of the accounting.

12. Corporations 🔑1

Where a corporation is instrumentality of individuals who control conduct of its affairs and where interests of third parties are not affected, corporation is treated as mere agency of associates created for sake of convenience in carrying out agreement made before corporation was organized.

13. Pleading 🔑53(2)

Where plaintiff alleged that he transferred or caused to be transferred certain options on realty to defendants and assigned priorities for construction materials and performed services for defendants, that plaintiff was to receive one-third of profits and one-third of corporate stock, but that defendants retained property and refused to account to plaintiff for profits, there was no conflict between first count alleging that plaintiff had been damaged and second count seeking rescission as to four of properties involved.

14. Pleading 🔑18

Where plaintiff alleged that he agreed to transfer certain options to company to be organized, that after property was acquired it would be subdivided and about 30 houses would be built, and that profits were to be equally divided, complaint seeking damages was not uncertain because it did not specify exact number of houses to be built, since exact number would depend on building and zoning laws and regulations and on portion of property dedicated for street purposes.

15. Pleading ⟹229

Where complaint states cause of action, plaintiff should not be deprived by technical but curable defects of privilege of presenting case on merits and should be granted opportunity of making definite such allegations as are indefinite.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by A. M. Hillman against Hillman Land Company and others for an accounting and damages and for rescission of an agreement. From an adverse judgment, plaintiff appeals.

Reversed with instructions.

Martin Goldman and Alvin P. Jackson, both of Los Angeles, for appellant.

Albert H. Allen, of Beverly Hills, and Hyman Goldman, of Los Angeles, for respondent Hillman Land Co.

Fred Horowitz, of Los Angeles, for respondents Koch and Spiegelman.

WILSON, Justice.

The amended complaint may be thus briefly summarized: Plaintiff conveyed or caused to be conveyed several parcels of real property to defendant Hillman Land Company, caused priorities for construction materials, both priorities and materials being difficult to obtain, to be assigned to the corporation and also performed services for the benefit of the company and of defendants Koch and Spiegelman. The conveyances and assignments were made and the services performed on the promise of the individual defendants that in consideration thereof they would perform the acts required of them by their agreement with plaintiff. Koch and Spiegelman failed and refused to perform. Plaintiff has received no consideration for the transfers and assignments made by him, or for his services, and defendants have refused to return or to pay for the property.

Upon the filing of the amended complaint demurrers were interposed and were overruled, whereupon answers were filed. When the cause came on for trial the court, on application of defendants, reconsidered the demurrers, sustained them without leave to amend, and sustained a demurrer to the introduction of evidence, both orders having been made on the ground that the amended complaint did not state facts sufficient to constitute a cause of action against defendants or any of them. Thereupon a judgment of dismissal as to all defendants was entered, from which plaintiff has appealed.

The demurrers as originally interposed and overruled were both general and special, reciting numerous particulars of alleged uncertainties, but since the last order, which resulted in the judgment of dismissal and which plaintiff assigns as error, was solely on the ground of insufficient facts we shall confine our discussion to that ground alone.

1. *The allegations in the amended complaint.* The following are the facts alleged upon which plaintiff bases his action:

(a) First cause of action. In March 1945, plaintiff had an option in writing in the name of Merit Finance Corporation, wholly owned by him, to purchase a tract of real property in Bell, California, and also had in the name of his corporation priorities for various construction materials for houses to be erected on the property.

About that date it was orally agreed by plaintiff and defendants Koch and Spiegelman as follows: A corporation would be forthwith organized by them under the laws of California to be known as Hillman Land Company; plaintiff would transfer or cause to be transferred and conveyed to the company the title to said property; stock in the corporation would be issued forthwith after incorporation to plaintiff and defendants Koch and Spiegelman in equal shares; regardless of the number of shares issued profits and voting power would be equally shared and divided, one third each among plaintiff and the two individual defendants; Koch and Spiegelman would each contribute as capital in equal shares to the corporation the sums required to pay for the property in accordance with the terms of plaintiff's option; after it had been purchased the property would be subdivided, streets, sewers, lights, and all utilities would be installed, and thereafter there would be constructed on the property about

30 3-bedroom houses, provided it would be permissible to sell the houses for approximately $10,000 each, and in the event such sale price was not permitted the lots so subdivided would be sold; plaintiff would use his efforts in connection with seeking contractors for the development and improvement of the property, in arranging for the construction of houses and in connection with future sales; plaintiff would assign or cause to be assigned his priorities to the company which would forthwith proceed to develop, improve and subdivide the property and to sell dwellings thereon in accordance with the agreement; Koch and Spiegelman would contribute as capital to the company in equal shares of one half each the required money for such development, improvement, subdivision, construction and sale; the proceeds and voting control with respect to the management of the venture would be equally divided one third each among plaintiff, Koch and Spiegelman.

After entering into the foregoing contract the purchase of the property was consummated in the name of Hillman Land Company and the priorities were assigned to the company as agreed.

In June, 1945, it was orally agreed between plaintiff, Koch and Spiegelman that the company would continue to buy additional real estate and would develop, improve and subdivide the same and construct dwellings or other improvements thereon in accordance with the plan above set forth; Koch and Spiegelman would each contribute additional capital in equal shares to pay for such purchases through the corporation, and to develop, subdivide, improve and sell the property or to construct dwellings or other improvements thereon; plaintiff would give defendants his opinion upon proper plans and procedure in connection with the development, improvement and sale of the property, and would use his efforts to find suitable purchasers or tenants therefor and in connection with seeking contractors for such work and with the general supervision of the construction, improvement and subdivision of the property; profits and voting power in connection with the venture would be shared and divided equally one third each among plaintiff, Koch and Spiegelman.

About July 17, 1945, the parties caused defendant Hillman Land Company to be organized pursuant to the oral agreement of the parties; work was begun on the subdivision and improvement of the property and plaintiff used his efforts in connection therewith in accordance with the terms of the agreement.

On July 23, 1945, plaintiff was elected a director and secretary of the corporation and acted as such thereafter until prevented from doing so by Koch and Spiegelman.

At a meeting of the directors of the corporation held about July 29, 1945, a resolution was adopted reciting among other things the following: the corporation should open a bank account, the checks to be signed by the secretary (plaintiff) and countersigned by either the president or the vice president; it should remain a closed corporation, no stock to be issued or transferred excepting to plaintiff, Koch and Spiegelman; the earnings of the corporation, or declared dividends, should be equally distributed and the voting power vested in the three persons named irrespective of the number of shares each one of them held; salaries, if any, were to be determined by mutual consent; the secretary was authorized to execute a petition for substitution of successor owner, as required by Federal Housing Authority, in order to have the priorities transferred to the corporation, and was authorized to sign contracts with contractors for the purpose of constructing 2 4-flat buildings in Maywood and the improvement of the above mentioned subdivision in Bell which had been acquired through plaintiff's option.

Plaintiff had options on other properties that were purchased in the name of Hillman Land Company and several parcels were otherwise obtained by plaintiff for the company. An oral agreement similar to that entered into in reference to the parcel first above mentioned was made among the three individual parties as to each of the tracts purchased; Koch and Spiegelman were to provide the funds in equal shares for the purchase and development of each property, plaintiff was to furnish his services as before, and the profits were to be divided equally among plaintiff, Koch and Spiegelman.

Pursuant to the oral agreement plaintiff used his best efforts as provided therein and performed all the terms of the agreement on his part to be performed except insofar as he was prevented by defendants.

Defendants and each of them without cause have failed, refused and neglected to carry out and perform the terms of the agreement on their part; they have failed and refused (a) to issue to plaintiff a one-third interest in or any part of the stock in Hillman Land Company; (b) to recognize plaintiff's right to any interest in the company; (c) to continue the construction of buildings agreed to be erected on the properties; (d) in some instances to commence construction work or to develop and subdivide properties although the necessary materials, contracts, plans and contractors have been available; (e) defendants have attempted by a cessation of work in connection with the development of the properties to force plaintiff to relinquish and release his share in the company, in his one-third stock interest therein and in the profits which might have been realized from said ventures; about January 13, 1946, defendants without notice, authority or cause purported to remove plaintiff as a director and officer of the company, and since January 16, 1946, have refused to permit plaintiff to have access to or the use of the corporation's offices, or to give plaintiff an accounting or any information concerning the business of the company.

Defendants Koch and Spiegelman have mismanaged the company and are threatening to continue to do so in the future, in that without cause they have ordered the cessation of construction on some of the properties; have failed to start construction on others; have used the services of a contractor hired by the company to do their personal work; have used a truck belonging to Merit Finance Corporation for their personal business; are planning to sell some of the property for less than its reasonable market value; are purporting to be operating the company under a spurious set of bylaws; have used for their personal benefit and not for the business of the company seven carloads of lumber which plaintiff had in the name of Merit Finance Corporation.

Plaintiff has at all times been and is ready, able and willing to perform all the terms of the oral agreement between himself and Koch and Spiegelman. By reason of the acts of the defendants great and irreparable harm and injury have been caused and will be caused to plaintiff.

(b) Second cause of action. As a separate cause of action plaintiff recites by reference the allegations contained in the first count and alleges: About January 4, 1946, he notified defendants orally of his rescission of parts of the oral agreement entered into in March, 1945, between himself, Koch and Spiegelman relating to certain of the properties described in the first cause of action and offered to reimburse defendants for what they had paid therefor, including escrow and title expenses and all improvements made by them, and offered to deposit in court such sum as the court should find to equal the amount required for such reimbursement; title to each of the properties was vested in or controlled by plaintiff prior to the transfer thereof to Koch and Spiegelman or to Hillman Land Company; plaintiff received no consideration for the transfers to defendants other than the latters' promises and agreements contained in the oral agreement above outlined; defendants have failed and refused to continue with the agreement or to abide by it; plaintiff has received nothing of value from defendants in connection with the properties concerning which the notice of rescission was given.

The foregoing allegations constitute the basis of plaintiff's effort to recover from defendants. The only question to be determined is whether the amended complaint, or either cause of action therein, states facts sufficient to constitute a cause of action against the corporation or against defendants Koch and Spiegelman.

[1] 2. *Alleged defects in amended complaint.* Defendants contend that the pleading is fatally defective and cannot be amended to state a cause of action. Plaintiff concedes that there are uncertainties but maintains that they can be cured. We

have concluded that each count states a cause of action and that the court erred in sustaining the demurrer solely on the ground that insufficient facts were alleged and that it abused its discretion in refusing leave to amend. Plaintiff should be allowed the opportunity to make certain such allegations as now appear to be uncertain, if any there be.

[2] Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to obviate the objections thereto it is error to refuse permission to amend. Hamer v. Ellis, 40 Cal.App. 57, 59, 180 P. 30; Payne v. Baehr, 153 Cal. 441, 447, 95 P. 895; Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 480, 63 P. 1025, 67 P. 759.

The allegations are that plaintiff parted with value; he transferred or caused Merit Finance Corporation, wholly owned by him, to transfer options on real property to Hillman Land Company which it purchased; plaintiff and his personally owned corporation assigned priorities for construction materials and he performed services for defendants; Hillman Land Company and Koch and Spiegelman acquired real property, they acquired priorities that they would have been unable to obtain but for plaintiff's assignments, and they had the benefit of plaintiff's services; plaintiff received nothing in return; defendants still retain the property and refuse to account to plaintiff for it or for any profits arising from their joint transactions.

In count 1 plaintiff seeks an accounting and to recover damages for the loss which he sustained by defendants' actions and the value of his interest in the property; in count 2 he asks a rescission of his agreement with defendants as to several of the properties on the ground that defendants failed to fulfill their obligations thereunder.

[3] The court did not rule upon any alleged uncertainties or ambiguities in the pleading but held that a cause of action was not stated in either count of the amended complaint. An abuse of discretion in the refusal of leave to amend, although permission so to do was requested by plaintiff's counsel during the argument, appears from the face of the record. The trial judge stated in making his ruling on the demurrer that plaintiff had a cause of action against defendants and would be able to state it, not in this case but in another which the court inferentially suggested should be filed. He expressed the view that it would be impossible "to work out a proper solution on the pleading" and at the same time suggested the commencement of a new action that would plead plaintiff's cause of action. Again the court stated that "it may be possible to state a case, and there is time to do that, since apparently the statute has not run." Nothing appears in the record to indicate why a cause of action could be stated in a complaint in a new proceeding but could not be as well set forth in an amendment to the pleading already on file. There is no suggestion that in a new action the facts upon which plaintiff relies would be different from those now before the court—merely that the same facts would be stated in a different manner and with more certainty.

During the argument plaintiff's counsel, who then represented him but who does not represent him on this appeal, stated in apparent good faith, and his present counsel likewise assert in their argument before this court that some objections offered against the sufficiency of the amended complaint refer to allegations that are imperfectly pleaded, that amendments can be made to meet those objections and that none of the defects are fatal to plaintiff's right to recover. Plaintiff maintains and we agree that other objections are without merit.

[4, 5] (a) The first objection relates to the allegation that plaintiff had an option in writing in the name of Merit Finance Corporation which was wholly owned by him. This averment is clear, certain and unambiguous. If the allegation is true plaintiff had control and direction of the corporation and of its affairs and was able to cause it to make the assignments which he agreed to make. Furthermore it is common knowledge that for personal reasons many individuals own property which stands in the name of a corporation or of another person and which can be transferred at the behest of the true owner. It is also a common oc-

currence that a person will make an agreement to convey property which he does not own but he expects to acquire in sufficient time to comply with his contract. In either event if he provides a conveyance according to his agreement the other party has no cause to complain, and if he is unable to do what he agreed to do he is liable in damages to the other party.

[6] It is pleaded that Merit Finance Corporation in fact did make the assignments of options and priorities in accordance with plaintiff's agreement. Since defendants received what plaintiff agreed to transfer they are not in a position to refuse to perform their part of the contract. No valid objection is available as to the manner in which the facts of former ownership are pleaded.

[7] (b) It is contended by defendants that it can be construed from the allegations of the amended complaint that the partnership or joint venture agreement originally entered into between plaintiff on the one hand and Koch and Spiegelman on the other was cancelled when defendant Hillman Land Company was organized, and that as a consequence there is no longer any individual liability on the part of Koch and Spiegelman. No such construction can be placed on the pleading. Plaintiff's counsel stated during the argument in the lower court that the parties did not contemplate or agree that the partnership would be dissolved when the corporation began to function, but that the corporation was to exist for limited purposes only and that it was to be an instrumentality of the partnership, the obligations of the individuals to remain binding upon them. While we find no reason for construing the allegation according to defendants' contention, plaintiff should have been permitted to amend if he considered it necessary. It cannot be assumed or inferred from the allegations in the pleading that the partnership was dissolved or that it was intended that the obligations of Koch and Spiegelman to plaintiff would be terminated by reason of the incorporation of Hillman Land Company.

[8, 9] Although a corporation is usually an entity separate and distinct from its stockholders, having separate and distinct liabilities and obligations, yet when it is necessary to redress fraud, to protect the rights of third persons, or to prevent injustice, both the law and equity will cast aside the legal fiction of individual corporate existence as distinguished from those who own its capital stock and deal with the corporation and its stockholders as identical entities with identical duties and obligations. A corporation may be but the mere instrumentality through which, for their convenience, the individuals who own all the capital stock transact their business. Looking to substance rather than to form the law and equity will hold the corporation obligated for the acts of the sole owners of its stock. Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 696, 227 P. 723; Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673.

(c) It is alleged that it was agreed that upon the incorporation of Hillman Land Company the capital stock would be issued in equal shares to Koch and Spiegelman, and that regardless of the number of shares issued profits and voting power would be equally divided, one third each among plaintiff, Koch and Spiegelman. Obviously plaintiff would have no voting power in the corporation unless he owned capital stock therein. Since it appears from the entire pleading that the corporation was merely an instrumentality of the partnership or joint venture consisting of the three individuals, plaintiff, though not entitled to vote in the corporation until he acquired the capital stock that Koch and Spiegelman agreed to transfer to him, would be entitled to his share of the profits derived from the corporate transactions. He is seeking no greater relief by this action.

[10, 11] Plaintiff does not ask that the corporation be required to issue stock to him without lawful consideration or that any of the defendants do anything in violation of the corporation law. Koch and Spiegelman promised, according to the pleading, to pay for the stock and to assign one third of it to plaintiff in consideration for what he had done and had agreed to do. Plaintiff is therefore entitled to

have issued to him one third of the capital stock that was originally issued to Koch and Spiegelman. He is entitled to a declaration of his interest in the assets of the corporation since his allegations are that the only assets it possessed were those transferred to it by him and through his instrumentality, excepting only the money paid to the corporation or for its benefit by Koch and Spiegelman, and he is entitled to an accounting and to recover such amount as the court finds he is entitled to receive as a result of taking an account.

[12] Where a corporation is the instrumentality of individuals who control the conduct of its affairs and where the interests of third parties are not affected, the corporation is treated as the mere agency of the associates created for the sake of convenience in carrying out an agreement made before the corporation was organized. Conover v. Smith, 83 Cal.App. 227, 231, 256 P. 835.

[13] (d) Objection is made to the second cause of action alleging that plaintiff rescinded the original agreement as to four of the properties described in the amended complaint, defendants' contention being that he is not entitled to both rescission and damages. Plaintiff makes no allegation in the second count that he has been damaged. We find no conflict between the second cause of action seeking rescission and the first count alleging that he has been damaged. When the evidence is before the court appropriate relief can be granted.

[14] (e) Defendants' final contention is that the original agreement set forth in the amended complaint is uncertain in that it did not specify the exact number of houses to be built on some of the tracts acquired under the agreement. For example, as to the tract first purchased pursuant to plaintiff's option it is alleged that the parties agreed that they would construct about 30 3-bedroom houses. Defendants contend that since the exact number of houses to be constructed was not stated the agreement is so indefinite as to be unenforceable. It is obvious that the number to be erected would depend upon the building and zoning laws and regulations and upon the portion of the property that would be required to be dedicated for street purposes. When these condiditions became definitely known more or fewer than 30 dwellings might have been permissible. Such objections are hypertechnical and are without merit.

The cases cited, wherein an agreement was "to do the street work" or where parties agreed to "use our best endeavors" to sell property, have no application here.

Plaintiff's contention is that he has parted with options, property and priorities and has performed services for which he has received no compensation; Koch and Spiegelman own the issued capital stock of Hillman Land Company and through its instrumentality own and have possession of the various properties described and refuse to admit plaintiff to his rights therein.

[15] Each count of the amended complaint clearly states a cause of action. We do not express an opinion as to whether there are allegations that are uncertain or ambiguous since that question is not before us. If such be the case appropriate amendments may be made. Plaintiff should not be deprived by technical but curable defects of the privilege of presenting his case on its merits. He is entitled to the opportunity of making definite such allegations in his pleading as are indefinite, if there be any.

Judgment reversed with instructions to vacate the order denying the privilege of amending and to allow plaintiff to amend in such particulars as he desires.

McCOMB, J., concurs.

MOORE, Presiding Justice (concurring).

I concur in all that is said by Justice WILSON. However, the implied concession that the special demurrer might have merit invites my protest. This appeal presents a classic illustration of the law's delays. The amended complaint sets forth facts which should jar the conscience of even the accused persons, yet they contend with a bold disdain that the pleading is wholly inadequate and follow with a series of hypertechnical special demurrers, the majority of which are wholly without merit.

Inasmuch as the judge who sustained the objection to all evidence effectually overruled the order of his colleague who had theretofore in the "Writs and Receivers" department overruled all demurrers including the special as well as the general, future proceedings might be simplified by a few observations upon the criticisms of the amended complaint.

With reference to paragraph III, defendants say it is uncertain how plaintiff could have an option on the land while the option was in the name of the Merit Finance Corporation. The very same paragraph alleges that such corporation is wholly owned by plaintiff. The same is true with reference to the alleged uncertainty as to how plaintiff could have priorities in the name of the same corporation. As to the attack upon paragraph IV, the phrase "certain priorities for various construction materials, etc.," has a meaning in the law which was comprehended by defendants who accepted such priorities as a part of the consideration for their investment.

Referring to the criticism of paragraph V, as to "how a third of the capital stock * * * would be issued to plaintiff if plaintiff were to receive only one-third of the profit of the transaction, and not to receive one-third of the capital invested," the pleading alleged that it was agreed that stock in defendant corporation would be issued forthwith, after incorporation, to plaintiff, Koch and Spiegelman in equal shares, and that regardless of the number of the shares issued, profits and voting power would be equally shared and divided "one-third each among" the contracting parties. The criticism as to whether an application was made to the corporation commissioner for a permit for plaintiff to issue one third of the capital stock or was ever granted to the corporation is to disregard the law. It is presumed that defendants had performed their legal duty by obtaining a permit from the corporation commissioner for the issuance of the corporate shares. The criticism that permission was never sought or granted for the commissioner to authorize the corporation to give plaintff one third of the profits and one third of the voting power is immaterial. Under the contract defendant corporation became an agency of the three contracting parties, and by the terms of their agreement the corporation was authorized to divide the profits among the three organizers who were and are its only shareholders. The point that if the title to the property was vested in the corporation how the corporation would not share in the profits is answered by the fact that the corporation was nothing more than an instrumentality of the three organizers. The criticism that the commissioner did not give his permission to the corporation to conduct its business as described is without basis for the reason that the commissioner's authorization is not essential to the validity of corporate acts, except that it is necessary only to authorize the issuance of securities and to require a corporation to comply with the terms of its permit.

The criticism that the pleading does not allege the cost of thirty three-bedroom houses does not take into account the terms of the contract whereby such cost is to be determined by the three contracting parties of which defendants constituted a majority. The criticism that the pleading does not allege who would determine whether it would be permissible to sell the houses for $10,000 each is answered by the allegations of the pleading that "voting power would be equally shared among the three contracting parties." The criticism that the phrase "approximately $10,000 each" has no certain meaning is answered by the fact that the ability to sell a house at any price had to be determined by the same three as contracting parties or as directors of the corporation, the defendants Koch and Spiegelman constituting the control thereof. The criticism that the pleading does not disclose how must capital Koch and Spiegelman would be obliged to contribute and whether it would be contributed or loaned is answered by the allegation that those defendants "would contribute as capital to Hillman Land Company in equal shares of one half each the money required for such development * * * and that the profits and voting control * * * would be equally divided one-third each among plaintiff, Koch and Spiegelman." Defendants know that capital is always contributed, not loaned. If money is loaned to a corporation a debt is thereby created.

The criticism of paragraph VII that the pleading does not allege how many years land purchased by the corporation would be subject to the oral agreement is answered by the pleaded facts that a corporation was organized, that it presumptively kept a record of its acts, and that the oral agreement of the parties would be evidenced by corporate records. The criticism that the pleading does not allege who would decide what land would be purchased or how it would be improved is answered by the pleading and by the law that all decisions of the corporation would be made by a majority of the directors.

The criticism that paragraph IX does not allege what land is referred to is answered by the phrase "said property", which can have reference to no property other than the property acquired by defendant corporation.

The criticism of paragraph XIII, that the meaning of the clause "that the land would be subdivided into about 48 separate lots," is answered by the allegations that the tract would be subdivided, requiring streets to be laid out. The necessary inference from such a covenant is that the exact number of lots had not been computed, leaving a margin of freedom of judgment for those who should make final decision. But it is patent that whatever determination should be reached upon such a matter would be derived by at least two of the contracting parties. The same is true with reference to the criticism that the "type" of streets, sewers and other utilities is not alleged or the cost or size or quality of construction of the 48 separate dwellings.

The foregoing will serve to illustrate the nature of the demurrer for want of uncertainty which continues similarly as to the remaining paragraphs of the pleading. In granting a nonsuit the court below did not rule upon the special demurrer. The foregoing is the first judicial comment of record upon its merits. Because the trial court entertained the opinion that plaintiff's cause, though meritorious, should be attempted on some other theory or at least in a different action, the general demurrer was sustained by the process of excluding all evidence. If plaintiff's facts entitled him to relief he should not thus be expelled by a chancellor whose sacred duty is to see that the "King's subjects" are not turned away if the bill by which the litigant comes may be so framed as to warrant relief in equity. Justice delayed is justice denied. Plaintiff's pleading outlined a series of events whereby it appears that he was in possession of options to purchase desirable lands for subdivision and development for profit. Also, he had acquired priorities for the essential building materials. These were valuable property rights which by plaintiff's agreement with Koch and Spiegelman they acknowledged and of which, by the contract, they obtained control. They then ruthlessly excluded him from participation in the ownership of his own valuable property and its increment. To allow such conduct to go unrestrained by necessitating long delays incident to an appeal is to give encouragement to the actor with the stronger hand.

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81 Cal.App.2d 229

COZZI v. COZZI.

Civ. 15620.

District Court of Appeal, Second District, Division 3, California.

Aug. 14, 1947.

1. Husband and wife ⚷264

In divorce action, evidence sustained finding that there was no community property owned or acquired by parties but that defendant husband acquired property prior to marriage and that it was his separate property.

2. Husband and wife ⚷257

In divorce action, in finding all property, including increments through income, to be separate property of defendant husband, trial court was entitled to consider fact that any so-called earnings which might have accrued to community by virtue of work, of defendant on his separate property might well have been expended by him in support of his wife and child, thus leaving his separate estate intact. Civ. Code, § 163.

3. Husband and wife ⚷264

Even though husband fully and wife partially employed themselves in maintenance of husband's separate property and large portion of income from husband's separate property was necessarily expended on amortization payment on principal due on notes, secured by incumbrances on husband's property, evidence in divorce action supported finding that wife had not acquired a community interest in the property. Civ. Code, § 163.

4. Divorce ⚷235

Where divorce is granted for offence of husband, court may, in its discretion, compel husband to provide for such support of wife as may be deemed just, having regard to circumstances of parties respectively. Civ. Code, §§ 137, 139.

5. Divorce ⚷286

An abuse of discretion in matter of allowance for support of divorced wife is never presumed but must be affirmatively established by party complaining of order. Civ.Code, §§ 137, 139.

6. Divorce ⚷235

Where interlocutory divorce judgment awarded wife use, rent and tax free, of house owned by husband as his separate property, and $100 per month for support of minor child, failure of court to award wife permanent support money was not an abuse of discretion, in view of fact that wife was 30 years of age, husband 56 and in view of wife's history of employment before marriage. Civ. Code, §§ 137, 139.

◆

Appeal from Superior Court, Los Angeles County; Elmer D. Doyle, Judge.

Action for divorce by Maria de La Luz Tovar Cozzi against Rosario Cozzi, wherein the defendant filed a cross-complaint. From an interlocutory judgment of divorce, plaintiff appeals.

Affirmed.

Clayton B. Thomas, of Los Angeles, for appellant.

Gilford, Morris & Bragin, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Plaintiff appeals from an interlocutory judgment of divorce granted in her favor following a contested trial on the issues presented by her complaint and defendant's cross-complaint.

The parties were married March 5, 1939, and there is one child the issue of the marriage, aged four years at the time of the filing of the complaint on September 18, 1944. Plaintiff claimed therein that certain personal and real property, together with the improvements thereon, which was owned by and stood in the name of defendant at the time of the marriage and at all times subsequent thereto, was community property. Defendant in his pleadings claimed, and the court found the same at all times to have been his separate property, that it was acquired by him prior to his marriage to the plaintiff, and that it has a value of approximately $60,000. The trial court further found that defendant, throughout his marriage, has had no income save and except that which came to him as rentals from his separate property, aggregating about $850 per month; that defendant was compelled to and did pay on account of the mortgage and trust deed notes on said real property, federal and state income taxes, real property taxes, utilities costs upon said property, fire insurance, miscellaneous supplies and repairs for and upon said property, about the sum of $680.50 per month; that in addition thereto defendant pays the sum of about $23 per month on a policy of life insurance of which the minor child of the parties is the beneficiary, leaving approximately $146.50 per month with which to support himself, plaintiff and their child.

The court further found that there is no community property owned or acquired by the parties hereto, that defendant did treat plaintiff in a cruel and inhuman manner granting her the interlocutory judgment on that ground, awarding her the custody of the minor child and the sum of $100 per month for its support, further awarding her the use of certain residential property, referred to in the judgment as a "homestead," owned by defendant as his separate property and from which he had been receiving rentals in the sum of $45 per month, to be held and occupied by plaintiff and the child without rent until the further order of the court, but in no event beyond the time that plaintiff remarries.

Plaintiff claims as grounds for her appeal that the trial court erred, (1) in finding that the parties were not possessed of any community property interests in which plaintiff was entitled to share, and (2) in failing to grant to plaintiff an allowance for the support of herself in addition to that which was made for the support of the minor child.

[1] The evidence clearly shows, and apparently plaintiff now concedes, that all the real property, stocks and bonds presently owned by defendant were acquired by him with separate funds prior to his marriage to plaintiff. It is equally true that, during the period of some 5½ years they lived together as husband and wife his entire and only income resulted from the rents, issues and profits of such property and defendant maintained and supported himself and family therefrom. He devoted his full time to the management and upkeep of his property. A portion of plaintiff's time was likewise utilized in collecting rents and otherwise assisting her husband in caring for the real property.

Plaintiff now contends she has acquired a community interest in such real estate because of the facts that defendant fully and plaintiff partially employed themselves in the maintenance and care thereof, and that a large proportion of such income was necessarily expended on amortization payments upon the principal due on notes, secured by mortgage and trust deed encumbrances thereon.

Section 163 of the Civil Code provides: "All property owned by the husband before marriage * * * with the rents, issues, and profits thereof, is his separate property." "Likewise, ordinarily improvements made out of community funds on lands constituting the separate property of one of the spouses follow the character of the land and become separate property. 5 Cal. Jur. 298." Seligman v. Seligman, 85 Cal. App. 683, 689, 259 P. 984, 987. That portion of the profits of a business, however, is not necessarily separate property when earned therefrom after marriage, even though such business has been owned and carried on by one of the spouses before the marriage. "The capital which the husband brings to the marriage partnership is his own separate property, but it is a question for the court to determine what portion of the profits thereafter arises from the use of this capital and what part arises from the activity and personal ability of the husband. That portion of the income due to the 'personal character, energy, ability and capacity of the husband' is community property. Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A. N.S., 880, 134 Am.St.Rep. 107; In re Gold's Estate, 170 Cal. 621, 151 P. 12; In re Caswell's Estate, 105 Cal.App. 475, 288 P. 102." Witaschek v. Witaschek, 56 Cal. App.2d 277, 281, 132 P.2d 600, 603.

[2, 3] Assuming the care and maintenance of income properties owned by him to be a "business," it is not the profits of the business, but only the ascertained earnings of the defendant from his individual efforts in managing, laboring on and caring for such property, in the nature of salary, wages or the equivalent thereof, which would be community property. Seligman v. Seligman, supra, 85 Cal.App. at page 687, 259 P. 984. No evidence has been called to our attention appraising the value of plaintiff's such "earnings" or to what proportion of the income they should properly be allocated. In finding all the property, including the increments through income, to be separate property of the defendant, the trial court was entitled to take into consideration the fact that any so-called earnings which might have accrued to the

community by virtue of the work, labor or services of defendant, may well have been expended by him in the support of his wife and child, thus leaving his separate estate intact. Cline v. Cline, 4 Cal.App.2d 626, 629, 41 P.2d 588; Conard v. Conard, 5 Cal.App.2d 91, 93, 41 P.2d 968. The evidence supports such an inference and we are unable to say that the court abused its discretion or committed error in finding for the defendant on this issue.

[4] With reference to plaintiff's second ground of appeal complaint is made of the failure of the court to award her permanent support money. As previously indicated the interlocutory judgment does award her the use, rent and tax free, of a six-room dwelling house owned by defendant as his separate property, in addition to the sum of $100 per month for the support of the minor child. Where, as here, a divorce is granted for offense of the husband the court may, in its discretion, compel him to provide for such support of the wife as may be deemed just, having regard to the circumstances of the parties respectively. (Civ. Code, secs. 137, 139.) "But this discretion is not arbitrary. '* * * it must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities, and the financial ability of the husband. * * * In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason,—all the circumstances before it being considered.' 1 Cal.Jur. 965." Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72, 73; see also Kyne v. Kyne, 70 Cal.App.2d 80, 83, 160 P.2d 910.

[5] "An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032; Kaiser v. Hancock, 25 Cal.App. 323, 328, 143 P. 614; Lynch v. Lynch, 69 Cal.App. 66, 71, 230 P. 462. The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. Hale v. Hale, 55 Cal.App.2d 879, 883, 132 P.2d 67; Sharpe v. Sharpe, 55 Cal.App.2d 262, 265, 130 P.2d 462." Berry v. Chaplin, 74 Cal.App.2d 669, 672, 673, 169 P.2d 453, 456.

[6] Taking into consideration all the evidence, including that showing the plaintiff to be 30 years of age as compared to the defendant as 56, her history of employment before the marriage as a stenographer and teacher of shorthand in Spanish and subsequently, in a few instances, as a foreign language translator, the time elapsing between the marriage and separation, the amount left to defendant from the rents, issues and profits of his separate properties after paying the sums necessary to keep them as income producers, the required payments by defendant of taxes and other essential charges, the order for the support of the child and that awarding to plaintiff the so-called homestead with the consequent reduction of defendant's income by the $45 rental which the dwelling had previously produced, we are unable to agree with plaintiff that the refusal by the trial court to award her permanent or any support money constituted a miscarriage of justice or an abuse of discretion.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

HALL et al. v. CHAMBERLAIN et al.*

Civ. 15938.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1947.

Hearing Granted Oct. 2, 1947.

1. Taxation ⚿805(1)

Under statute requiring that a proceeding based on alleged invalidity or irregularity of any deed to the state for taxes be commenced within one year after June 1, 1941, parties who filed complaint to quiet title on August 9, 1944, were barred from attacking validity of deed from tax collector to state, and deed and all proceedings leading up to its execution were deemed to be valid. Revenue and Taxation Code, § 3521.

2. Taxation ⚿439, 688, 770

Tax validation acts of 1943 and 1945 validated anything that the Legislature could have dispensed with and any matter of procedure that it could have provided. St.1943, p. 1993; St.1945, p. 2176.

3. Constitutional law ⚿196
Taxation ⚿439, 688, 770

The failure to observe the requisites of due process cannot be cured by a validating tax statute, but irregularities or failure to comply with statutory requirements that could have been omitted in the first instance may be cured.

4. Taxation ⚿25

The manner of tax procedure, after jurisdiction has been acquired and the mandates of due process are complied with, is a matter within legislative discretion.

5. Taxation ⚿421(3, 6)

Description in assessment roll for 1932–33 reading "Lot 1 Sec 28 1–S 20 7.48 Acs." was sufficient.

6. Evidence ⚿23(2)

The courts take judicial notice of government surveys of public lands.

7. Taxation ⚿421(2)

As respects the sufficiency of description in an assessment roll, it is the invariable rule to follow the number of the section with the description of the township, and to follow that with description of the range.

8. Evidence ⚿10(4), 16

In determining the sufficiency of description in assessment roll for 1932–33 reading "Lot 1 Sec 28 1–S 20 7.48 Acs.", the court would take judicial notice that San Bernardino Base and Meridian was the only base and meridian for townships and ranges in Ventura county, that "1–S" meant "Township 1 South", that all ranges in Ventura county were west of San Bernardino Meridian, and that "20" meant "Range 20 West".

9. Taxation ⚿439, 688, 770

As respects validity of proceedings upon which deed from tax collector to state was based, alleged error consisting of the alleged fact that land was owned by Pan American Bank of California but was assessed to "Bank, Pan American of California", and that same designation appeared in delinquent tax list for 1932–1933 as well as in addenda to delinquent tax list published in 1938, was validated by the tax validation statutes of 1943 and 1945. St. 1943, p. 1993; St.1945, p. 2176.

10. Taxation ⚿439, 688

As respects validity of proceedings upon which deed from tax collector to state was based, alleged error consisting of the alleged fact that addenda did not set forth the amount for which property had been sold to state as required by statute which was in effect at the date of publication of delinquent tax list for 1932–33 was cured by tax validation statutes of 1943 and 1945. St.1943, p. 1993; St.1945, p. 2176; Pol. Code, § 3817d.

11. Taxation ⚿688

As respects validity of proceedings upon which deed from tax collector to state was based, alleged defect consisting of fact that total amount of taxes, assessments, penalties, and costs due and a lien on the property was stated in delinquent list for 1932–33 to be $56.46, but addenda to delinquent list for 1938 recited $58.46 as "least amount accepted at sale", was cured by the validating statutes of 1943 and 1945. St.1943, p. 1993; St.1945, p. 2176.

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* Subsequent opinion 192 P.2d 759.

12. Taxation ⚿763

Under provision of the Political Code which remained in force until superseded by provision of the Revenue and Taxation Code which was adopted in 1939, a deed from tax collector to the state was not void because several parcels of real property which had been separately assessed and so appeared in the delinquent list were conveyed by the same deed. Pol.Code, §§ 3771a(2), 3785; Revenue and Taxation Code, § 3513.

13. Taxation ⚿761, 762

Under provision of the Political Code which remained in force until superseded by provision of the Revenue and Taxation Code which was adopted in 1939, a deed from the tax collector to the state setting forth $2,720.52 as the total for which all parcels described in the deed were sold, the amount for which each separate parcel was sold appearing opposite the description of such parcel, was sufficient. Pol.Code, §§ 3771a(2), 3785; Revenue and Taxation Code, § 3513.

14. Taxation ⚿770

Incorrect recitals in deed from tax collector to state and failure to state therein all items specified in the statute then in effect were errors cured by the validating statutes of 1943 and 1945, as matters that might have been dispensed with by the legislature. St.1943, p. 1993; St.1945, p. 2176.

15. Taxation ⚿695, 778, 781, 784

Deed from tax collector to state was valid and conveyed to state the absolute title to the property free of encumbrances, except liens for district taxes, special assessments, and certain easements and water rights, and former owner had no title to or interest in the property thereafter except for a right to redeem within the time and in the manner prescribed by law. Pol.Code, § 3787; Revenue and Taxation Code, § 3520.

16. Taxation ⚿788(2)

Statutes making deed from tax collector to state prima facie evidence of certain steps in tax proceedings and conclusive as to others are not unconstitutional. Pol.Code, §§ 3786, 3787; Revenue and Taxation Code, §§ 3517, 3518.

17. Constitutional law ⚿285
Taxation ⚿679(5), 688

A notice by tax collector to board of supervisors stating that pursuant to statute he submitted an application for an order of the board to sell described property at public auction was not jurisdictional and was not a step required by due process, and hence error in the statutory reference in the notice was cured by tax validation statutes of 1943 and 1945. St.1943, p. 1993; St.1945, p. 2176.

18. Constitutional law ⚿285
Taxation ⚿679(5), 688

The statement of amount for which property would be sold appearing in notice by tax collector to board of supervisors, stating that pursuant to statute he submitted an application for an order of the board to sell described property at public auction, was not required in order to satisfy due process, and hence error in statement of the amount was cured by the tax validation statutes of 1943 and 1945. St.1943, p. 1993; St.1945, p. 2176.

19. Evidence ⚿23(2)

The court would take judicial notice that in government survey there was only one section numbered 28 in each township, and that there was only one lot 1 in any section.

20. Taxation ⚿679(5)

Proceedings for sale of land theretofore acquired by state for taxes were not invalid because the description contained in tax collector's notice to board of supervisors included the designation of school district in which the property was located, thus differing from description in assessment roll and in delinquent tax lists.

21. Taxation ⚿679(5), 688

The transmission of notice by tax collector to board of supervisors of intention to sell land theretofore acquired by the state for taxes need not have been required by the Legislature, and the absence of notice in particular proceedings or any error in notice given was validated by the tax validation statutes of 1943 and 1945. Revenue and Taxation Code, § 3698; St.1943, p. 1993; St.1945, p. 2176.

22. Taxation ⚷679(5), 688

The transmission by board of supervisors to tax collector of a copy of resolution authorizing sale of tax deeded lands was not jurisdictional, and alleged defect consisting of failure to transmit copy was cured by tax validation statutes of 1943 and 1945. Revenue and Taxation Code, § 3698; St.1943, p. 1993; St.1945, p. 2176.

23. Taxation ⚷695, 781

The state acquired absolute title to land by deed from tax collector, and former owners had no interest in the property except an offer enabling them to regain title by redeeming from sale, which offer the state could revoke at any time before redemption was made. Revenue and Taxation Code, § 3520.

24. Taxation ⚷679(5)

Neither the state nor the tax collector as its representative had any constitutional obligation to give any notice to assessee prior to sale of tax deeded lands except by publication of delinquent list and notice of intended sale.

25. Evidence ⚷83(4)

Where it was not contended that notice of intended sale by tax collector of tax deeded lands was not published at the times and in the manner required by law, it would be presumed that official duty had been regularly performed. Code Civ.Proc. § 1963, subd. 15.

26. Constitutional law ⚷92
Taxation ⚷695

A taxpayer has no vested right in the method adopted by the state for the disposition of its tax deeded lands, and the right of redemption is not a property right.

27. Constitutional law ⚷285
Taxation ⚷688

The mailing of notice to assessee of intended sale of tax deeded lands by the tax collector was not required by due process and alleged error in failure to mail was cured by tax validation statutes of 1943 and 1945. St.1943, p. 1993; St.1945, p. 2176.

28. Taxation ⚷770

Where tax deeded lands are sold by the tax collector as representative of the state, the failure to insert in the deed certain items specified by the statute is cured by the tax validation statutes of 1943 and 1945. St.1943, p. 1993; St.1945, p. 2176.

29. Taxation ⚷502, 511

Bank which acquired record title to land took that title subject to all unpaid taxes and to tax sale, since a conveyance by one person to another does not cancel the tax lien, and deed from the bank to others gave the latter no greater title than that held by the bank, but they took title subject to all unpaid taxes, tax sales, and tax deeds, though deed to the bank and deed from bank to others antedated the effective date of the tax validation statute of 1943. St.1943, p. 1993.

30. Constitutional law ⚷196

A person cannot by reason of his ownership of property prior to the levy of tax escape from operation of tax validating statute by claiming a vested right that cannot be taken by retroactive legislation. St. 1943, p. 1993; St.1945, p. 2176.

31. Taxation ⚷439, 688, 770

A tax validating statute that becomes effective pending litigation will act retroactively to cure defects in the proceedings that are relied on to defeat the tax deed, and similar irregularities are no less subject to validation though title may be transferred by one person to another. St. 1943, p. 1993; St.1945, p. 2176.

32. Taxation ⚷679(5), 696

The Legislature has full control over the sale of property belonging to the state and may regulate or change at any time the method of its disposition and may make retroactive changes in method of redemption.

33. Constitutional law ⚷98

A taxpayer has no vested right in method of procedure for redemption of property sold for taxes.

34. Taxation ⚷695

The power to prescribe procedure for redemption of property sold for taxes is vested in the Legislature and it may change the method as it chooses.

35. Taxation ⚷695

The right to redeem property sold for taxes is not a vested right in the property.

36. Taxation ⚷1

The relationship of sovereign and taxpayer is not founded on nor does it create contractual rights.

37. Trial ⚷89

In action to quiet title which defendants claimed by virtue of tax deed to the state and deed to one of the defendants, where the deeds were valid and were supported by valid tax proceedings, they constituted evidence of the defendants' title and striking them from the record was error.

◆

Appeal from Superior Court, Ventura County; Ernest D. Wagner, Judge.

Action by B. P. Hall and others against Henry Chamberlain and others to quiet title to real property. Judgment for plaintiffs, and defendants appeal.

Reversed with directions.

William T. Selby, of Ventura, Edward C. Maxwell, of Oxnard, and M. Arthur Waite and Julien G. Hathaway, both of Ventura, for appellants.

Wm. Mackenzie Brown, of Los Angeles, and Chas. F. Gerard, of Ventura, for respondents.

WILSON, Justice.

Respondents brought this action to quiet title to real property in Ventura County. The appeal is from the judgment in their favor.

Respondents contend that the tax deed to the state and the deed to appellant Henry Chamberlain, upon which the latter's title rests, are both invalid and conveyed no title by reason of defects in the tax proceedings. They have raised no issue concerning certain steps in the proceedings and thereby admit that (1) the property was lawfully assessed; (2) the taxes were lawfully equalized; (3) the taxes were levied in the manner required by law; (4) the taxes levied for 1932–33 were not paid; (5) the tax sale to the state and the sale by the state were had at the times and places required by law; (6) the property was never redeemed from the tax sales; (7) no taxes were paid on account of or after the 1932 levy and prior to the deed by the state to appellant Chamberlain; (8) Robert Cooney was the tax collector of Ventura County at all times during the proceedings involved in this action.

Respondents maintain and the court found that certain steps in the tax proceedings leading up to the two deeds were invalid and conveyed no title.

Chronologically the facts are as follows: In 1932 the property was assessed for the taxes of 1932–33. The taxes were not paid and the property was sold to the state July 1, 1933. California Bank acquired the property by deed dated February 14, 1938, and recorded February 25, 1938. No taxes having been paid and redemption not having been made, the property was conveyed by the tax collector to the state by deed dated July 1, 1938, and recorded August 4, 1938. By deed dated July 9, 1943, and recorded August 14, 1943, California Bank conveyed the property to respondents. On January 25, 1944, the tax collector gave notice to the board of supervisors of his intention to sell, advertisement of the sale was published and on March 20, 1944, the property was sold to Chamberlain and a deed was issued to him bearing that date which was recorded on April 15, 1944.

Respondents rely on errors in the tax proceedings which prior to the adoption of the tax validation acts to which we shall later refer would have been fatal to the tax title. For example, they direct attention to cases holding that a sale of the property for a small amount, even one cent, more than actually due for taxes, penalties, and costs renders a tax deed void. See Hotchkiss v. Hansberger, 15 Cal.App. 603, 607, 115 P. 957; Warden v. Broome, 9 Cal. App. 172, 174, 98 P. 252; Miller v. Williams, 135 Cal. 183, 184, 67 P. 788; Hall v. Park Bank, 165 Cal. 356, 358, 132 P. 452. Also the failure to set forth in the deed the name of the person to whom the property was assessed spelled exactly as it appeared on the assessment roll has been held to invalidate the deed. Bruschi v. Cooper, 30 Cal.App. 682, 683, 159 P. 728; Henderson v. De Turk, 164 Cal. 296, 298, 128 P. 747; Biaggi v. Phillips, 50 Cal.App.2d 92, 99, 122 P.2d 619. Failure in other particulars to follow strictly the tax provisions of the code have been held to render the tax deed void and ineffective. Such irregularities and errors, and all others except as to jurisdictional matters required in order to satisfy the due process provisions of the federal and state Constitutions, have been rendered innocuous by the curative acts which will be considered later. Stats. 1943, ch. 458, p. 1993; Stats.1945, ch. 1134, p. 2176.

[1] 1. *The statute of limitations relating to the deed to the state.* The deed is dated July 1, 1938, was acknowledged on July 28, and recorded on August 4, 1938. The complaint in this action was filed on August 9, 1944. Respondents are barred from attacking the validity of the deed from the tax collector to the state by reason of section 3521 of the Revenue and Taxation Code, which provides: "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later." Respondents are not defendants in the action basing their defense on the alleged invalidity of the deed. Having commenced the action they are the moving parties in a proceeding attacking the deed for alleged irregularities in steps leading to its issuance. By reason of the limitation of said section 3521 the last date on which an action could have been commenced attacking the validity or regularity of the deed to the state was June 1, 1942. Therefore the deed and all proceedings leading up to its execution are deemed to be valid and regular and the state is deemed to have acquired a clear title to the property. Tannhauser v. Adams, — Cal.App.2d —, 182 P.2d 280.

However, since both appellants and respondents have discussed alleged errors in the tax proceedings without reference to section 3521, we shall dispose of the objections raised by respondents to their validity.

2. *Effect of the tax validation acts.* In order that property upon which taxes had not been paid for many years could be rehabilitated and returned to the assessment rolls and pay its fair share of taxes levied for the support of the government, the legislature in 1943 passed a tax validation act, sections 1 and 2 of which read as follows:

> "Section 1. Every act and proceeding heretofore taken by any county, city and county or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any county or city and county, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, are hereby confirmed, validated and declared legally effective. Sec. 2. (a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken. (b) This act is limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions." Stats.1943, ch. 458, p. 1993. This statute related only to taxes levied by a county or city and county.

[2] In 1945 a similar act was passed, applicable to the tax proceedings of all taxing agencies and revenue districts including those covered by the 1943 act. Stats.1945, ch. 1134, p. 2176. These acts validated anything that the legislature could have dispensed with and any matter of procedure that it could have provided. Wall v. State, 73 Cal.App.2d 838, 844, 167 P.2d 740.

[3, 4] In discussing the validating acts the Supreme Court held in Miller v. McKenna, 23 Cal.2d 774, 781, 147 P.2d 531, that (1) the legislature has power to enact statutes to validate prior tax proceedings, (2) a proper validating act may be effective as to pending litigation, (3) a curative act may heal a fatally defective proceeding, except the omission of jurisdictional acts, that is, acts required by the due process

provisions of the federal and state Constitutions. The failure to observe the requisites of due process cannot be cured by a validating statute. Irregularities or failure to comply with statutory requirements that could have been omitted in the first instance may be cured. It was held that among the jurisdictional essentials that cannot be cured are (1) a duly constituted taxing authority; (2) property to be taxed within the territorial jurisdiction of the taxing body; (3) property legally subject to the tax; (4) sufficient notice and opportunity for hearing to constitute compliance with due process. The manner of procedure after jurisdiction has been acquired and the mandates of due process are complied with is a matter within legislative discretion. Steps which may be dispensed with in the beginning or if required by statute and not performed or are done in an irregular manner may be waived by a curative act. The jurisdictional requisites for due process mentioned in the Miller case were all complied with in the instant case.

In Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921, it was contended that the deed was invalid because (1) an excessive rate of taxation had been fixed; (2) the assessment roll failed to show the road district in which the land involved was located; (3) the amount stated in the delinquent list to be due was incorrect; (4) the published delinquent list constituted a separate folded section of the newspaper, and therefore a supplement rather than an integral part of the newspaper; (5) the deed was void on its face for the reason that it did not comply with section 3480 of the Revenue and Taxation Code. The court held (26 Cal.2d at page 143, 156 P.2d 921) that all the irregularities relied on by the defendants, including the claimed irregularity in the recitals in the deed, were such that the legislature could and did cure by the ratifying statute. None of the objections related to the absence of notice or any other element of due process affecting the rights of defendants.

In City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397, it was claimed that the tax proceedings were void in that (1) the county tax levy was excessive resulting in an invalid tax; (2) the land was not included in the improvement bond assessment; (3) notices of delinquency contained incorrect amounts; (4) the sales were for amounts less than the correct amounts; (5) the words "penalties and costs" were omitted from the statement appended to the notice; (6) the lots were not sufficiently described in the delinquent tax list; (7) the tax deeds were void on their face because they did not state the fact and date of sale by the tax collector to the City of Compton; (8) notice was not mailed to the assessee and he did not receive notice. The court held that the asserted irregularities were healed by the curative act; that the requirements for the publication of delinquency and notice constituted a jurisdictional prerequisite, but the form and content of the notice are details that are subject to legislative or administrative discretion; that defects that are related to the mode of the exercise of the power are merely directory and may be made effective by a curative act. The court concluded that the following irregularities complained of were validated by the statute: (1) The statement of an incorrect amount in the notice of delinquency; (2) irregularity in the fixing of the budget and the tax rate; (3) the omission of the words "penalties and costs" from the statement appended to the delinquent notice; (4) an irregularity in the description of the property in the delinquent tax lists; (5) the irregularity in giving notice of sale; (6) failure to insert in the tax deed the items required by the code.

In Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567, it was objected that the delinquent tax lists were published in sections among various newspapers in the county. The court held that assuming that certain jurisdictional steps had been taken the details in the mode or manner of pursuing those steps may be changed by the legislature within constitutional bounds, and that any defectively pursued steps were cured by the validating act. The court stated that a notice of delinquency having been published in a newspaper of general circulation, the property owner was not deprived of a constitutional right even though the notice was defective. It was also held that (1) alleged irregularities in the form and execution of affidavits, (2) an incorrect statement in the delinquent tax list of the amount of the least acceptable bid, and (3) the omission from the tax deed of recitals required by the code were cured by the 1943 validating act.

In Wall v. State of California, 73 Cal. App.2d 838, at page 843, 167 P.2d 740, several objections were made to the tax proceedings, those applicable to this action being (1) that there was a single tax deed made for all the parcels of land involved although they had been separately assessed, and (2) that the statement of penalties and costs in the delinquent tax list was erroneous in that it showed the amount of taxes due to be one cent less than the amount actually due. The court held that the curative acts validated anything that the legislature could have dispensed with or any manner of procedure for which the legislature could have provided, and that the alleged defects to which we have referred were healed.

The objections made by respondents in this action to the tax proceedings are the orthodox objections usually made to the validity of tax deeds, and, save for the validating acts, we would be compelled to hold that appellant Chamberlain did not acquire title to the property by reason of his tax deed. However, all the objections upon which respondents depend are anachronous as to any of the errors, omissions or irregularities that occurred prior to the effective dates of the validating acts.

3. *Objections to the tax proceedings leading to the deed to the state.* Respondents offer several objections to the deed to the state and to the proceedings leading to its execution.

[5] (a) *The description of the property.* It is described in the assessment roll for 1932–33 as "Lot 1 Sec 28 1–S 20 7.48 Acs." Respondents contend that this description is insufficient to identify the property. The same description appears in the delinquent tax list published in 1933 and in the addenda to the delinquent list published in 1938. Such description is adequate. It identifies the property with sufficient certainty and from it the taxpayer could have ascertained "for what property he [was] assessed" and that is all that is required. Smith v. Addiego, 54 Cal.App.2d 230, 242, 129 P.2d 953; San Francisco v. Pennie, 93 Cal. 465, 470, 29 P. 66; Biaggi v. Phillips, 50 Cal.App.2d 92, 98, 122 P.2d 619.

[6-8] In Stanton v. Hotchkiss, 157 Cal. 652, 108 P. 864, one parcel of property was described as a fractional part of "sec. 23—16—15." This was held (157 Cal. at page 655, 108 P. 864) to designate section 23, township 16 south, range 15 east, Mt. Diablo Base and Meridian. It is conceded that the land in question in this action is in Ventura County. The courts take judicial notice of government surveys of the public lands. It is the invariable rule to follow the number of the section with the description of the township and the latter is followed by the description of the range. Stanton v. Hotchkiss, supra, 157 Cal. at page 655, 108 P. 864. We take judicial notice (1) that San Bernardino Base and Meridian is the only base and meridian for townships and ranges in Ventura County; (2) that "1—S" means "Township 1 South;" (3) that all ranges in Ventura County are west of San Bernardino meridian, and hence "20" must mean "Range 20 West." The description derived from the letters and figures used by the taxing officials is Lot 1 in Section 28, Township 1 South, Range 20 West, San Bernardino Base and Meridian, in Ventura County, California, which is conceded to be the correct legal description of the property involved in this action.

[9, 10] (b) *Miscellaneous objections.* Respondents contend that the proceedings upon which the deed to the state is based are defective for other reasons: (1) The land was owned by Pan American Bank of California but was assessed to "Bank, Pan American of California," and the same designation of the name appeared in the delinquent tax list; (2) in the addenda to the delinquent tax list published in 1938 the description of the property and the name of the assessee were the same as in the delinquent list for 1932–33, and were incorrect for the reasons above stated; (3) the addenda did not set forth the amount for which the property had been sold to the state as required by section 3817d of the

Political Code which was in effect at the date of the publication of the delinquent list. These alleged errors were validated by the curative acts. It was so held in the cases cited in our previous discussion.

[11] Another alleged defect is that the total amount of taxes, assessments, penalties and costs due and a lien on the property was stated in the delinquent list for 1932–33 to be $56.46, which was the amount for which the property was required by law to be sold, but the addenda to the delinquent list for 1938 contained a statement "least amount accepted at sale" and the amount was stated to be $58.46, which was $2 in excess of the amount for which the property was sold in 1933. This objection is likewise within the provisions of the validating acts. Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921; City of Compton v. Boland, 26 Cal.2d 310, 314, 158 P.2d 397; Barrett v. Brown, 26 Cal.2d 328, 332, 158 P.2d 567.

Some of the errors mentioned by respondents have been held in decisions rendered prior to 1943 to be fatal and to render a tax deed void. Those decisions need not be cited nor discussed since they have no effect on this action for two reasons: (1) All the foregoing objections are to the deed to the state and to the proceedings leading up to its execution. The adoption of section 3521 of the Revenue and Taxation Code above quoted placing a limitation on the time for commencing actions to invalidate such deed is a bar to respondents' attack on the deed in question since, as we have pointed out, this action was not commenced within the time limited by that section. (2) None of the errors is in regard to a matter required in order to satisfy due process and the failure to perform any of the acts referred to by respondents or to perform them in the manner prescribed by the statute is not fatal to the proceedings and does not render the deed invalid. No one of the matters of which respondents complain is a necessary step in due process. If the legislature had failed to require any one of the acts mentioned the proceedings had and taken by the taxing authorities would have been sufficient to tax the property and to authorize its sale for nonpayment of the tax.

[12] 4. *Effect of the deed from the county tax collector to the state.* The deed contains all recitals required by section 3785 of the Political Code then in force to be made in a deed from the tax collector to the state. That section remained in force as amended in 1911 until superseded by section 3513 of the Revenue and Taxation Code when that code was adopted in 1939.

(a) Respondents contend that the deed is void because several parcels of real property were conveyed by the same deed, although they had been separately assessed and so appeared in the delinquent list. They cite in support of their contention Sterling Realty Co. v. Relfe, 21 Cal.2d 164, 130 P.2d 410, 412, which concerned a sale under a city ordinance that required the issuance of a certificate of sale "for each sale." Several lots were included in one certificate, the total amount of all sales was stated, and the amount of the sale of each separate lot was not set forth. Such is not our problem here.

Section 3771a of the Political Code, Stats. 1921, ch. 117, p. 109, provides in subdivision (2) that if no sale is had under the provisions of said section then the property shall be deeded to the state. There is nothing in that section or in any other provision of the statute to which our attention has been called requiring a separate deed for each parcel conveyed to the state. A deed conveying several parcels was sustained in Wall v. State, 73 Cal.App.2d 838, 843, 167 P.2d 740. The court held that the error, if any, was cured by the validating acts.

[13] (b) Another alleged error in the deed is that $2720.52 is set forth as the total for which all parcels described in the deed were sold. The amount for which each separate parcel was sold appears opposite the description of such parcel. This is a sufficient compliance with the statute.

When one of the several parcels of land contained in the deed is redeemed the requirement that the redemption shall be noted on the record of the deed may be complied with and the law will be satisfied by an appropriate notation on the record that such parcel has been redeemed, referring to it by description. That is just what was done in connection with the deed involved in this action. A photostatic copy of the record of the deed in the county recorder's office is in evidence. Several parcels were redeemed and the recorder made marginal entries setting forth the fact and the date of redemption and the description of each parcel redeemed. A notation appears on the margin of the record that the property which is the subject of this action was sold to Henry Chamberlain on March 20, 1944, for $100.

The statutory requirements for the cancellation of double assessments and those relating to deeds issued for property erroneously assessed may be fulfilled in a similar manner by the making of marginal entries on the record stating that the deed has been cancelled as to the property described in such entry and the reason therefor.

(c) It is objected that the property was incorrectly and insufficiently described in the deed. This is the same objection as that made to the description in the assessment roll and has been disposed of in our previous discussion of the tax proceedings.

[14] (d) It is contended that the deed is deficient in that the name of the assessee recited in the deed is not the same as the name appearing on the assessment roll. Incorrect recitals in the deed and failure to state therein all items specified by the code are matters that might have been dispensed with by the legislature and the errors are cured by the validating acts. Chambers v. Duvall, 26 Cal.2d 139, 143, 156 P.2d 921; Barrett v. Brown, 26 Cal.2d 328, 332, 158 P.2d 567.

[15] The deed to the state was valid and conveyed to it "the absolute title to the property free of incumbrances, except" liens for district taxes, special assessments and certain easements and water rights. Pol.Code, sec. 3787; Rev. and Tax.Code, sec. 3520; Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 147 A.L.R. 1111; Helvey v. Bank of America, 43 Cal.App.2d 532, 537, 111 P.2d 390. The former owner had no title to or interest in the property after the execution of the deed to the state—only a right to redeem within the time and in the manner prescribed by law, a right which was not exercised.

Section 3786 of the Political Code, superseded in 1939 by section 3517 of the Revenue and Taxation Code, provides that such deed is prima facie evidence that: (a) The property was assessed as required by law. (b) The property was equalized as required by law. (c) The taxes were levied in accordance with law. (d) The taxes were sold as prescribed by law. (f) The property was not redeemed. (g) The person who executed the deed was the proper officer. Section 3517 of the Revenue and Taxation Code contains the following that was not in the Political Code: "(h) That the amount for which the property was sold was legally a lien on the real property." There is no evidence in the record contradicting any of the facts of which the deed is prima facie evidence.

Section 3787 of the Political Code, superseded by section 3518 of the Revenue and Taxation Code, provides that such deed is conclusive evidence, except against actual fraud, of the regularity of all other proceedings from the assessment of the assessor to the execution of the deed, both inclusive. No claim of fraud is made in connection with the deed in question.

[16] It was within the power of the legislature to make the deed prima facie evidence of certain steps in the tax proceedings and conslusive as to others. The sections above referred to are not in violation of the Constitution. Rollins v. Wright, 93 Cal. 395, 397, 29 P. 58; Clarke v. Mead, 102 Cal. 516, 519, 36 P. 862; Tilton v. Russek, 171 Cal. 731, 734, 154 P. 860.

5. *Proceedings after the deed to the state.* In considering this phase of the case it must be borne in mind at the outset (1) that as stated in the last preceding paragraph the state became the absolute owner of the property, subject only to certain tax and assessment liens, through the deed from the tax collector; (2) that by reason of the deed the owner of the property forfeited all right in it except the privilege of redeeming before the state

disposed of it (Mercury Herald case, supra, and cases cited, Helvey case, supra); (3) that when this action was commenced by respondents an attack upon that deed was barred by the statute. Rev. & Tax. Code, sec. 3521.

Respondents contend nevertheless that several errors occurred intermediate the deed to the state and the sale to appellant Chamberlain that render the latter's title void.

[17-20] (a) On January 25, 1944, the tax collector transmitted a notice to the board of supervisors stating that "pursuant to the provisions of Chapter 529 of the political code, Stats.1939," he submitted an application for an order of the board to sell at public auction "Yerba Buena Lot 1 Sec. 28–1s–20 7.48 acs." for the minimum price of $50 plus costs of sale. The alleged errors in the notice are three in number: (1) That it is insufficient in that there is and was no Chapter 529 of the Political Code. This was a clerical error of no importance in the validity of the tax proceedings. The notice refers to statutes of 1939. Chapter 529 of the statutes of that year (p. 1917) adds a chapter to the Political Code relating to the sale of tax deeded lands. Obviously by the reference to chapter 529 and to the statutes of 1939 the tax collector intended to refer to those provisions which constituted his authorization to sell. Such notice by the tax collector to the board of supervisors was not jurisdictional and was not a step required by due process. The legislature might have dispensed with such notice or it might have provided some other method of procedure. The tax collector was proceeding by authority of law and his failure to designate the provisions of the statute under which he was proceeding is an error healed by the validating acts as completely as errors in the amount of the sale and in failing to follow the code provisions concerning the delinquent list. See Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567. (2) That the minimum price for which the property was to be sold was stated to be $50, an amount less than that due for taxes, penalties, interest and costs. The statement of the amount likewise was not important and was not required in order to satisfy due process. If the legislature had not required a statement of the amount for which the property would be sold the proceedings would have been sufficient to support the sale. The state was the owner of the land by virtue of the deed of 1938, and like any other owner of property could dispose of it in any manner it chose. The state, which is the party interested in the disposition of its property, has offered no objection to the manner of its sale. Respondents cannot complain since their title had been lost in 1938. Inasmuch as the state need not have required the tax collector to include in his notice a statement of the minimum amount for which the property would be sold, an error in omitting such statement or in stating an incorrect amount is validated by the curative acts. Barrett v. Brown, supra; City of Compton v. Boland, 26 Cal.2d 310, 314, 158 P.2d 397; Wall v. State, 73 Cal.App.2d 838, 167 P.2d 740. (3) That the addition of "Yerba Buena" to the description invalidated the proceedings, since the description in the notice was different from that in the assessment roll and in the delinquent tax lists. We take judicial notice that in the government survey there is only one section numbered 28 in each township, and that there is only one Lot 1 in any section. Consequently the land described in the tax collector's notice to the board of supervisors is the same as that described in the assessment roll, in the delinquent tax lists, and in all other previous proceedings. Furthermore, it appears from the assessment rolls in evidence that the property was in the Yerba Buena school district. The description used by the tax collector is not different from that contained in the previous tax proceedings but merely identifies the land as being in that district.

The tax collector did not, as contended by respondents, proceed on his own initiative or without legal authority in selling the property. He was authorized by law to sell, but he failed in some nonjurisdictional particulars to proceed as laid down in the code. Since the state owned the property and could have adopted other means of selling it, and since it is offering no objection to the proceedings or to the failure to follow the statutes minutely, we conclude that it sanctioned the sale as made. The state's own validating act healed all the error to which we have referred.

[21, 22] (b) It is further objected that (1) the tax collector did not transmit to the board of supervisors a notice of his intention to sell as provided in section 3698 of the Revenue and Taxation Code, and (2) the board of supervisors did not transmit to the tax collector a certified copy of its resolution authorizing the sale within five days or at any other time as required by section 3699. The first criticism is disposed of by the evidence, and by respondent's admission as well, that the notice was in fact transmitted by the tax collector although they assert that it was insufficient for the reasons above discussed. As we have already pointed out the transmission of such notice need not have been required by the legislature and its absence or any error in it has been validated. Concerning the second point, the transmission of a copy of the resolution to the tax collector was likewise not jurisdictional. Since the legislature might have dispensed with it, the failure to forward it is within the terms of the validating acts. The board of supervisors did adopt a resolution authorizing the tax collector to sell. Since the authority was adequately given, although such resolution might have been dispensed with by the legislature, the transmission of the resolution to the tax collector was an immaterial omission. Notice to the board of intention to sell and the transmission of a copy of the board's resolution are of no greater importance than giving notice of sale to the assessee, which is next discussed.

[23-25] (c) Complaint is made that the tax collector did not send a notice of the intended sale to the assessee of the property as prescribed in section 3701 of the Revenue and Taxation Code. The tax collector made an affidavit that the property was assessed to "Calif. Bank-Real Est. Dept." on the assessment roll for 1938–39, that there did not appear on the assessment roll an address for the assessee, and that he did not know its address. The assessee's address did in fact appear on the assessment roll in connection with its name. No reason has been advanced for and we are not now concerned with the making of an affidavit contrary to the facts shown by the record. The only question is whether a failure to send a notice of the intended sale to the assessee was a lethal error.

The state had absolute title to the land by reason of its deed. Pol.Code, sec. 3787; Rev. & Tax.Code, sec. 3520. Respondents and their predecessors in the title had no interest in the property except an offer enabling them to regain title by redeeming from the sale, which offer the state could revoke at any time before redemption was made. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 147 A.L.R. 1111. The offer was revoked by the sale and there was no constitutional obligation on the part of the state or of the tax collector as its representative to give any notice whatsoever to the assessee prior to the sale except by publication of the delinquent list and notice of intended sale. Since respondents do not contend that the notice was not published at the times and in the manner required by law, it will be presumed that official duty has been regularly performed. Code Civ.Proc. § 1963, subd. 15. The publication of the notice is all that the taxpayer is entitled to and when published as required by the code provisions "he has been accorded the full measure of his constitutional right in that respect." Merchants Trust Co. v. Wright, 161 Cal. 149, 151, 118 P. 517, 518; Bank of Lemoore v. Fulgham, 151 Cal. 234, 240, 90 P. 936; Fox v. Wright, 152 Cal. 59, 63, 91 P. 1005; Tannhauser v. Adams, —— Cal.App.2d ——, 182 P.2d 280.

[26, 27] A taxpayer has no vested right in the method adopted by the state for the disposition of its tax deeded lands, and the right of redemption is not a property right. Mercury Herald Co. v. Moore, supra; Helvey v. Bank of America, 43 Cal.App.2d 532, 537, 111 P.2d 390. Since the mailing of notice to the assessee was not required in order to satisfy the constitutional demand for

due process and might have been dispensed with by the legislature, and since the notice was published as required by law, the failure to mail it was an error that was validated by the curative acts and did not render the sale to appellant Chamberlain void.

[28] (d) The failure to insert items in the deed that are specified by the code is also cured by the validating acts. Chambers v. Duvall, 26 Cal.2d 139, 142, 156 P.2d 921; City of Compton v. Boland, 26 Cal.2d 310, 317, 158 P.2d 397; Barrett v. Brown, 26 Cal.2d 328, 332, 158 P.2d 567.

6. *Respondents' claim of vested rights.* Respondents contend that they must succeed in this action by reason of their asserted vested rights. The deed to the state was executed July 1, 1938. It was stipulated that California Bank acquired the record title to the property by deed dated February 14, 1938, and recorded February 25, 1938, and that it made a grant deed to respondents dated July 9, 1943, and recorded August 14, 1943. The validating act of 1943 became effective on August 4 of that year. Respondents maintain (1) that the deed to the bank having been executed prior to the deed to the state and prior to the validating act the title of the bank was superior to that of the state; (2) that the bank obtained a vested right that was not lost through the deed to the state and that its vested right was conveyed to respondents; (3) that respondents having acquired the record title by a deed dated prior to the effective date of the validating act their title was not affected by it.

[29] The bank took title subject to all unpaid taxes and to the tax sale. Taxes had been delinquent for more than four years when the bank received its deed and none were paid prior to the Chamberlain deed. A conveyance by one person to another does not cancel the tax lien. The bank's title did not supersede the claim of the state, and the deed from the bank to respondents gave the latter no greater title than that held by the bank. They took the title subject to all unpaid taxes, tax sales and tax deeds.

[30-36] Respondents' title is not strengthened by the fact that the deed to the bank and the deed from the bank to respondents antedated the effective date of the validating act of 1943. (1) Respondents obtained no better right than the bank possessed—a title subject to the tax lien. (2) A person cannot by reason of his ownership of property prior to the levy of the tax escape from the operation of the validating statute by claiming a vested right that cannot be taken by retroactive legislation. Mais v. Poinsettia Land Co., 71 Cal.App.2d 347, 349, 162 P.2d 925. (3) Since a validating statute that becomes effective pending litigation will act retroactively to cure defects in the proceedings that are relied on to defeat the tax deed (Miller v. McKenna, 23 Cal.2d 774, 781, 147 P.2d 531), similar irregularities are no less subject to validation although title may be transferred by one person to another. See Southern Service Co., Ltd. v. County of Los Angeles, 15 Cal.2d 1, 12, 97 P.2d 963, holding that the legislature may constitutionally withdraw the right to a refund of an illegal tax and cut off the remedy sought in pending actions. It would indeed be a novel method of defeating a tax deed if a sale and conveyance of the record title could be held to create a vested right paramount to the tax title. (4) Whatever else may be said concerning respondents' alleged vested rights they cannot be enforced by reason of the fact, as we have pointed out, that the deed to the state conveyed the absolute title, subject to assessment liens, and that this action which is an attack on the deed is barred by section 3521 of the Revenue and Taxation Code. (5) The legislature has full control over the sale of property belonging to the state and may regulate or change at any time the method of its disposition (South San Joaquin Irr. Dist. v. Neumiller, 2 Cal.2d 485, 489, 42 P.2d 64) and may make retroactive changes in the method of redemption. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 274, 138 P.2d 673, 147 A.L.R. 1111. (6) The taxpayer has no vested right in the method of procedure for redemption of property sold for taxes. The power to prescribe the procedure is vested in the legislature and it may change the method as it chooses. The right to redeem is not a vested interest in the property. Helvey v.

Bank of America, 43 Cal.App.2d 532, 537, 111 P.2d 390; South San Joaquin case, supra. (7) The relationship of sovereign and taxpayer is not founded on nor does it create contractual rights. Southern Service Co., Ltd. v. County of Los Angeles, 15 Cal.2d 1, 11, 97 P.2d 963; Mercury Herald Co. v. Moore, supra, 22 Cal.2d at page 272, 138 P.2d 673, 147 A.L.R. 1111.

[37] 7. *Error in rejecting deeds as evidence.* After the deeds to the state and to appellant Chamberlain were received in evidence counsel for respondents moved to strike them from the record and the motion was taken under advisement. The court's written opinion directing judgment for plaintiffs contained an order granting the motion to strike but it was not entered in the minutes. Though the order is not in the record the motion will be considered as having been granted. Since the deeds are valid and are supported by valid tax proceedings they constituted evidence of Chamberlain's title and it was error to strike them from the record.

It is unnecessary to restate the alleged irregularities which respondents contend invalidated the deeds. The case may be summed up in one sentence: All jurisdictional requirements of due process were fulfilled and all errors and irregularities in the proceedings were cured by the validating acts, since every particular in which the statutory provisions were departed from was a matter nonessential to due process which the legislature might have omitted or for which it might have provided other methods of procedure.

The judgment is reversed with directions (1) to receive the deeds in evidence upon a retrial of the action, (2) to make and file findings of fact and conclusions of law in accordance with this opinion and (3) to enter judgment denying relief to plaintiffs and quieting title in defendant Henry Chamberlain against the claims of plaintiffs.

MOORE, P. J., concurs.

McCOMB, J., deeming himself disqualified, takes no part in this decision.

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81 Cal.App.2d 169

MENKE et al. v. RAND MINING CO. et al.

Civ. 15703.

District Court of Appeal, Second District, Division 1, California.

Aug. 5, 1947.

1. Licenses ⚷18½

Rights to participate in profits of mining and milling venture were "securities" within Corporate Securities Act, so as to require permit from Commissioner of Corporations for sales thereof. Gen.Laws, Act 3814.

> See Words and Phrases, Permanent Edition, for all other definitions of "Securities".

2. Licenses ⚷39

The relation of seller and buyer of rights to participate in profits of mining and milling venture of sellers, who obtained no permit from corporation commissioner to make sales, did not give rise to "constructive fraud," which arises only when special confidential or fiduciary relation, investing one of parties to transaction with power and means to take undue advantage of, or exercise undue influence over, other party, exists. Gen.Laws, Act 3814.

> See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Fraud".

3. Licenses ⚷39

One selling a security impliedly represents that permit required by Corporate Securities Act has been secured, and false implied representation of such fact is negligent misrepresentation constituting actionable fraud, but buyer's right of action therefor does not accrue until he discovers its falsity, unless seller acted on information sufficient to justify reasonable man in concluding that no permit was required, in which event there is breach of warranty, but no fraud, and buyer's cause of action accrues at date of sale. Gen.Laws, Act 3814.

4. Licenses ⚷39

In action to rescind contracts to purchase rights to participate in profits of mining and milling venture on ground that contracts were void because of defendants' failure to obtain permit from corporation commissioner to make sales, exclusion of defendants' proffered evidence that they acted on information sufficient to justify reasonable man in concluding that no permit was required was error. Gen.Laws, Act 3814.

5. Cancellation of Instruments ⚷49

On discovering facts indicating that contract sought to be rescinded is illegal and should not be enforced, court must pass on question whether all parties to contract were in pari delicto.

6. Licenses ⚷39

In action to rescind contracts to purchase rights to participate in profits of mining and milling venture on ground of defendants' failure to obtain permit from corporation commissioner to make sales, as required by Corporate Securities Act, rejection of defendants' offer to prove that parties were in pari delicto was erroneous. Gen.Laws, Act 3814.

7. Cancellation of Instruments ⚷43

In action to cancel contracts as illegal and unenforceable, defendants need not specifically plead that parties were in pari delicto before offering proof on such issue.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Jack Menke and others against the Rand Mining Company, a partnership, and the members thereof to rescind contracts for purchase of rights to participate in the profits of a mining and milling venture. Judgment for plaintiffs, and defendants appeal.

Reversed and remanded for a new trial.

Walter H. Hewicker, of Bakersfield, for appellants.

Forster & Gemmill, John G. Gemmill and Glenn E. Correa, all of Los Angeles, for respondents.

WHITE, Justice.

This is an action for rescission of several contracts entered into between plaintiffs and defendants for the purchase by the former for a cash consideration, of the right to participate in the profits of a mining and milling venture. The complaint contains twelve causes of action. The first seven causes of action rest upon the claim that the aforesaid contracts are void for the reason that defendants did not obtain a permit from the Commissioner of Corporations of the State of California authorizing the respective sales. In the final five causes of action the transactions referred to in the preceding seven causes of action are repleaded. The last five causes of action ask for rescission on the ground of actual fraud and deceit.

Except for the names of the plaintiffs, the dates of the transactions and the amounts of cash involved, the first seven and the last five causes of action are identical. From an adverse judgment, defendants prosecute this appeal.

The trial court found that the foregoing instruments were securities under the California Corporate Securities Act (Deering's California General Laws, Act 3814); that no permit was ever issued by the Division of Corporations of the State of California, authorizing the issuance of said securities. It was further found that in issuing the aforesaid instruments "defendants fraudulently and falsely pretended that the plaintiffs, respectively, were receiving valid and legal securities; that the plaintiffs, respectively, in paying the sums of money herein mentioned to the defendants, relied upon said fraudulent and false pretenses; that the defendants obtained the said sums of money through fraud and false pretenses".

At the conmmencement of the trial it was stipulated by defendants that the above-mentioned agreements were entered into and signed by the persons whose signatures they bore; that the monies alleged therein to have been paid were actually paid; that the Rand Mining Company was a partnership, consisting of the persons named herein as defendants; and that said defendants had never obtained a permit from the Commissioner of Corporations of the State of California, authorizing them to enter into the transactions set forth in the aforesaid written instruments.

The court thereupon heard argument of counsel upon the question of whether the foregoing documents constituted securities under the provisions of the California Corporate Securities Act, and determined that such documents did constitute securities within the purview of the Act. In that regard it might here be noted that upon this appeal it is not seriously contended that the ruling of the court in this regard was erroneous.

It is first contended by appellants that the court's finding that they obtained money from respondents under false pretenses and by fraud and deceit is without evidentiary support "of any kind" in the record.

[1] From an examination of the documents in question, it cannot be doubted that the court correctly decided that the instruments here in question were securities as that term is defined by the Corporate Securities Act. It was stipulated that no permit had been secured from the Commissioner of Corporations prior to the issuance of such securities. Reaching the conclusion that the sale and issuance of such securities was made without obtaining the requisite permit, the court concluded that the transactions in question were void, that respondents obtained nothing of value for their money, and were thereby made the victims of an implied misrepresentation, and entitled to recover on the ground of fraud.

[2, 3] It is true, as contended by appellants, that the buyer of securities sold without a permit does not have a cause of action for fraud under all circumstances. The relation of seller and buyer under the circumstances here present does not give rise to a constructive fraud, which arises only when a special confidential or fiduciary relation exists between the parties which invests one of the parties with the "power and means to one to take undue advantage of, or exercise undue influence over, the other" (23 Am.Jur. 764). The applicable rule is thus stated by the Supreme Court in Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 525, 86 P.2d 102, 114, wherein it is said that "Upon a full consideration of the applicable principles of law, it is clear that a person who sells a security impliedly represents that a permit therefor has been secured when one is required by the Corporate Securities Act for such a sale. If this implied representation is false, then it is a negligent misrepresentation which is an actionable fraud, and the buyer's right of action does not accrue until he discovers its falsity unless the seller acted upon information sufficient to justify a reasonable man in concluding that no permit was required. In that event there has been a breach of warranty, but no fraud, and the buyer's cause of action occurs at the date of the sale." (See also Bartlett v. Suburban Estates, 12 Cal.2d 527, 530, 86 P.2d 117, and Le Sage v. Title Guarantee & Trust Co., 12 Cal.2d 531, 533, 86 P.2d 115.

[4] While the record herein contains no evidence that appellants did not believe a permit was required, it does contain an offer of proof made by them wherein, after the court had stated, "Well, the very fact that there was no Corporation Commissioner's permit constitutes fraud, doesn't it, as a matter of law", appellants' counsel stated in part:

"Mr. Hewicker: I offer to prove that none of the defendants ever offered to sell plaintiffs or any of them any interest in the partnership known as Rand Mining Company; that on the contrary, plaintiffs approached defendants for the purpose of purchasing an interest in a partnership which they, through outside investigation, felt would be a very profitable investment.

"Mr. Gemmill: If the court please—

"Mr. Hewicker: (Continuing) That the offer—just please let me finish my offer. I don't like to have my thoughts interrupted.

"The Court: One at a time.

"Mr. Hewicker: That the transaction was entered into voluntarily by the plaintiffs of their own free will. There was no inducement offered by the defendants or any of them; that the defendants did not exercise any duress or undue influence or fraud in the transaction; *that the defend-*

ants honestly believed that no permit was necessary from the Commissioner of Corporations in order to carry out this transaction; (emphasis added * * *." Objection to the offer of proof was sustained.

Under the decisions hereinbefore cited, it is manifest that insofar as the first seven counts of the complaint, alleging failure of appellants to secure a permit were concerned, they were entitled to offer proof that they "acted upon information sufficient to justify a reasonable man in concluding that no permit was required." Bartlett v. Suburban Estates, 12 Cal.2d 527, 530, 86 P.2d 117, 118. And it was prejudicial error to exclude such proffered evidence.

[5-7] Appellants next urge a reversal upon the ground that the court below refused to permit them to offer testimony on the question of whether or not the parties were in pari delicto. In this regard the record reflects the following:

"The Court: The court will have to hold that these are securities and there was a violation of the Corporate Securities Act in not obtaining a permit for the sale of them before making the sale. That ends your lawsuit, doesn't it?

"Mr. Gemmill (one of appellants' counsel): Does the court care to hear me on the pari delicto question? Counsel raised that in his argument?

"The Court: No."

This ruling was erroneous. When the court discovers facts which indicate that the contract is illegal and ought not to be enforced, it is required to pass upon the question of whether or not all the parties to the contract were in pari delicto. Domenigoni v. Iimperial Live Stock, etc., Co., 189 Cal. 467, 475, 476, 209 P. 36. Appellants offered to prove that the parties were in pari delicto but the offer was summarily rejected by the court. If the evidence which was offered established the fact that respondents were equally culpable with appellants in the transactions, then the former must be held to be in pari delicto. Miller v. California Roofing Co., 55 Cal.App.2d 136, 143, 144, 130 P.2d 740. The case of Domenigoni v. Imperial Live Stock etc., Co., supra, 189 Cal. at pages 475, 476, 209 P. 36 answers respondents' claim that the issue of pari delicto must be specifically pleaded before appellants are entitled to offer proof upon such issue.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.

81 Cal.App.2d 240

BRIGGS et al. v. SUPERIOR COURT OF ALAMEDA COUNTY.

Civ. 13446.

District Court of Appeal, First District, Division 1, California.

Aug. 15, 1947.

Rehearing Denied Sept. 13, 1947.

Hearing Denied Oct. 2, 1947.

1. Prohibition 🔑10(2)

Where defendants had appeared specially and made a motion in the Superior Court to vacate and quash service of complaint and summons on the ground that at time of automobile accident, they were not nonresidents of the state of California, but motion was denied, prohibition was appropriate remedy to invoke in the District Court of Appeal to restrain the Superior Court from any further proceedings in the action. Vehicle Code, § 404.

2. Evidence 🔑589

The court was not bound to accept statement of parties that they were residents of California and that they intended to live in California permanently, if the actions of the parties were inconsistent therewith.

3. Evidence 🔑151(1), 589

A person's statement of his intention is a statement of a probative fact about which he is qualified to testify but a jury or trial judge need not believe the witness and may find in the circumstances, actions and language an entirely different intent.

4. Automobiles ⚷235

The purpose of the statute authorizing service of process on director of motor vehicles when a nonresident is sued for damages arising out of an automobile accident within the state is to provide a method whereby persons from other states, who while temporarily within the state become involved in litigation as result of their use of a motor vehicle on highways of the state, may be sued in the state, and although they have left the state, may be served with process by substituted service. Vehicle Code, § 404.

5. Automobiles ⚷235

"Nonresident" within statute authorizing service of process on director of motor vehicles when a nonresident is sued for damages arising out of an automobile accident within the state refers to an out-of-state person who comes to California for a temporary sojourn, whether it be a transient who is merely journeying through the state or one who has come for temporary purposes, which might or might not, later, result in the determination to remain for a considerable period, if not permanently. Vehicle Code, § 404.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonresident".

6. Automobiles ⚷235

The statute authorizing service of process on director of motor vehicles when a nonresident is sued for damages arising out of an automobile accident within the state does not require that a person from out-of-state acquire a domiciliary residence in order not to be classified as a nonresident, but it does require a stay in the state of such length coupled with an intention to remain long enough, that presence in the state cannot be classified as merely temporary. Vehicle Code, § 404.

7. Automobiles ⚷242(1)

In action for injuries arising out of an automobile accident wherein defendants are served by leaving copies of summons and complaint with director of motor vehicles, on theory that defendants are "nonresidents" within statute, burden is on plaintiff, when such service is challenged, but plaintiff need not necessarily offer evidence if the facts stated in defendants' affidavits support plaintiff's contention. Vehicle Code, § 404.

8. Automobiles ⚷235

Husband and wife who came to California after husband as a member of the navy received permanent duty orders assigning him to the Naval Air Station at Alameda and who stated that they then intended to reside permanently in the state but, who, in fact, remained in the state only one month and 12 days altogether and left the state two days after his discharge from the navy without awaiting outcome of application for a civil service position, and later took up permanent residence in New York, were "nonresidents" within statute authorizing service of process on director of motor vehicles when a nonresident is sued for damages arising out of an automobile accident within the state. Vehicle Code, § 404.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Prohibition proceedings by Lyda Richards Briggs and another against the Superior Court of the County of Alameda, State of California, to restrain the court from any further proceedings in an action filed against petitioners by one Dorothy Fowler.

Petition denied.

Fitzgerald, Abbott & Beardsley, of Oakland, for petitioners.

Phil F. Garvey, of San Francisco, and Owen M. Gentry, Nat Frankel and Owen M. Gentry, all of Oakland, for respondent.

BRAY, Justice.

Petitioners seek a writ of prohibition to restrain the Superior Court of Alameda County from any further proceedings in an action filed in said court against them by one Dorothy Fowler. Petitioners previously appeared specially, and made a motion in said superior court to vacate and quash service of complaint and summons which had been made upon them under the provisions of section 404 of the Vehicle Code.

The ground of their motion was that at the time of the accident upon which the cause of action is based both petitioners were not "nonresidents" of the state of California. This motion was denied.

[1] It is conceded that prohibition is the appropriate remedy here. Berger v. Superior Court, 79 Cal.App.2d 425, 179 P.2d 600; Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291.

On August 13, 1945, petitioners were involved in an automobile accident in Alameda County with Dorothy Fowler, who on June 11, 1946, filed suit against both petitioners for injuries alleged to have been received by her in that accident. Service was made on petitioners by leaving copies of summons and complaint with the Director of Motor Vehicles, Sacramento, California, and by personal service thereof on petitioners in the city of Rochester, New York.

Petitioners contend that on the date of the accident they were residents of Oakland, California, and hence not "nonresidents," as required by section 404 of the Vehicle Code. This section provides that in any action or proceeding growing out of any accident or collision resulting from the operation by a nonresident, or his agent, of a motor vehicle upon the highways of California, service of summons and complaint may be had in the manner followed here. The question to be determined in this case is whether at the time of the accident petitioners were "nonresidents" of the state within the meaning of the Vehicle Code.

At the hearing of the motion to quash service, the sole evidence introduced was the affidavits of both petitioners. The affidavit of Ernest Briggs stated that his present home and his home at the time he received a copy of summons and complaint was Rochester, New York; that he is 28 years of age, was born and raised in New York and lived there until June, 1941, when he entered the United States Navy; that, at that time he had no plans for returning either to New York at a later date or for not returning to it; that he had no fixed intention as to where ultimately he would reside; that he was married to petitioner Lyda R. Briggs in Florida on March 15, 1944, while in refresher training after a return from duty in the Atlantic Ocean area; that he was then living at a naval station. He and his wife established no home together in Florida or elsewhere, as he was required to live at the naval station and there were no quarters there for dependents. In June he was sent for duty in the Pacific Ocean area, and his wife stayed in Florida. In the early summer of 1945 he returned to the United States, and after a leave reported for further orders to the Naval Air Station, Corpus Christi, Texas. About August 3, 1945, he received a set of what he calls "permanent" duty orders to the Naval Air Station, Alameda, California. He was an Aviation Machinist's Mate, 2d Class. A copy of the orders are attached to the affidavit and show that he was ordered to report to the Commanding Officer "for duty in the A & R Shops"; "This was the first set of permanent duty orders in the United States which I had ever received, and they came to me after I had had extended sea duty, both in the Atlantic and Pacific Oceans. I knew it was the policy of the United States Navy to follow a period of sea duty with a period of permanent shore duty, and I was greatly elated over the fact that the orders were to California for I had, during the course of the war years, heard much of the virtues of that state, and had hoped that we might some day live there. I then and there decided to take this opportunity to establish myself and my family in California and to live there permanently, except for such periods as I might be ordered elsewhere by the U. S. Government. At the time of that decision, I did not intend ever to return to New York or to Florida to live permanently. In line with this plan of action, I determined to take my wife to California with me, to have her's and my personal effects sent from Florida to California, and to establish our home in California." He and his wife drove, in his car bearing a Florida license, to Oakland, California, arriving there about August 6, 1945. They secured an apartment at 2111 23d Avenue, and he reported for duty at the Naval Air Station, Alameda. The living accommodations were not what they desired, and during his spare time they looked for a house to buy or rent. He did not expect that the war would end in August or that he would be eligible for discharge in September or at any time within the near future. When he learned that he would be eligible for discharge in September, his wife and he decided to stay in California, making it their home, particularly because the California climate helped her asthmatic condition. They continued to look for a house and he applied for a civil service job in the A & R Shops. He was discharged from the Navy "on or about the middle of September." They were unable to find a suitable house to buy or rent, and became discouraged about finding one. "No final action had been taken on my application for a civil service job, and I did not know at the time of my discharge when or whether I would be offered the job." They decided to change their plans, to leave California and take a vacation trip, during which they would decide where to locate. His wife insisted that the new location must be one like California, which agreed with her asthma. They left Oakland September 17th and went to Florida to visit her parents. They found nothing suitable there. The climate did not agree with her condition, so in October they went to New York to visit his parents. The New York climate agreed with the wife's asthma, and they decided to make New York their home. He got a job, and they bought a house in Rochester where they now live. During the war, he did not own a home in New York, nor did he have a job to which he was entitled to return. Had he found a house and received a civilian job in California, they would have stayed here. At all times between August 6 and mid-September, 1945, both he and his wife lived in California "with the intention of remaining there permanently. * * * regarded 2111 23rd Avenue, Oakland, California, as our home," and were residents of the State of California.

The affidavit of Lyda R. Briggs was to the same effect. She added one more fact to those set forth in her husband's affidavit. She states: "I had all of our belongings in Florida shipped to California."

[2, 3] If the statements of the petitioners that they were residents of California and that they intended to live here permanently must be taken by the courts at face value, there can be no question but that they were not "nonresidents," whatever the interpretation of that word may be. But the court is not bound to accept their statements, if the actions of the parties are inconsistent therewith. While a person's statement of his intention is a "statement of a probative fact about which he was qualified to testify" (Johnston v. Benton, 73 Cal.App. 565, at page 570, 239 P. 60, at page 62), "A jury or trial judge is not bound, of course, to believe the witness when he says he did not have a certain intent, and may find in the circumstances, actions, and language, an entirely different intent, but the testimony of the witness 'is competent and relevant and not immaterial.' See Walker v. Chanslor, 153 Cal. 118, 125, 94 P. 606, 17 L.R.A.,N.S., 455, 126 Am. St.Rep. 61; Barnhart v. Fulkerth, 93 Cal. 497, 499, 29 P. 50; Kyle v. Craig, 125 Cal. 107, 114, 57 P. 791; Bertelsen v. Bertelsen, 7 Cal.App. 258, 261, 94 P. 80." Fanning v. Green, 156 Cal. 279, 285, 104 P. 308, 311; see also Gilmour v. North Pasadena Land etc. Co., 178 Cal. 6, 9, 171 P. 1066. "The trier of the facts is the exclusive judge of the credibility of the witnesses. § 1847, Code Civ.Proc. * * * In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal.Jur. 180, § 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. [Citing cases.]" Hicks v. Reis, 21 Cal.2d 654, 659, 660, 134 P.2d 788, 790. "While practically all of the decisions say intention is the controlling factor in determining residence, this court said, in Harrison v. Harrison, supra [117 Md. 607, 84 A. 57], it may be more satisfactorily shown by what is done than by what is said." Wagner v. Scurlock, 166 Md. 284, 170 A. 539, 542.

There were no counter affidavits filed. However, the substance of the affidavits are contradictory. The acts of the parties as shown in the affidavits definitely contradict their statements as to their intentions. Disregarding, as obviously the trial court did, the self-serving statements of the petitioners, the facts as set forth in the affidavits show that petitioners came to California because of petitioner-husband's Navy orders; that while he calls them "permanent" orders, they were made at a time when the fighting part of the war was almost over (it did formally end August 15th. The orders are dated August 3 and petitioners arrived here August 6), and when the Navy for some time previously had been discharging men from the service. Moreover, the orders appear to be merely routine orders; and even if "permanent" they were subject to change by the Navy at any time. The petitioners were actually in the state only seven days when they had the accident, and altogether were here only one month and 12 days. That petitioners recognized the impermanency of the orders is shown by petitioner-husband's application for a civil service position. Moreover, the car involved in the action was never registered in this state. The exact day of the husband's release from the Navy is not given. It is stated as "on or about the middle of September." They left the state on September 17th. It is significant that although they profess to have desired to make California their home, they left the state within a day or two (or perhaps even the very day) of the husband's release from the Navy, without waiting to find out if the civil service job would be forthcoming. The most reasonable interpretation of the situation is that petitioners intended to remain here only as long as the Navy required them to do so, or until discharged—a time that they well knew would be comparatively short—and then possibly, they would continue to remain provided the husband decided to accept a civil service job if one were available. Their intention to remain in California was a most indefinite one.

Did their presence here under naval orders, with such an indefinite intention of remaining, make them residents within the meaning of the Vehicle Code? Residence, as used in the law, is a most elusive and indefinite term. It has been variously defined, and means one thing under the attachment laws, another under the voting laws, and still another under the venue laws. There has been no definition of its use in the Vehicle Code of California. In Berger v. Superior Court, supra, 79 Cal.App.2d 425, 179 P.2d 600, it was treated, under the facts of that case, as synonymous with domicile, although the question of residence as distinguished from domicile was not discussed.

[4, 5] To determine its meaning, it is necessary to consider the purpose of the act. It is to provide a method whereby persons from other states, who while temporarily within the state of California, become involved in litigation as the result of their use of a motor vehicle on the highways of the state, may be sued in this state, and, although they have left the state, may be served with process by substituted service. As said in Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 633, 71 L.Ed. 1091, in upholding the constitutionality of a similar statute of the state of Massachusetts, "in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use." Residents of the state are excluded from this requirement, because being residents here, it is more likely that they will be available for service within the state. Of course, there will be cases where a plaintiff would be met by a change of residence by a defendant who had been a long time resident of the state, very shortly after an accident occurs, and would be thereby prevented from serving process as in a case where a defendant was a nonresident at the time of the occurrence, but as pointed out in Suit v. Shailer, D.C., 18 F.Supp. 568, 571, that situation is not peculiar to automobile accidents but would equally apply to other causes of action where the defendant removes from the state shortly after the event giving rise to the cause of action occurs. Evidently what the Legislature intended by the word "nonresident" was the out-of-state person who comes to California for a temporary sojourn, whether it be a transient who is merely journeying through the state, a person who as in Bigham v. Foor, 201 N.C. 14, 158 S.E. 548, came for

a "temporary sojourn during the summer," or, as the facts of this case indicate, came for temporary purposes, which might or might not, later, result in the determination to remain for a considerable period, if not permanently. Surely, the Legislature never intended that under circumstances of this kind, persons who remained in this state a mere six weeks should be considered residents. Such persons have only a temporary abode as distinguished from actual residence. "It is the actual residence of the defendant, not the temporary abode at the time of the accident, which seems to control." 37 Mich.Law Rev. 58, at page 68.

[6] While the Vehicle Code does not require that a person from out of state must acquire a domiciliary residence in order not to be classified as a nonresident, it does require a stay here of such length coupled with an intention to remain long enough, so that the presence in the state cannot be classified as merely temporary. Therein lies the difference between the situation in the case at bar and in the cases of Suit v. Shailer, supra, 18 F.Supp. 568, and Uslan v. Woronoff, 173 Miss. 693, 18 N.Y.S.2d 222, as well as Berger v. Superior Court, supra, 79 Cal.App.2d 425, 179 P.2d 600. In the Shailer case the husband of defendant was a lieutenant in the United States Navy. In 1937 he was assigned to duty at the Naval Academy at Annapolis, Maryland. It being peace time, such an assignment meant a reasonable expectation of the assignment not being changed for three or four years. His wife came to Maryland with him and they lived for the next three years, approximately, in the city of Annapolis, first in a dwelling house and later in an apartment leased by them. The husband registered his automobile in accordance with the Maryland statutes. The accident occurred after they had been living in Annapolis approximately a year and eight months. They continued to live there for over a year after the accident occurred in which the wife was driving her father's car. It was conceded that both husband and wife were domiciliary residents of California at the time of the accident. In the litigation which ensued in Maryland the wife was served under a vehicle act similar to ours in California by substituted service. The court held, in effect, that a person in military service could hold his domiciliary residence, or citizenship, in another state and yet have a residence for the purposes of the vehicle act in Maryland. It said [18 F.Supp. 571]: "The meaning of the word 'resident' varies with the context and subject matter. When used in connection with the exercise of political rights it may have a different connotation from that given it where it is used to determine property rights. [Citing cases.] The construction of the term as here used should be made consistent with the particular subject matter. The mischief which was intended to be overcome by the statute was obviously the difficulty of effecting service of summons in the usual way within the State on transient motorists or nonresidents who are only temporarily within the State. But no such condition existed in this case where the defendant was actually residing within the State for two years before the wrong complained of, and for more than a year thereafter. There is nothing in the case to indicate that she would not have been amenable to service of summons in the ordinary way at any time within a year after the accident, and indeed it appears that she could not in fact have effectively been sued elsewhere than in Maryland during that period. And it does not appear that, during the three years she was actually here with her husband, she had a home or permanent place of abode elsewhere. Looking at the evident purpose of the Maryland statute and the mischief to be remedied, it seems apparent that the plaintiff's contention puts an artificial and strained construction upon the term 'non-resident' which, for all practical purposes in relation to the subject matter, is far removed from actualities." In distinguishing the facts of the case from Wagner v. Scurlock, supra, 166 Md. 284, 170 A. 539, the court said: "It was there held that a Washington doctor having a substantial family residence and practice in the City was to be considered a nonresident of Maryland even though he had a small bungalow here and had once voted in this State, in a primary election. While the facts of the case are utterly different from those we are

here dealing with, the decision in the opinion puts emphasis upon the defendant's permanent place of abode as constituting his residence, in contra-distinction to a merely temporary residence in some other place. I find nothing in that case, either as to the facts, or on the principle stated, to rule the decision in the instant case." It will be noted that the court there made the same distinction we are making here, that the residence contemplated by our Vehicle Code must be something more than a mere temporary presence. On page 570 of 18 F. Supp. the court said: "The typical case which the statute is apparently designed to meet is where the defendant is only transiently operating a motor vehicle on the Maryland highways, although the statute is not necessarily limited to a continuous journey through the State, but may cover any case where a foreign motor vehicle owner or operator causes damage within the State *while temporarily stopping here.*" (Emphasis added.)

In the Woronoff case, supra, there was the same element of semi-permanency that is found in the Shailer case. The defendant admittedly had a domicile in the State of New York, but was attending the University of Pennsylvania at Philadelphia, lived there almost the entire year, gave Philadelphia as his address, and registered his automobile there. While driving in his home state of New York he was involved in a collision between his automobile and that of another person, which resulted in a personal injury action against him. As he had returned to Philadelphia, substituted service was made upon him under a statute similar to ours, on the theory that he was a nonresident of the state of New York. Defendant contended that since he had a domicile in New York he could not be a nonresident thereof. The court stated: "The recent tendency is to give to the word 'resident' a popular rather than a technical and restricted meaning," (18 N.Y.S.2d at page 224), and held that for the purposes of substituted service in cases arising from motor vehicle accidents, a person could have a domicile in one state and still be a resident of another state, and that the defendant was a nonresident of New York regardless of the fact that he had a domiciliary residence there. But the case stresses the fact that his residence in Philadelphia was more than just temporary. "In the instant case the defendant attends a university in Philadelphia, Pennsylvania. He lives there practically the entire year; he has registered his automobile there, and has given Philadelphia as his address. Upon these facts alone, it would seem that the defendant is in no position to contest service upon him as a nonresident of the State of New York no matter where he may be domiciled. The plaintiffs were placed in the position either of serving process in the manner they adopted or of awaiting patiently the return of the defendant to his domicile. A prolonged absence, even for years, from his permanent home may occur, for he may find summer employment in the locality where he now attends college. Can it be said that meanwhile the defendant is a resident of New York? The purpose of the statute is to make possible service upon defendants who are not available within the state, and the most reasonable conclusion is to hold that actual residence, regardless of domicile, was within the contemplation of the statute."

The situation in the Berger case was one in which the length of time of the residence in this state was important. While Berger came to California as a memeber of the armed forces, he had been here over three years at the time of the accident. There was nothing temporary about the length of Berger's stay in California, at the time the question of residence arose. The Berger case seemed mostly concerned with the question of whether the fact that Berger came and remained here as a member of the armed forces precluded him from claiming a residence here. The court properly held that his mere presence under military orders caused him to neither gain nor lose domicile; that his gaining a residence depended upon his desire or intention. The question that the court did not have to accept defendant's statement of intention was raised in the briefs. The court stated [179 P.2d 602]: "Respondent argues that little reliance should be placed upon petitioner's affidavit because it 'merely states his conclusion that he was a resident of the State of California.' However, in Johnston v. Benton, supra, the court said 73 Cal.App. at page 570, 239 P. at page 62: '* * * And in this connection it may be added that Benton's own affidavit, in which he stated that he was a resident of Shasta County, must be considered in corroboration of his oral testimony because it was the statement of a probative fact, about which he was qualified to testify. O'Brien v. O'Brien, supra [16 Cal.App. 103, 116 P. 692].'" Apparently, the opinion was concerned with whether or not the statement of intention as to residence is a conclusion or an ultimate fact, and not with the question of whether the court must necessarily believe the party's statement as to that fact. The opinion, likewise, states that there was no evidence to the contrary of defendant's statement as to his intention. No consideration was given to the fact that a court does not have to accept a defendant's own statement as to his intention. It must be pointed out that the only facts before the court were the defendant's residence here under military orders and his statement of his intention. His residence under military orders would not necessarily negative his statement concerning his intention. As stated in Pettaway v. Pettaway, Tex.Civ. App., 177 S.W.2d 285, at page 287: "There is no doubt that a soldier of the United States may, while he is such, acquire a domicile in Texas entitling him to resort to the proper courts here to secure a divorce. Morehouse v. Morehouse, Tex.Civ. App., 111 S.W.2d 831; Warfield v. Warfield, Tex.Civ.App., 161 S.W.2d 533; Kennedy v. Kennedy, 205 Ark. 650, 169 S.W.2d 876. However, his removal to the State is not voluntary. His actual physical presence is likewise not necessarily voluntary. He comes and remains in pursuance to orders. This being the case, his coming to the State and remaining therein loses much of its weight in establishing that it was his intention to make Texas his legal residence, that is, his domicile. Despite this, however, it is possible for a soldier to change his domicile from some other state to Texas."

In our case, on the other hand, we have the acts of the petitioners which are inconsistent with their declarations. "Actions speak louder than words." Moreover, in the Berger case, although the court did not not take into consideration the fact that prior to the accident Berger became a registered voter of Yuba county, that fact was in the background.

The Sacramento Superior Court case of Voytus v. Rowe is easily distinguishable from the case at bar. There, although the defendant actually only stayed in California a little less than five months, his actions on coming here corroborated his claim of intention to reside here. Among other things he brought his wife and child and not just "our belongings in Florida," but his furniture, household effects, etc. Shortly after his arrival he applied to the Motor Vehicle Department of California for and was issued a license for his automobile as a permanent resident of this state; and also applied for and was issued a California chauffeur's license. In our case the only act performed by petitioners which might indicate a desire to stay in California more than temporarily was the application of the husband for a civil service job, and the effect of that act is completely spoiled by the fact that he left the state immediately upon his release from the Navy without attempting to find out whether or not he would obtain the job.

[7] The burden of proof in a case of this kind is on the plaintiff. Jermaine v. Graf, 225 Iowa 1063, 283 N.W. 428. However, that does not mean that the plaintiff must necessarily offer evidence if the facts stated in the petitioners' affidavits support plaintiff's contention. The facts in this case (other than the claim of the intention of the petitioners) are not disputed. The inferences to be drawn from those facts are controverted. These facts and the reasonable inferences to be drawn therefrom contradict petitioners' statements of their intentions. The most reasonable interpretation of the facts disclose a very temporary sojourn in California. Collins v. Grey, 123 Misc. 227, 204 N.Y.S. 210, relied upon by petitioners, is of no help in this discussion, as the facts set forth in the opinion are extremely meagre. While there was no answering affidavits, apparently there was nothing in the supporting affidavit that con-

tradicted in any way the facts of defendants' residence. The same is true of the factual situation in Jermaine v. Graf, supra.

Respondent calls attention to the fact that subsection (h) added to section 404 of the Vehicle Code in 1945, and providing, "As used in this section 'nonresident' means a person who is not a resident of this State at the time the accident or collision occurs," did not take effect until subsequent to the accident upon which the litigation is based, and contends that the time when the question of residence should be considered is the time of service, when admittedly petitioners were nonresidents of California. Petitioners' position is that the addition of subsection (h) was merely a declaration by the Legislature of its previous intent rather than a new interpretation of, or change in, the act. In view of our determination that petitioners at all times were nonresidents of California, it is unnecessary to pass upon this question, although, as shown in Suit v. Shailer, supra, 18 F.Supp. 568, 570, it is doubtful if the courts would be justified in supporting respondent's contention.

As hereinbefore quoted from Suit v. Shailer, D.C., 18 F.Supp. 568, 571, "the meaning of the word 'resident' varies with the context and subject matter." Thus, in construing the attachment statutes of this state, the case of Hanson v. Graham, 82 Cal. 631, at page 634, 23 P. 56, at page 57, 7 L.R.A. 127, held "where a man has a settled abode for the time being in another state for purposes of business or pleasure" he was a nonresident even though he had a domiciliary residence in this state. Although the rule as to attachment proceedings is not necessarily the one to apply to proceedings under the Vehicle Code, it is interesting to note that in the Hanson case the defendant "went to Chile for the purpose of prosecuting his business of contractor there, and that, if successful in obtaining contracts, he would remain at least as long as would be necessary for their completion; and that he had been gone about four months without returning." 82 Cal. at page 632, 23 P. at page 57, 7 L.R.A. 127. The admittedly temporary apartment occupied by the petitioners here and the temporary nature of their stay could hardly be termed "a settled abode." Moreover, the court 82 Cal. at page 633, 23 P. at page 57, 7 L.R.A. 127, quotes with approval from the Virginia case of Long v. Ryan, 30 Grat. 718, 720: "'It is apparent that the word "residence," like that of "domicile," is often used to express different meanings, according to the subject-matter. In statutes relating to taxation, settlements, the right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in the statutes relating to attachments. In the latter, actual residence is contemplated, as distinguished from legal residence. * * * While, on the one hand, the casual or temporary sojourn of a person in this state, whether on business or pleasure, does not make him a resident of this state, within the meaning of the attachment laws, especially if his personal domicile be elsewhere, so, on the other hand, it is not essential he should come into this state with the intention to remain permanently, in order to constitute him a resident.'"

The phrase "casual or temporary sojourn of a person in this state * * * on business" well describes the short stay of the petitioners in California. Egener v. Juch, 101 Cal. 105, 35 P. 432, 873, again an attachment case, applied the ruling in the Hanson case to members of a theatrical troup performing in California. As pointed out in the dissenting opinion of Chief Justice Beatty, the majority ruling held, in effect, that the mere presence of a defendant in the state made him a resident within the meaning of the attachment law. No one would contend that under the Vehicle Code the mere presence of a defendant in the state constitutes him a resident.

In San Diego Savings Bank v. Goodsell, 137 Cal. 420, 70 P. 299, the court laid down the rule that for purposes of publication of summons under sections 412 and 413 of the Code of Civil Procedure, "residence" meant an actual residence as distinguished from domiciliary residence. But in our case, the facts do not justify a finding of actual residence as distinguished from a mere temporary residence within the state.

[8] We do not deem it necessary to decide petitioners' contention that in a case involving jurisdictional facts tried on affi-

davits, uncontradicted by other affidavits, the appellate court should try the issues de novo, somewhat analogous to the rule relating to the effect of a trial court's construction of a writing when no parole evidence is involved (Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772; Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Landres v. Rosasco, 62 Cal.App.2d 99, 144 P.2d 20), for the reason that we believe that the inferences drawn by the trial court from the facts set forth in the affidavit are the most reasonable ones to be drawn, and are the ones we would draw were the matter one before us de novo. As in the case of Fuller v. Lindenbaum, 29 Cal.App.2d 227, 84 P.2d 155, we agree with the trial court's finding.

The petition is denied.

PETERS, P. J., and WARD, J., concur.

30 Cal.2d 485

PEOPLE v. MAXFIELD et al.

L. A. 19624.

Supreme Court of California.
July 31, 1947.

1. Taxation 🔑695, 778

Though tax deed to the state, executed pursuant to statutory requirements, conveys absolute title, free of all encumbrances except certain specified liens, it is not the same title as that of a private purchaser, because purpose of conveyance is not acquisition of realty but collection of taxes, but only difference is privilege of redemption. Revenue and Taxation Code, §§ 3520, 4107, 4112.

2. Taxation 🔑695, 778

On execution of tax deed to the state, the owner of the realty forfeits all rights in the realty except the privilege of redeeming it at any time before the state disposes of it. Revnue and Taxation Code, §§ 3520, 4107, 4112.

3. Taxation 🔑713

Tax collector's receipt, which is issued by controller on request of redemption officer, and which is recorded like a deed, is a reconveyance of absolute title owned by state under tax deed to it, and issues on performance of all conditions necessary for redemption. Revenue and Taxation Code, § 4107.

4. Taxation 🔑739

The state was entitled to rents, issues and profits collected by former owners of lands conveyed to state in satisfaction of delinquent taxes, for period between date of tax deed and date of redemption by owners. St. 1941, p. 131; p. 1432, § 49; Revenue and Taxation Code, §§ 3476, 3520, 3651–3655, 4107, 4112.

SHENK, CARTER, and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by the People of the State of California against James Maxfield Wilton and Associates, and Residential Income Properties, Inc., for rents received from realty during period between dates of tax deeds made by County of Los Angeles because of tax delinquencies, and the times of redemptions of the realty. From a judgment for defendants, the plaintiff appeals.

Judgment reversed.

Prior opinion, 173 P.2d 845.

Robert W. Kenny, Atty. Gen., E. G. Benard, Deputy Atty. Gen., and Harold W. Kennedy, County Counsel, and A. Curtis Smith, Deputy County Counsel, both of Los Angeles, for appellant.

Kenneth W. Kearney, of Los Angeles, for respondent.

EDMONDS, Justice.

The state claims the rents which it charges were received from certain real estate during the period between the dates of tax deeds made by the county of Los Angeles because of tax delinquencies, and the times of redemptions of the properties. A demurrer to the state's complaint was sustained without leave to amend, and the appeal from the judgment which followed this ruling presents for decision only the question of law which concerns the construction to be given the applicable statutory provisions.

The amended complaint alleges that on July 1, 1943, certain parcels of land were conveyed by the tax collector of Los Angeles County to the state. The deeds were recorded on November 8, 1943, and the state alleges that it was the owner of these parcels from that date until each of them was redeemed in full by the former owner. The latest redemption was in June, 1944. According to the complaint, from the date of the deed to each lot until its redemption, the former owner "took the rents, issues and profits from said parcels * * * and have at all times retained said rents, issues and profits", the exact amount and value of which is unknown to the state.

The decisive question is whether the state, after the redemption of the property, has the right to an accounting and to the payment of rents collected by the redemptioners during the period of time the state was owner of the properties. It bases its rights to the income from them upon sections 3651 and 3652, Revenue and Taxation Code, which provide:

"3651. After the recording of the deed to the State, the State has exclusive power through the Controller to rent tax-deeded property and to receive all proceeds arising in any manner from the property except proceeds from a transaction terminating the right of redemption, if the right of redemption has not been terminated, or from a sale of a parcel of tax-deeded property."

"3652. The Controller or any person designated by him may exact an accounting of the proceeds from tax-deeded property from:

"(a) The former owner of the property.

"(b) Any person having an interest in the property.

"(c) Any person in actual or constructive possession of any part of the property."

The redemptioners contend that upon payment of a tax delinquency, all rights of the state, including that to collect accrued rents and profits, cease. This is the construction which must be given to the quoted statutes, it is said, when they are read in conjunction with sections 4112 and 4107 of the Revenue and Taxation Code which provide: "On request of the redemption officer, the Controller shall issue a receipt which may be recorded in the recorder's office like a deed. This record has the same effect as a deed of reconveyance of the interest conveyed by the sale or deed to the State." (Sec. 4107.) "On redemption, the deed becomes null and any interest acquired by virtue of the sale to the State ceases." (Sec. 4112.)

[1-3] The deed to the state, excecuted pursuant to the statutory requirements, conveys absolute title, free of all encumbrances, except certain specified liens. Sec. 3520, Revenue and Taxation Code. It is not the same title as that of a private purchaser, because the purpose of the conveyance is not the acquisition of the property but the collection of the taxes. Anglo California Bank of San Francisco v. Leland, 9 Cal. 2d 347, 353, 70 P.2d 937. However, the only difference between the state's title and that of a private purchaser is the privilege of redemption. "Upon execution of the deed [to the State] the property owner forfeited all rights in the property except the privilege of redeeming it at any time before the state disposed of it." Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 675, 147 A.L.R. 1111. The state's title is absolute, but subject to defeasance should the former owner exercise his privilege of redemption. The tax collector's receipt, authorized by section 4107 of the Revenue and Taxation Code, which is recorded "like a deed", is a reconveyance of an absolute title owned by the state and issues upon the performance of all conditions necessary for redemption.

Rights incident to ownership of property conveyed to the state are expressly provided for by the Revenue and Taxation Code. These include the right to possession (sec. 3653); the right to rent or lease and receive the proceeds from the property (secs. 3651 and 3655); the right to exact an accounting of the proceeds of the property (sec. 3652); the right to bring an action of unlawful detainer or ejectment (sec. 3654); and the right to sell the property at public auction to the highest bidder (sec. 3476). These rights are no more limited than those of an individual who has title to real property. They cease upon the transfer of title but certain rights, such as that to rents and profits which accrued during the period of ownership, are personal and do not pass with the deed nor cease to be actionable upon the conveyance of the property. Under section 4112 of the Revenue and Taxation Code the tax deed is not void from the beginning but only upon redemption; the state's interest in the land then ceases because title has passed to the redemptioner. At that time the right to possession of the land, and to lease or rent and receive the proceeds, is at an end. So also is the right to sell the property at public auction. But a right of action which accrued during the period of ownership is not terminated by the redemption; the state is in the same position as that of an individual who conveys land to which he has title.

The case of List v. Sandell, 42 Cal.App.2d 505, 109 P.2d 376, relied upon by the respondents, is not inconsistent with these conclusions. There the state leased tax-deeded property to a stranger. As part of the consideration for the use of the property, the lessee agreed to pay the state one-sixth of the crop to be grown. The former owner redeemed the property before the crop was harvested. As between the state and the former owner, it was held that the latter was entitled to share the crop with the tenant. The court applied the general rule that growing crops remain a part of the realty until severed and, unless reserved in writing, pass with the title to the grantee. In people v. Gustafson, 53 Cal.App.2d 230, 127 P.2d 627, the court expressly declined to decide the precise question now presented for determination. And although In re Mead-Huskell Co., D.C., 47 F.Supp. 997, holds that the right of the state to collect rents and profits is in the nature of a penalty and, therefore, they may not be collected from a trustee in bankruptcy after redemption, such a construction cannot be reconciled with fundamental principles incident to the ownership of land.

[4] The Tax Redemption Termination Act (Stats. 1941, Ch. 47, p. 131, and see Stats. 1941, Ch. 290, sec. 49, p. 1432) effected a fundamental change in the taxation law. For the purpose of establishing a comprehensive tax rehabilitation program, the legislature determined that the title to property upon which taxes should become delinquent was to vest absolutely in the state upon execution of the tax deed. Accordingly, the appellant's complaint states a cause of action.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SHENK, Justice.

I dissent. The complaint does not allege that in the period between the deed to the state and the redemption of the lands the state sought to obtain possession or that it entered into any agreements for the rental of the property, or exercised any rights of ownership conferred upon it by statute. Nevertheless the state, after redemption, seeks an accounting and recovery of rents collected by the redemptioner during that period. What the rights of the state may be while title to unredeemed property remains in the state is not involved here.

Upon the redemption of the property the deed to the state became null and any interest acquired by virtue of the sale to the state ceased. Section 4112, Revenue and Taxation Code; List v. Sandell, 42 Cal. App.2d 505, 508, 109 P.2d 376.

The majority arrive at the conclusion that, although none of the powers of ownership conferred by the statutory provisions were exercised prior to redemption, the state after redemption has a cause of action for an accounting and recovery from the former owner (the redemptioner) of the rents collected by him during the period when title was vested in the state. The failure of public officials to exercise the powers expressly conferred by law may deprive the state of the concomitant benefits flowing from the ownership vested by section 3520 of the Revenue and Taxation Code. People v. Gustafson, 53 Cal. App.2d 230, 242, 243, 127 P.2d 627. In that case the state, after redemption, sought recovery from the former owner of the rental value of his use and occupancy during the period following the conveyance to the state. It was held that the state had only those attributes of ownership expressly conferred by statute, and that no power was vested in the state to receive or collect the rental value of the land from the former owner who without objection remained in possession.

The provisions of sections 3520 and 4112 of the Revenue and Taxation Code, as well as of the other sections, notably 3476, 3651, 3652, 3653, 3654, and 3655, were a part of the law prior to the enactment of the Revenue and Taxation Code and any amendments thereto. They are substantial re-enactments of sections 3764, 3773, 3787 and 3817 of the Political Code, or portions thereof. At all times when those provisions were in effect it was recognized that the title acquired by the state) of tax-sold property was not the same as that vesting in a private purchaser of lands, since the object of the tax sale to the state was not the acquisition of the property, but was the collection of taxes; that the policy of the law was to give a deliquent taxpayer every reasonable opportunity compatible with the rights of the state to redeem his property and to make his burden as light as possible. Anglo California Nat. Bank of San Francisco v. Leland, 9 Cal.2d 347, 353, 70 P.2d 937; People v. Gustafson, supra, 53 Cal.App.2d at page 234, 127 P.2d 627, citing Dougery v. Bettencourt, 214 Cal. 455, 462, 6 P.2d 499. In the Anglo California Nat. Bank of San Francisco v. Leland case, 9 Cal.2d at page 351, 70 P.2d 937, 939, this court said in 1937 through Mr. Justice Edmonds: "The settled policy of the law is to allow a delinquent owner to redeem his property (Buck v. Canty, 162 Cal. 226, 121 P. 924), and to make his burdens as light as possible"; and 9 Cal.2d on page 353, 70 P.2d 937, is the following quoted with approval from Walker v. Ferguson, 176 Ark. 625, 3 S.W.2d 694, 695, which cites in support thereof the case of Board of Com'rs of Tippecanoe County, Ind., v. Lucas, Treasurer, 93 U.S. 108, 23 L.Ed 822: "The title acquired by the state, or an instrumentality thereof, at a tax sale is not the same as that vesting in a private purchaser, since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes." The sale of the land to the state is in the exercise of the sovereign power to collect the tax. Mercury Herald Co. v. Moore, 22 Cal. 2d 269, 272, 273, 138 P.2d 673, 147 A.L.R. 1111. Since the primary purpose of the statutes here considered is the collection of taxes, and not the acquisition of property or income therefrom, they should be given a construction favoring the taxpayer. People v. Gustafson, supra, 53 Cal.App.2d at page 238, 127 P.2d 627. Thus, upon redemption, as this court said through Mr. Justice Spence in 1945: "All that the state is justly entitled to have is its tax money * * *." Gartner v. Roth, 26 Cal.2d 184, 190, 157 P.2d 361, 364. With this salutary policy in mind section 4112 of the Revenue and Taxation Code clearly means that after redemption as in this case all interest acquired by the state has terminated. That section provides: "On redemption, the deed becomes *null* and any interest acquired by virtue of the sale to the State *ceases.*" (Emphasis added.) In List v. Sandell, supra, 1941, 42 Cal.App.2d 505, 109 P.2d 376, the state claimed after redemption the rental value of lands leased by the state (sharecropping lease) during tax delinquency and prior to redemption. The claim was denied. It was held that under section 3817 of the Political Code (now section 4112, Revenue and Taxation Code) the state could not recover. The court said, 42 Cal. App.2d at page 508, 109 P.2d at page 377: "When upon redemption, the rights of the state acquired under a tax sale become *null* and *void,* and *all right, title and interest,* acquired by virtue of the tax sale, shall *cease and determine,* it leaves no rights remaining in the state, and certainly no rights to the crops growing upon the redeemed property, of which, according to the stipulation of the parties, plaintiff has been the owner, and in possession, ever since redemption was made." In the absence of the exercise of any of its statutory rights and powers of ownership, any further exaction by the state is in the nature of an additional penalty. In re Mead-Haskell Co., D. C., 47 F.Supp. 997. In the latter case the claim of the State of California against the bankrupt owner's estate for rents collected by the trustee-redemptioner during the state's period of ownership was denied.

It is apparent that the majority, by a conclusion that the ownership rights conferred upon the state "are no more limited than those of an individual who has title to real property" have attempted to apply "fundamental principles incident to the ownership of land." Those principles in an unlimited sense have not been deemed to apply to state ownership of tax-sold property, but such ownership has always been considered distinct from that vesting in a private purchaser. That is, the rights and powers of the state as owner are those expressly conferred by statute, and they must be exercised before the benefits of such ownership attach.

It is of course true that the return to the tax rolls of property sold to the state is in the public interest (Anglo California Nat. Bank of San Francisco v. Leland, supra, 9 Cal.2d at page 352, 70 P.2d 937 and cases cited), and the provisions for termination of the right of redemption look to the accomplishment of that objective. Mercury Herald Co. v. Moore, supra, 22 Cal.2d at page 272, 138 P.2d 673, 147 A.L.R. 1111; Gartner v. Roth, supra, 26 Cal.2d at page 188, 157 P.2d 361, 367. Further acceleration of restoration of lands to the tax rolls is induced by appropriate changes in the redemption statutes. The majority refer to the Tax Redemption Termination Act of 1941 as having effected a fundamental change in the taxation law. In this connection it is stated that "for the purpose of establishing a comprehensive tax rehabilitation program, [the legislature] determined that the title to property upon which taxes should become delinquent was to vest absolutely in the state upon execution of the tax deed." The provision that the deed to the state conveys absolute title to the property, free of all encumbrances, etc., was first enacted into law by the Statutes of 1895, p. 329 (section 3789, Political Code). It was not therefore a novel part of the tax rehabilitation program indicated by the Tax Redemption Termination Act of 1941. The amendments to the redemption statute thereby enacted should not effect by mere implication such vital changes in the settled statutory rights and powers of the state as owner of tax-sold lands as will be brought about by the majority view. Changes in that respect, even though they may indirectly tend to expedite the restoration of tax-sold lands to the tax rolls, should be made, if at all, by the legislature.

In my opinion the judgment should be affirmed.

CARTER and SCHAUER JJ., concur.

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81 Cal.App.2d 316

ARMSTRONG v. ARMSTRONG.

Civ. 15738.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1947.

Rehearing Denied Sept. 10, 1947.

Hearing Denied Oct. 20, 1947.

1. Judgment 🔑143(3)

Trial court's power to set aside default judgments for mistake, inadvertence, surprise, or excusable neglect should be liberally exercised to end that cases shall be disposed of according to their substantial merits rather than on mere technical matters of procedure. Code Civ.Proc. § 473.

2. Appeal and error 🔑957(1)

Whether default judgment shall be set aside for mistake, inadvertence, surprise, or excusable neglect rests almost entirely in lower court's discretion, with exercise of which appellate tribunals will rarely interfere and never unless plain abuse of discretion clearly appears. Code Civ. Proc. § 473.

3. Divorce 🔑161

Vacation of default interlocutory judgment granting wife divorce was not abuse of superior court's discretion either in respect to matter itself, court's jurisdiction, notice and conduct of hearing on husband's motion, notice of which was served on wife, her attorney and his secretary on day before hearing, or consideration of husband's supporting affidavit, stating that he suffered great mental anguish and became hopelessly discouraged because of wife's indifferent attitude toward and treatment of him. Code Civ.Proc. § 473.

4. Divorce 🔑184(12)

A wife, granted default interlocutory divorce judgment, was not prejudiced by her attorney's participation in discussion concerning form and substance of affidavits supporting and notice and service of husband's motion to vacate judgment, attorney's statement that he wanted to raise certain point so that judge might consider everything, or court's ruling vacating judgment, regardless of whether such attorney's announced special appearance to contest court's jurisdiction was general appearance, where same matter was again brought to trial court's attention on wife's motion to vacate order setting aside judgment and she had full opportunity to present all matters pertinent to issue at second hearing. Code Civ.Proc. § 473.

5. Divorce ⟾161

Denial of wife's motion to vacate order setting aside default interlocutory judgment granting her divorce was not abuse of discretion, where there was substantial showing justifying such order, parties' counsel stipulated that record at hearing on husband's motion to vacate judgment was part of record at second hearing, matter was argued in extenso, and trial court again concluded that matter should be disposed of after hearing on merits rather than by default judgment. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Ruth K. Armstrong against Lee R. Armstrong for a divorce, custody of the parties' minor children, and approval of a property settlement agreement. From an order setting aside a default interlocutory divorce judgment and an order denying plaintiff's motion to vacate the order setting aside such judgment, plaintiff appeals.

Affirmed.

Finlayson, Bennett & Morrow, of Los Angeles, and Marlan A. Proctor, of Burbank, for appellant.

Clyde C. Shoemaker, of Los Angeles, for respondent.

DORAN, Justice.

The appellant herein seeks a review of two orders of the Superior Court; the first being an order setting aside a default interlocutory judgment of divorce, and the second order denying appellant's motion to vacate the order setting aside such judgment.

The facts involved in this case, likewise of interest in the companion case, 183 P.2d 905, wherein the husband appeals from an order for the payment of the wife's attorney fees and costs incident to the present appeal, may be briefly summarized. On June 19, 1945, the appellant wife, Ruth K. Armstrong, filed a complaint for divorce, charging extreme cruelty, seeking custody of two minor children and asking court approval of a property settlement agreement. Respondent was personally served with a copy of the summons and complaint in North Hollywood, California, on July 12, 1945, and on July 26, 1945, the respondent's default was duly entered. On August 14, 1945 the appellant wife was awarded an interlocutory divorce with custody of the minor children. Pursuant to the property settlement which was approved, appellant was awarded as separate property the home of the parties located in Burbank, with furniture and furnishings, an automobile, and a 200-acre ranch near Delano, California. The respondent husband was awarded certain life insurance policies, securities, an automobile and personal effects; and the decree made no other provision for alimony or for support of the minor children.

On January 24, 1946, just previous to expiration of the six months' period from the date of entry of respondent's default, the respondent husband filed application to vacate the interlocutory divorce, and secured an order shortening the notice of such motion to one day. The application was noticed for hearing on Saturday, January 26, 1946, at 10:30 A. M. and copies of the papers were served on the secretary of appellant's attorney, Marlan A. Proctor, on January 25, 1946 at Burbank, California, about 9:20 A. M. during the absence of Mr. Proctor, who received such papers upon returning to the office sometime between 10:00 A. M. and noon of that day. Later, on the same day, about 5:05 P. M., a copy of the affidavit of Lee R. Armstrong in support of the motion, was personally served on Attorney Proctor. Notice of the motion was also personally served on the appellant wife at Earlimart, California on the same day.

The record fails to disclose that appellant's attorney made any application to the court for a continuance of the hearing although it does appear that M. Proctor had requested that respondent's attorney consent to a short continuance, which request was refused by Attorney Shoemaker. At the hearing appellant's attorney announced that he was appearing "especially for the purpose of contesting the jurisdiction of the Court to proceed at this time and I am here for that purpose only". Mr. Proctor then objected to the sufficiency of the service of papers upon his secretary, to the right of the court to shorten the time for hearing the motion, and to the fact that the appellant did not have one full day's time between notice and hearing. Although both were represented by counsel, neither party was personally present at the hearing, nor did the appellant's attorney present any counter affidavits or evidence.

The applicant of respondent to vacate the interlocutory judgment of divorce was upon the ground that such judgment was made and entered "through and by reason of the mistake, inadvertence, surprise or excusable neglect of said defendant," under the provisions of Section 473 of the Code of Procedure. An affidavit of the respondent, Lee R. Armstrong, in support thereof, stated that as a result of the wife's "attitude of indifference", and apparent desire to break up the home, "and her treatment of him during the years 1942, 1943 and 1944, affiant suffered great mental anguish, misery and grief, * * * became ill and despondent, and hopelessly discouraged, and was beset with worry, grief and mental agony over the domestic situation," which condition "became worse and more aggravated as the domestic situation developed" into the divorce action. The affidavit further alleges that the wife "took an unfair advantage" of the husband's "confused mental state," induced the husband to leave and to "give her what she wanted" by way of the property settlement; that affiant did not consult an attorney when served with the divorce summons, and "suffered his default to be entered without knowing or understanding the nature or effect or the consequence thereof." It is further alleged that affiant was induced to sign the property settlement by reason of the wife's false promises "that if affiant would give her all the property she desired, and would allow her to obtain a divorce, that she would make a good mother to the children." The affidavit then sets forth the details of an alleged adulterous relation with one Earl Francis Cutter. Attached to the affidavit are photostatic copies of certain hotel registrations bearing on the alleged adultery. At the hearing of the motion the trial court took the position that since the time had been shortened to one day and the papers had been duly served on the day before the hearing, the law would not take into account any fractions of a day, and the notice was sufficient. The default was then set aside and the defendant husband given leave to file an answer and cross complaint, the trial judge saying in this connection: "After reading the affidavit I am inclined to think that in view of the situation the Court certainly ought to hear a case like this rather than having it be heard summarily in the form of a default."

Thereafter, on February 7, 1946, the appellant wife served and filed a motion seeking to set aside the order vacating the interlocutory divorce, "on the ground that appellant was taken by surprise and that neither she nor her counsel had had any opportunity to prepare for or present any defense on the merits to respondent's prior motion." Neither appellant nor respondent were present at the hearing and after argument the motion was denied. The present appeal is from both orders.

According to the appellant's brief the basic questions involved are "Whether the trial court abused its discretion" in granting respondent's motion to set aside the interlocutory judgment, and in later refusing, on appellant's motion, to vacate such order; and "Whether the trial court had jurisdiction, in any event, to set aside and vacate the interlocutory divorce judgment." The brief concedes that the matter is one of discretion, but alleges that the respondent husband "made no adequate showing that his default was taken and judgment taken against him through his mistake, inadvertence, surprise or excusable neglect within the meaning of Code Civ.Proc. Section 473, or otherwise."

[1, 2] The rule which must be applied in the present case has been often stated,

and is in no manner unsettled. As is said in Miller v. Lee, 52 Cal.App.2d 10, 15, 125 P.2d 627, 630: "In the exercise of discretion by the trial court in proceedings under the provisions of section 473 of the Code of Civil Procedure, two propositions of law seem to be definitely settled. First, that the power vested in trial courts * * * should be freely and liberally exercised to the end that cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure, and secondly, that * * * the proper decision * * * rests almost entirely in the discretion of the court below, and appellate tribunals will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion." Again, it is said in Hecq v. Conner, 203 Cal. 504, 509, 265 P. 180, 183, that "It is only in extreme cases that an appellate court will interfere with the action of a trial court in refusing or granting an order of this character. * * * 'Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits.' Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Savage v. Smith, 170 Cal. 472, 150 P. 353."

A similar pronouncement is found in the case of Hambrick v. Hambrick, 77 Cal.App.2d 372, 175 P.2d 269, 271, where the facts are not unlike those of the instant situation. There the trial court had set aside a default interlocutory judgment of divorce where the husband was distraught and nervous and did not understand that a default divorce would be entered without further notice. In affirming the order vacating the default the court said: "'An appellate court, owing to the remedial character of the statute and the policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to an appeal from an order denying relief than to one granting relief * * *.' 14 Cal.Jur. 1076; see, also Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148 * * * and cases cited; Brill v. Fox, 211 Cal. 739, 743, 744, 297 P. 25."

[3] Cases cited by appellant in no way militate against the application of the above rules. It is true that in Elms v. Elms, 72 Cal.App.2d 508, 164 P.2d 936, the appellate court reversed an order vacating an annulment decree on the ground that there had been an abuse of discretion, but the facts therein are in no way similar to those of the instant case. The record herein discloses no abuse of discretion in the vacation of the default interlocutory judgment, either in respect to the matter itself, notice and conduct of the hearing, jurisdiction, consideration of the supporting affidavit, or otherwise. No prejudicial error has been shown and the various contentions of appellant are untenable.

[4] The briefs of the respective parties discuss at some length the question whether the appearance of the wife's attorney, Mr. Proctor, at the hearing of the motion to set aside the default, amounted to a special appearance "for the purpose of contesting the jurisdiction of the court to proceed," as announced by Mr. Proctor. It is respondent's contention that because of the attorney's participation in discussion and argument concerning form and substance of affidavits and notice and the service thereof, right of the court to shorten time of notice, etc., and Mr. Proctor's statement that "Now I want to raise this point, too, *so that your Honor might take everything under consideration*" (italics added), and other statements and conduct at the hearing, the appearance, although denominated "special," was actually a general appearance. However, regardless of the attempted distinction, it is clear that the appellant wife has suffered no prejudice from this or any other matter connected with the hearing, or from the ruling that the default interlocutory divorce be vacated. The same matter, as hereinbefore indicated, was again brought to the trial court's attention by way of the second motion seeking to vacate the first order. At this second hearing, although the wife did not appear in person, the appellant had full opportunity to present, and must be deemed to have presented, all matters which were in any manner pertinent to the issue.

[5] Nor is there any merit in appellant's claim that "The trial court abused its discretion in denying appellant's motion for an order vacating and setting aside the or-

der setting aside the interlocutory divorce judgment." No abuse of discretion is disclosed by the record which reveals a substantial showing justifying the order made. By stipulation of counsel the record at the first hearing was deemed a part of the record at the second hearing; the matter was argued in extenso, and the trial court again came to the conclusion "that in equity the matter should be disposed of after a hearing on the merits", rather than by a default judgment.

The order setting aside the interlocutory divorce judgment, and the subsequent order refusing to vacate the order setting aside such judgment, are therefore affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

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81 Cal.App.2d 322

ARMSTRONG v. ARMSTRONG.

Civ. 15624.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1947.

1. Divorce 🔑184(1)

The merits of husband's defense to wife's divorce action and of his cross-action cannot be considered on his appeal from order requiring him to pay wife's attorneys' fees and costs on her appeal from order setting aside default interlocutory judgment granting her a divorce, only matter before trial court being purely discretionary one of requiring husband to pay such fees and costs. Civ.Code, § 137; Code Civ. Proc. § 473.

2. Divorce 🔑184(5)

An order requiring husband to pay wife's attorneys' fees and costs on her appeal from order setting aside default interlocutory judgment granting her divorce will not be disturbed, unless trial court's discretion was clearly abused. Civ.Code, § 137; Code Civ.Proc. § 473.

3. Divorce 🔑194, 197

An order requiring husband to pay wife's attorneys' fees and costs on her appeal from order setting aside default interlocutory judgment granting her divorce was not abuse of discretion, in view of substantial showing justifying order in husband's supporting affidavit, though much of such showing was contradicted by wife. Civ.Code, § 137; Code Civ.Proc. § 473.

4. Divorce 🔑197

Whether husband should be required to pay fees of more than one attorney employed by wife to prosecute appeal from order setting aside default interlocutory judgment granting her divorce was matter of judicial discretion. Civ.Code, § 137; Code Civ.Proc. § 473.

5. Divorce 🔑197

A wife's appeal from order setting aside default interlocutory judgment granting her divorce was within statute providing for allowance of counsel fees necessary to prosecute or defend action. Civ. Code, § 137; Code Civ.Proc. § 473.

6. Divorce 🔑194, 197

A wife's application for order requiring husband to pay her attorneys' fees and costs on her appeal from order setting aside default interlocutory judgment granting her divorce was proceeding wherein proof could be made by means of affidavit instead of sworn testimony. Civ.Code, § 137; Code Civ.Proc. §§ 473, 2009.

7. Divorce 🔑186

An order requiring husband to pay wife's attorneys' fees and costs on her appeal from order setting aside default interlocutory judgment granting her divorce to such attorneys directly, instead of wife, should be modified on appeal to extent of ordering payment of costs directly to wife. Civ.Code, § 137.5; Code Civ.Proc. § 473.

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Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action for divorce by Ruth K. Armstrong against Lee R. Armstrong. From an order requiring defendant to pay plaintiff's attorneys their fees for prosecuting plaintiff's appeal from an order setting aside an interlocutory judgment granting her a divorce and the costs of such appeal, defendant appeals.

Modified, and affirmed as modified.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Finlayson, Bennett & Morrow, of Los Angeles, and Marlan A. Proctor, of Burbank, for respondent.

DORAN, Justice.

Reference is hereby made to the companion case, Cal.App., 183 P.2d 901, wherein the plaintiff Ruth K. Armstrong appealed from an order setting aside an interlocutory judgment of divorce, and a further order denying plaintiff's motion to vacate the first order, for a knowledge of such facts as are not fully stated herein.

The material facts directly involved in the present appeal may be summarized as follows: On August 14, 1945, the respondent wife was granted an interlocutory judgment of divorce from the appellant husband who had been personally served with summons; this interlocutory divorce judgment was, on January 26, 1946, set aside on the ground of "mistake, inadvertence, surprise or excusable neglect of said defendant" under the provisions of Section 473 of the Code of Civil Procedure, based upon a showing of the husband's "confused mental state" alleged to have resulted from worry over the domestic situation and various acts of the wife. Thereafter the wife filed an appeal in the divorce case, and the order now appealed from was entered on May 17, 1946, requiring Lee R. Armstrong to pay to Finlayson, Bennett & Morrow, plaintiff's attorneys, "the sum of $500.00 on account of attorney fees, for the prosecution of plaintiff's now pending appeal in this action * * * and in addition * * * the sum of $150.00 for costs" of such appeal. Neither plaintiff nor defendant appeared in person at the hearing of this motion; both parties relying on affidavits filed in the case, and the husband presenting evidence of a bank clerk in reference to certain accounts which had been maintained by the wife.

It is contended by the appellant husband that the making of the order for payment of attorney fees and costs incident to the wife's appeal "amounted to a plain abuse of discretion"; that the "wife's showing was insufficient to justify the order"; that "plaintiff's appeal from the order setting aside the interlocutory judgment of divorce, does not come within the provisions of Section 137, Civil Code," which provides for allowance of counsel fees, etc. "necessary for the prosecution of the action." Appellant also complains that the order was void because it "required defendant to pay (the costs) directly to plaintiff's attorneys."

[1] A considerable portion of appellant's argument is concerned with a review of the affidavits and evidence offered at the hearing, bearing upon the financial situation of the parties and the alleged adultery of the respondent wife. Obviously the merits of appellant's defense to the wife's action for divorce, and of the husband's cross action, are not within the scope of the present controversy. The only matter before the trial court was the purely discretionary one of requiring the husband to pay attorney fees and costs of the wife's appeal.

[2] It is not claimed that a wife possesses any absolute right to such an order, but as in other discretionary matters, the rule is well settled that the order made will not be disturbed by an appellate court "save when it clearly appears that such discretion has been abused," as was said in Wittman v. Superior Court, 19 Cal.App.2d 734, 736, 66 P.2d 180, 181, cited by appellant. It is true that in the Wittman case the court refused to issue a writ of mandate to compel the Superior Court to make an order requiring the husband to pay costs and attorney fees of the wife's appeal, but such opinion constitutes no authority for disturbing the discretionary order made in the instant case, and, as before indicated, reaffirms the usual rule. The same may be said of the other cases mentioned by appellant.

[3] Each case must stand on its own merits, and what might be a proper order in one case would be clearly improper in another controversy. In the instant case no abuse of discretion is apparent. There is a substantial showing by way of supporting affidavit, which would justify the

trial court's order. It is true that much of this showing is contradicted by the appellant, but this conflict is largely present in all litigation and does not demonstrate an abuse of discretion. Likewise the record fails to disclose anything indicating that the wife's appeal was not in good faith, and this question also was doubtless considered by the trial court in passing upon the motion.

It is also true, as urged by appellant, that in the property settlement the wife received a greater share of the property than did the husband, but in this connection it is to be noted that the wife assumed the care and support of the two minor children, and that a larger part of the wife's allotment consisted of a ranch in Tulare County. It must be assumed that all pertinent facts were presented to the trial court and duly considered before making the order requiring the husband to pay the wife's appeal expenses. Indeed, the record reveals that the court did not summarily dispose of the matter at the close of the hearing but took the matter under submission and thereafter made the order in question.

[4] The appellant's brief submits that "plaintiff has continually been represented by Marlan A. Proctor, an attorney at law"; that "plaintiff has made no showing whatever of any reasonable necessity for the employment of associate counsel or more than one attorney to represent her"; and that in the language of 1 Cal.Jur., Sec. 48, page 995, "the wife cannot, as of course, employ as many attorneys as she chooses, and compel the husband to furnish funds for whatever she is to pay them." There is, however, no rule expressly limiting a wife to representation by a single attorney, and this matter, as well as the making of the order itself and the amount thereof, was one of judicial discretion as hereinbefore indicated.

[5] There is no merit in the contention that "plaintiff's appeal from the order setting aside the interlocutory judgment of divorce does not come within the provisions of Section 137, Civil Code," which provides for an allowance of counsel fees "necessary * * * to prosecute or defend the action." A similar contention was made in the case of Nelson v. Nelson, 7 Cal.2d 449, 60 P.2d 982, the headnote of the published opinion reading in part as follows: "when the trial court vacates a final decree fraudulently procured by the husband, and, after notice of appeal the wife applies for counsel fees, costs on appeal and temporary support, the parties then retain their status as husband and wife * * * and the cause is 'pending' within the meaning of section 137 of the Civil Code so as to authorize awards as prayed * * *." Although, as argued by appellant, the facts in the Nelson case are not identical with those of the instant controversy, the underlying principle is undoubtedly the same. In Borenstein v. Borenstein, 11 Cal.2d 301, 79 P.2d 388, an award was approved to enable the plaintiff wife to defend the husband's appeal from an order refusing to vacate interlocutory and final decrees of divorce and the court expressly held that the order "was one which the trial court had jurisdiction to make." Again, the facts in the Borenstein case were somewhat divergent from those in the present matter, but appellant's attempted distinction between these cases and the instant problem are not persuasive. Obviously such a remedial provision as the code section in question should not receive a rigid and highly technical construction based upon finely spun distinctions of doubtful value.

[6] In the reply brief appellant has for the first time raised the point that the wife's application for an order requiring the husband to pay attorney fees and costs on appeal "was not a proceeding where proof was authorized to be made by means of an affidavit instead of by sworn testimony." As pointed out in a supplementary brief filed by respondent, "The point was not raised in the lower court as an inspection of the record will show." In this connection it may be noted that the appellant, likewise, filed an opposition affidavit: that neither appellant nor respondent testified at the hearing and that apparently appellant made no request that respondent appear personally for cross-examination. As respondent has pointed out, "a considerable portion of appellant's * * * briefs

contain references to and arguments based upon the evidence allegedly shown by his own affidavit * * *. He seems to consider his own affidavit as being in a different category and a superior type of evidence to that of appellant's." In this state of the record it is at least doubtful whether the point made deserves consideration. In any event the contention is without merit.

Section 2009 of the Code of Civil Procedure provides that an affidavit may be used "upon a motion"; the section contains no qualifying phrase and, as mentioned by respondent, the use of such affidavit is not limited to uncontested motions. The cases cited by appellant are not authority for the contention here made, for the most part dealing with the contents and substance of particular affidavits, and asserting the obvious propositions that conclusions, hearsay statements and the like contained in such affidavits will not suffice. In Miller v. Miller, 57 Cal.App.2d 354, 362, 134 P.2d 292, 297, involving a contested motion for increase of temporary alimony, the court said: "An affidavit is proper in support of, or in opposition to, such a motion as the one involved herein. Code of Civil Procedure, sec. 2009. The original order was made upon affidavits (although defendant was present at the hearing he did not testify)." In Falk v. Falk, 48 Cal.App.2d 780, 789, 120 P.2d 724, 729, occurs the following: "The appellant contends that plaintiff's affidavit is incompetent evidence for the reason that it contains averments which are hearsay and which amount to mere conclusions. Even conceding that many of the averments of the affidavit are conclusions or hearsay, they become competent evidence for the reason that they were admitted without objection."

[7] One further point made by appellant requires attention, namely that the order appealed from is bad because providing for the payment of both attorney fees and costs directly to plaintiff's attorneys in place of being made payable to the plaintiff. Section 137.5, added to the Civil Code in 1937 changed the former rule and provided that "attorney's fees * * * may, in the discretion of the court, be made payable, in whole or in part, to the attorney entitled thereto." Appellant submits that since this section did not expressly provide that "costs" may be made payable directly to the attorney, such an order as was here made, is not justified. Although not fully conceding this point respondent's brief suggests that "If the court should be of the opinion that the portion of the order relating to payment of costs is irregular, we request that the court modify same in that regard, in the exercise of its inherent powers and in the interests of justice. See Storke v. Storke, 99 Cal. 621, 34 P. 339." Such modification can in no manner prejudice the appellant's rights, and the change should be made.

The order appealed from is therefore modified to the extent that the sum of $150 for costs of plaintiff's appeal, ordered to be paid by the defendant Lee R. Armstrong, shall be paid directly to the plaintiff, Ruth K. Armstrong; and the order as so modified, is affirmed.

YORK, P. J., and WHITE, J., concur.

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81 Cal.App.2d 346

WRIGHT v. VERNON.

Civ. 13394.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1947.

Hearing Denied Oct. 23, 1947.

1. Brokers 🔑55(3), 56(1)

An agency contract carries the implication that the owner of realty reserves the right to sell without obligation to pay the stipulated commission to the broker, except when the contract gives the agent the exclusive "right to sell" and when the owner sells through another agent.

2. Brokers 🔑11

Where contract gave agent exclusive right to sell realty with provision for cancellation on 30 days notice, an exchange of the realty by owner without notice to agent and pursuant to a contract subsequently executed by owner designating another broker as owner's agent to exchange the property was a breach of contract and supported judgment for agent for damages.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by F. L. Wright against E. M. Vernon for breach of contract to sell realty. From an adverse judgment, defendant appeals.

Judgment affirmed.

John F. O'Sullivan, of San Francisco, for appellant.

John E. Truman and Harold A. Harwood, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

A real estate broker sues the owner for damages for the latter's breach of a written contract to sell real property. The plaintiff had judgment and defendant appeals.

The contract gave the plaintiff the exclusive right to sell 258 acres of land in San Joaquin county for $150 an acre. The owner reserved the right to cancel on thirty days' notice, and agreed to pay the broker five per cent commission. Without exercising the right of cancellation the owner, through another real estate broker, traded the land for property in Sacramento county which she testified was of a value equal to the value of $150 per acre which she had asked for the farm land. It was stipulated for the purpose of assessing damages that the defendant received in the exchange an equivalent of $150 an acre, or $38,700. The plaintiff's contract was executed on August 20, 1944. The exchange made by defendant with the third party was effected on September 20, 1944.

The trial court found that the defendant, by making the exchange of the property with a third party, had breached her exclusive sales contract with the plaintiff and that plaintiff was entitled to recover as damages for the breach a sum equal to five per cent of the exchange valuation of $38,700.

The only question raised by appellant is whether the sales contract excluded her right to exchange the property with a third party. The distinction between a sale and an exchange of real property may be conceded, but the concession has no bearing on the case. This is not an action to recover a broker's commission for a performance of his contract to obtain a purchaser. It is an action for damages for prevention of such performance. Thus the real question involved is whether when a broker is given an exclusive sales contract, as distinguished from an exclusive agency, the owner may defeat his right to procure a purchaser by disposing of the property through another broker.

[1] The authorities in this state follow the rule that an agency contract carries the implication that the owner reserves the right to sell without obligation to pay the stipulated commission to the broker. Snook v. Page, 29 Cal.App. 246, 155 P. 107; Faith v. Meisetschlager, 45 Cal.App. 7, 9, 187 P. 61; Wilck v. Herbert, 78 Cal.App.2d 392, 178 P.2d 25. The rule is contra when the contract gives the agent the exclusive "right to sell" and where the owner sells through another agent. Snook v. Page, supra; Wilck v. Herbert, supra; 2 Am.Jur. p. 240; Walter v. Libby, 72 Cal.App.2d 138, 164 P.2d 21; Restatement, Agency, p. 1058, § 449.

[2] Here the contract with the broker stipulated that "This right to sell is exclusive, but may be cancelled any time by 30 days notice." This contract was executed August 20, 1944. On September 18, 1944, the owner executed another contract designating another broker as her agent to exchange the property, and such exchange was made two days later and a commission was paid to the second broker. All this was done without notice to plaintiff and without cancellation of his exclusive contract to sell. It was a plain breach of the conditions of the contract and fully supports this judgment for damages.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.

81 Cal.App.2d 278

MacISAAC et al. v. POZZO et al.

Civ. 15673.

District Court of Appeal, Second District,
Division 3, California.
Aug. 18, 1947.

1. Joint adventures 🔑5(1)

Where plaintiff copartners and defendant copartners entered into a joint venture agreement for construction of large federal housing unit in Utah, and thereafter one of plaintiff copartners, without defendants' knowledge, solicited a private construction job in Utah, representing that job would be done by Utah organization, and represented to defendants that such job had been obtained before new organization was formed in Utah, and thereby defendants were induced to enter contract with plaintiffs whereby defendants were to receive only 15 per cent. of profits from private construction job, that contract was properly annulled on ground of fraud to permit defendants to recover an equal division of profits.

2. Joint adventures 🔑4(1)

Where construction job was offered to plaintiffs and defendants as joint venturers, it was the duty of both plaintiffs and defendants to conclude the negotiations for the benefit of the joint venture without seeking any advantage for themselves, to the detriment of the others.

3. Trusts 🔑231(1)

A fiduciary is held to the utmost measure of loyalty, and accordingly he may not use a trust opportunity for personal advantage.

4. Joint adventures 🔑5(1)

Where plaintiffs by breaching their fiduciary duty to defendants who had entered into a joint venture agreement with plaintiffs, and by misrepresentation, induced defendants to enter into a construction contract with plaintiffs whereby defendants were to receive only 15 per cent. of the profits, rather than 50 per cent., judgment properly awarded defendants the amount by which plaintiffs profited through such breach of duty.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Donald MacIsaac and Arthur F. Menke, copartners doing business as MacIsaac & Menke Company, a partnership, against Emile A. Pozzo and Louis J. Pozzo, copartners doing business as Pozzo & Pozzo, a copartnership, for declaratory relief concerning the division of fees between plaintiffs and defendants, wherein defendants filed a cross-complaint. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

A. L. Abrahams and H. B. Cornell, both of Los Angeles, for appellants.

H. G. Redwine and Gwyn S. Redwine, both of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

The parties hereto are construction contractors. Plaintiffs are copartners doing business as MacIsaac and Menke, and defendants are copartners doing business as Pozzo and Pozzo. In August, 1942, the parties entered into a joint venture agreement for the submission of a joint proposal to the United States for the construction of civilian housing at Ogden, Utah, known as the Hill Field project or job, and for the construction of the work if their proposal should be accepted. They secured the contract for general construction to an amount of some $1,500,000, set up an organization in Utah under the name of MacIsaac, Menke and Pozzo (hereinafter referred to as the Utah firm), and proceeded with the work. Their agreement related solely to this specific contract and they were to share equally the gains and losses thereunder.

The agreement provided (1) that neither party should incur liabilities for the joint association without the consent of the other, (2) the agreement was to become null and void if either party withdrew from it before a bid was submitted or if the contract was not secured, and (3) no agreement on behalf of the firm would be valid unless signed by MacIsaac or Menke for plaintiff and Emile A. Pozzo or Louis J. Pozzo for defendant. It contained another provision reading as follows: "The following additional jobs are added to above agreement: Only such contracts as are named above are to come under the terms of this joint venture agreement."

Under date of September 30, 1942 (signed October 5, 1942), plaintiff and defendant entered into an additional joint venture agreement for the purpose of bidding on a contract with the Utah Fuel Company for the management of construction of a residential subdivision at Sunnyvale, Utah, for a fee of approximately $65,000, of which plaintiff was to receive 85 per cent and defendant 15 per cent. A contract with Utah Fuel Company was signed October 5, 1942, and was duly performed, the fee was earned, was paid over and divided in part, in the proportions of 85 per cent to plaintiff and 15 per cent to defendant, and the balance was impounded in a bank because of the present dispute as to the proper division of the same and to await re-negotiation. Plaintiff brought this action for declaratory relief, contending that the fee should be divided in the proportions stipulated in the agreement. Defendant answered and filed a cross-complaint in which it was alleged that its consent to the 85—15 per cent division had been procured by fraud, and claimed 50 per cent of the fee. Findings and judgment were in favor of defendant upon its cross-complaint, awarding it the balance of 50 per cent of the net fee, and plaintiff appeals.

In the original cross-complaint it was alleged that employees and agents of the joint ventures did, for and on behalf of plaintiff and defendant as such joint venturers, negotiate for the contract with the Utah Fuel Company on a fee basis, and that as a result of the negotiations an understanding and agreement was reached for the performance of such work by the joint venturers; that plaintiff represented to defendant that the contract had been obtained by plaintiff for itself and not for or on behalf of the joint venturers and that by means of such false and fraudulent representations defendant was induced to and did enter into an agreement to accept 15 per cent of the fee earned in consideration for the use of the organization and facilities of the joint venturers in the work. There were further allegations of discovery of the fraud and notification of plaintiff that defendant would not be bound by the agreement. Defendant's answer contained substantially the same allegations. Judgment on the pleadings was rendered in favor of plaintiff, defendant appealed and the judgment was reversed. MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449. Defendant then amended its cross-complaint with additional allegations of the circumstances under which the contract was obtained and defendant was induced to enter into the disputed agreement.

The evidence disclosed that while the Hill Field work was under way Menke and plaintiff's employee, Smith, learned of the Sunnyvale job which the Utah Fuel Company wished to let on contract. Smith wrote to Thomas, a former employee of plaintiff and then employed by MacIsaac, Menke and Pozzo, in Utah, requesting him to look into the matter. Thomas contacted the architect of the job, believing at the time that he was acting for the joint venturers. Menke and Smith went to Utah and, with Thomas, conferred with the representatives of the Utah Fuel Company. In the negotiations which followed the work was solicited for the Utah firm. It was represented that the same organization would be used as was employed on the Hill Field job and in the same manner; the members of the Utah administrative organization and the connection of the Pozzos with the firm were discussed. Utah Fuel Company obtained a Dun & Bradstreet report on the Utah firm, which at that time was engaged only on the Hill Field job. The tenor of these negotiations is well described by Smith, as follows: "Q. In other words you attempted to sell the Hill Field organization to them, didn't you? A. We sold everything that either MacIsaac, Menke or Pozzo had to offer." As a result of the negotiations it was orally agreed that the Utah firm should have a contract for supervision at a fee of approximately $65,000. Emile Pozzo in the meantime had gone to Utah in another connection. He, also, had learned of the Sunnyvale job and showed a trade paper clipping to Menke, the same as the one which Smith had sent to Thomas, and he suggested that it would be a good job for them to go after. Menke then replied that MacIsaac and Menke had been recommended for the job by the Kaiser interests before the original joint venture agreement was entered into and said, "we have got that job in the bag." Menke testified as follows: "He [Pozzo] said, 'well, maybe I will give you some competition' and I told him that would be fine, if he could sell the job for himself it would be his, and if we sold the job it would be ours, and he said 'well, maybe I will do that,' and walked out." Menke also testified that he told Pozzo that it was satisfactory to Utah Fuel Company that plaintiff have the job. Although he testified that the representatives of Utah Fuel had so stated in the meeting this was denied by those representatives, and others, who testified that only the Utah firm (MacIsaac, Menke and Pozzo) name had been mentioned.

The court found that the contract was negotiated as stated above and that defendant had suffered damage in the amount for which judgment was given, namely, for the balance of one-half of the net profit on the job. In its attack upon the judgment plaintiff makes the following argument, (1) under the original agreement each party was at liberty to carry on its own contracting business, (2) neither party, nor any agent or employee, had authority to solicit or accept new business for the firm, (3) plaintiff was free to deal with Pozzo for the use of the firm's facilities upon the best obtainable terms, (4) Pozzo had no right to participate in the Sunnyvale contract by reason of the original joint venture, (5) defendant had no interest in the Sunnyvale contract until it acquired a 15 percent interest under the agreement; it lost nothing, but actually gained something it would not otherwise have had, and consequently has suffered no damage and is entitled to no relief. It is also claimed that the judgment re-writes the contract of the parties; that plaintiff entered into the Sunnyvale contract only upon the basis that it was to receive 85 percent of the profits, but the judgment converts the agreement into one which plaintiff never made, namely, an agreement to do the work jointly with defendant for one-half the profits. For these reasons, it is contended that no fraud was proved but that even if the agreement between the parties should be annulled, no implied agreement would remain as a basis for a division of the profits and defendant could recover only on quantum meruit.

Defendant, on the other hand, asserts merely that a fiduciary relation existed, that the contract was negotiated by agents of the firm and for its benefit, that the agreement for division of profits was obtained through fraud and that defendant is therefore entitled to one-half the profits.

We understand the controlling facts to be the following: Menke was a fiduciary as to all matters pertaining to the original joint venture. (MacIsaac v. Pozzo, supra); plaintiff solicited the Sunnyvale contract for the firm and the firm by reason of its reputation, organization and credit was offered an opportunity to take the contract; Menke, knowing these facts, misrepresented them to Pozzo and thus secured his consent to the 85-15 percent division, and having obtained it, joined with defendant in the contract with Utah Fuel Co.

It is not at all clear from the findings and conclusions what legal principles were applied to these facts as a basis for the judgment. The gravamen of the action is alleged breach of duty and actual fraud upon the part of plaintiff. The fraud charged goes to the validity of the agreement for division of profits. Annulment of the agreement for fraud only opened the way to a determination of rights unaffected by the agreement. These rights were then not fixed by contract. The Sunnyvale contract, as between the parties hereto, was taken upon the terms stated in their agreement which called for an 85-15 per cent division of profits and not otherwise. It cannot be considered as importing an implied agreement for an equal division of profits.

The additional facts pleaded in the amended cross-complaint and developed at the trial defined the extent of the fiduciary relationship which the Supreme Court recognized on the former appeal. The conditions under which the Sunnyvale contract was consummated are unusual in the extreme, and they require careful consideration in order to determine the exact basis of liability. Defendant's rights were such as grew out of the relationship of the parties and their conduct, and these will determine whether there was an actionable breach of duty.

[1] The fraud which vitiated the joint venture agreement, which provided for division of profits, consisted of concealment of the fact that the contract had been negotiated for the firm and the actual representation that it was available to plaintiff separately, as well as to the firm. Plaintiff insists this was not actionable deception because there was no fiduciary relation and without it there was no duty to make a full disclosure. There was a fiduciary relationship and a duty to make full disclosure, as will be developed later. It is argued also that Emile Pozzo, for defendant, at first demanded an equal share in the contract, but waived this right, if it existed, when he finally agreed to a participation to the extent of only 15 per cent. Inasmuch as his consent was induced by the fraud of plaintiff, it was not voluntary and defendant has shown good grounds for relief from it. Further discussion of the provision of the judgment which holds the agreement to be invalid is unnecessary. The findings are sufficient to justify annulment of the agreement and are amply supported by the evidence.

The remaining question relates to the rights of the parties in the absence of specific agreement as to the proportions in which the profits were to be divided.

Plaintiff insists that it entered into the contract only after having secured defendant's consent to accept 15 per cent of the profits and that it might not have been willing to undertake the agreement and to have shared the profits equally with defendant. This, of course, is true, but plaintiff cannot justly contend that the judgment has the effect of re-writing the contract. It does not purport to do that, but only to establish the rights and duties of the parties as they existed before the contract for division of profits was made. One who has obtained an unfair advantage through a contract induced by his fraud cannot shield himself from making restitution by the assertion that if it had not been for the advantage thus gained he would not have made the contract.

[2] We should, therefore, look to the relations of the parties, and their responsibilities, as of the time when they first learned of the Sunnyvale job, in order to determine whether plaintiff was guilty of a breach of duty which justified the judgment. Notwithstanding that the joint venture agreement related only to the Hill Field job, the Utah firm had been brought into existence, and had acquired certain intangible assets consisting of business reputation, standing and credit. It was in a favorable position to have presented to it business opportunities in the contracting field. It was within the contemplation of the parties that such opportunities might be presented to the firm. Paragraph 16 of the agreement, which we have quoted, indicates that other jobs might be added to the contract by mutual consent. The Utah firm did subsequently bid upon some 8 other jobs and obtained 2 small contracts. However, this could only have been done with the specific consent of plaintiff and defendant. Neither was authorized to represent the other in negotiating new contracts, nor was any agent so authorized. The negotiations that were carried on amounted only to the development of a business opportunity for the firm. The Sunnyvale job was essentially a business opportunity which was offered to the Utah firm within the field where the parties expected the firm to operate. The opportunity belonged to the firm and when the negotiations had been carried to the point where it was possible to take the contract for the firm, it was the duty of each of the parties to conclude those negotiations for the benefit of the firm and without seeking any advantage for itself to the detriment of the other. The duty existed from the time the negotiations began, and the rights of the parties after the contract was executed related back to the commencement of the negotiations.

Upon the facts as established by the findings it is clear that the principle which governs and which justifies the judgment is that stated in Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503, 511, as follows: "On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired." Beaudette v. Graham, 267 Mass. 7, 165 N.E. 671; Michigan Crown Fender Co. v. Welch, 211 Mich. 148, 178 N.W. 684, 13 A.L.R. 896; Bailey v. Jacobs, 325 Pa. 187, 189 A. 320; Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N.W. 839; Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378; cf. Rest. Agency, secs. 387, 403.

[3] The facts bring the case within the stated rule. While it has been applied so generally in corporation cases as to have become known as the doctrine of corporate opportunity, it is founded in the doctrine of loyalty in business which applies in all situations in which trust is reposed. Cf. Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1; Rest. Restitution, sec. 190. The fiduciary is held to the utmost measure of loyalty and accordingly he may not use a trust opportunity for personal advantage. Rest. Trusts, sec. 170. As stated in Hoyt v. Hampe, 206 Iowa 206, 214 N.W. 718, 724, 220 N.W. 45, "The policy of the law is to put fiduciaries beyond the reach of temptation by making it unprofitable for them to yield to it."

The primary duty of the parties was to take no advantage of each other within their fiduciary relationship by means of the slightest concealment, misrepresentation or adverse pressure. Defendant was entitled to a complete disclosure as to the negotiations with Utah Fuel Co. and an equal opportunity to take advantage of them. Plaintiff contrived to appropriate to itself the major share of the profits with the result that the firm, when it took the contract and assumed the responsibility stood committed to the unequal division. Defendant could not be deprived of its rights in this manner.

[4] The judgment properly awarded defendant the amount by which plaintiff profited through its breach of duty. Whether it be regarded as damages presumed to have been suffered through deprivation of a business opportunity or as profits unjustly received by plaintiff is immaterial. The finding that defendant sustained damage was proper. It implies the existence of facts which were material to a recovery for the deprivation of a business opportunity.

In fixing the amount of the recovery plaintiff was allowed $12,000 and defendant $1,000 for personal services of members of the two firms, as items of expense, before computation of profits. The October 5, 1942, agreement did not provide for such allowances. Plaintiff argues that if the agreement was not to be followed the profits should have been divided 12/13 to plaintiff and 1/13 to defendant, or upon a strictly quantum meruit basis. What we have already said answers this contention; the equal division was proper. Other points raised by plaintiff were urged and were disposed of adversely to its contentions upon the former appeal.

The judgment is affirmed.

WOOD, J., concurs.

KINCAID, Justice pro tem., concurs in the judgment.

81 Cal.App.2d 360

MISHKIND v. SUPERIOR COURT IN AND FOR FRESNO COUNTY.

Civ. 3595.

District Court of Appeal of California.
Aug. 27, 1947.

Stipulations ⚷17(3)

In action begun in a justice court against bank for paying a check on which payment had been stopped where bank on appeal to superior court filed a cross-complaint against payee who filed a conditional cross-complaint against plaintiff, superior court's action in entering a default judgment at bank's request on payee's cross-complaint against plaintiff contrary to parties' stipulation was unauthorized as in excess of jurisdiction. Code Civ.Proc. §§ 585, 586.

* * *

Proceeding by Ella F. Mishkind against Superior Court of the State of California in and for the County of Fresno to review an order of respondent entering a default and a default judgment.

Default and default judgment set aside and vacated.

Matt Goldstein, of Fresno, for petitioner.

G. D. Schilling, of San Francisco, R. I. McCarthy, of Los Angeles, and Backlund, Meux & Gallagher, of Fresno, for respondent.

BARNARD, Presiding Justice.

The petitioner, as plaintiff, brought an action in a Class A justice's court against the Bank of America. The action was based on the claim that the plaintiff had drawn a check on a Fresno branch of this bank in favor of one W. D. Brown, a resident of San Francisco; that she gave this branch of the bank a written notice stopping payment of this check; that thereafter, in violation of the stop-payment notice, the defendant bank paid the amount of the check to W. D. Brown and charged the plaintiff's account therewith; and that by reason of the negligence and carelessness of the defendant bank the plaintiff has been damaged in the amount of $1000.

The bank answered and after a trial a judgment was entered on July 19, 1946, in favor of the plaintiff for $1000. On August 13, 1946, the bank gave notice of appeal to the superior court of Fresno County, on questions of both law and fact, and a transcript was filed in that court on August 17, 1946. In February, 1947, with the permission of the court, the bank filed a cross-complaint naming Brown as cross-defendant and asking judgment against him, in the event judgment was rendered against it in the main action. Brown answered this cross-complaint and also filed another cross-complaint naming the bank and the petitioner herein as cross-defendants. In this cross-complaint he prayed that in the event he was held liable to the bank upon its cross-complaint the bank be ordered to deliver to him a certain promissory note, and that he have judgment against this petitioner, who is alleged to have signed the note, for the sum of $1000.

On June 3, 1947, the bank answered Brown's cross-complaint and on the same day this petitioner filed a demurrer to that cross-complaint. On June 23, this demurrer was overruled with permission given to this petitioner to amend within ten days. On June 26, the attorney for Brown wrote to the attorney for this petitioner stating that he desired to amend this cross-complaint, asking him not to file an answer until the amended cross-complaint was filed, and promising not to take or permit any default to be entered. The attorney for the petitioner agreed to this in writing and their letters constitute a stipulation to this effect.

On July 7, 1947, at the request of the attorneys for the bank, without notice, without the taking of any evidence, and without the knowledge or consent of Brown or of this petitioner, the court entered the default of this petitioner on Brown's cross-complaint and entered a judgment on that cross-complaint in favor of Brown and against this petitioner. By this judgment it was ordered and decreed that in the event Brown should be held liable on the bank's cross-complaint he should have judgment against this petitioner in the same amount.

On July 10, 1947, there was presented to the court a stipulation signed by Brown and by this petitioner stipulating that the default and judgment thus entered should be set aside. Although so requested to do, the judge refused to set aside the default and the default judgment. This proceeding was then brought to review the action of the trial court in entering this default and default judgment, on the ground that in taking this action the court exceeded its jurisdiction. The attorney for Brown immediately filed in this proceeding a statement declaring that he had stipulated that such a judgment would not be entered, that he desires to abide by that stipulation, and asking that the application filed by the petitioner be granted.

The original action on appeal from the justice's court was a damage action and Brown's cross-complaint asked conditionally that he be granted judgment in the same amount in the event that the bank recovered a judgment against him on its cross-complaint. Sections 585 and 586 of the Code of Civil Procedure were not complied with, the judgment entered on the cross-complaint was not in accordance with the prayer of that cross-complaint, but was prematurely entered under that prayer, and a different relief was given although no hearing or further pleading was had. The judgment was interlocutory and conditional, and entered prior to the happening of the events upon which it was conditioned. Moreover, when thus segregated from the appeal from the judgment of the justice's court, with which it was associated and pursuant to which it was filed, the relief sought by the cross-complaint and given by the judgment entered was not within the jurisdiction of the superior court.

There remained some six weeks in which to bring the appeal from the judgment of the justice's court to hearing, the court had ample power to protect the interests of all the parties, and no valid reason appears or is suggested which would in any way justify the action here taken at the request of third parties, who were not directly interested in the matter here in question, and in violation of the stipulation of the parties directly interested. Under these circumstances, and in the absence of any hearing or the taking of any evidence upon which any judgment could be based under the pleadings, the court exceeded its jurisdiction in having this default entered and in entering the default judgment.

For the reasons given, the order for the entry of this petitioner's default and the judgment entered against this petitioner on Brown's cross-complaint are vacated and set aside.

GRIFFIN, J., concurs.

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81 Cal.App.2d 312

WILCOX v. ROHR et al.

Civ. 15662.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1947.

Hearing Denied Oct. 20, 1947.

1. Bankruptcy 🔑314(1)

Prior to 1934, a claim based on a workman's compensation award was not provable against the estate of his bankrupt employer, but under 1934 amendment to the provision of the Bankruptcy Act relating to provable debts, a claim based on an award for workman's compensation is provable in bankruptcy. Bankr. Act, §§ 17, 63, as amended, 11 U.S.C.A. §§ 35, 103.

2. Bankruptcy 🔑314(1)

The intent of the 1934 amendment to the Bankruptcy Act, making a debt founded upon an award of an industrial accident commission provable in bankruptcy, is to grant a remedy to an injured workman, who prior to the amendment could not participate as a claimant against the bankrupt. Bankr. Act, §§ 17, 63, as amended, 11 U.S.C.A. §§ 35, 103.

3. Bankruptcy 🔑424

Where injury upon which award of workman's compensation to employee arose out of employment and was not based upon any act of the uninsured employer, award was not embraced within exception that discharge in bankruptcy shall release a bankrupt from provable debts except such as are liabilities for "willful and malicious injuries" to the person or property of another. Bankr. Act, §§ 17, 63, as amended, 11 U.S.C.A. §§ 35, 103.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful and Malicious Injury".

4. Bankruptcy ⚷421(1)

Where award of workman's compensation included an additional 10 per cent. because employer was willfully uninsured, the additional 10 per cent. award was dischargeable in bankruptcy of employer as against contention that the additional 10 per cent. award was in the nature of a "penalty" and therefore neither provable nor dischargeable in bankruptcy. Bankr. Act §§ 17, 63, as amended, 11 U.S.C.A. § 35, 103; Labor Code, § 4554.

See Words and Phrases, Permanent Edition, for all other definitions of "Penalty".

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Grace C. Wilcox, a widow, against Henry C. Rohr, as executor of the estate of Charles L. Rogers, deceased, and the estate of Charles L. Roger, deceased, to quiet title to realty, wherein Henry C. Rohr, as executor of the estate of Charles L. Rogers, deceased, cross-complained. From an adverse judgment, cross-complainant appeals.

Judgment affirmed.

Henry C. Rohr, in pro. per.

Archie McWilliam, of Glendale (Henry F. Walker, of Los Angeles, of counsel) for respondent.

YORK, Presiding Justice.

This is an appeal by defendant, as executor of the Estate of Charles L. Rogers, deceased, from a judgment quieting plaintiff's title to certain realty and determining that defendant executor and decedent's estate have no right, title or interest therein. This appeal is presented upon an agreed statement from which it appears that respondent and her husband, Oscar C. Wilcox, were owners as joint tenants of the property here involved. Also, that in June of 1936, Charles L. Rogers was employed by said Oscar C. Wilcox, and "while so employed, sustained an injury arising out of" and in the course of said employment, "resulting in permanent disability." On January 10, 1940, the Industrial Accident Commission made an award in favor of the employee Rogers for $3,615, which included an additional 10% because the employer Wilcox "was wilfully uninsured." The judgment based upon such award was entered on August 9, 1940. In the meanwhile, on February 6, 1940, the employer Wilcox was adjudged a bankrupt, and the schedule of debts contained in his petition in bankruptcy listed as a debt the award in favor of the employee Rogers. He received his discharge in bankruptcy on December 5, 1940.

Mr. Rogers died on February 26, 1941, and appellant was duly appointed executor of his estate. However, prior to such death, execution issued on the judgment arising out of the award of the Industrial Accident Commission, and levy was made upon the interest of the employer Wilcox in the realty in question, as a result of which appellant obtained title to a one-half interest therein pursuant to a deed dated July 31, 1942, executed by the Marshal of the Municipal Court of the City of Los Angeles.

Mr. Wilcox died on May 26, 1944, whereupon respondent, the surviving widow, instituted the present action to quiet her title to said realty.

Appellant contends that the judgment lien arising from the abstract of the judgment which arose out of the award of the Industrial Accident Commission constitutes a lien on one-half of the joint tenancy property and that the sale of said property by the Marshal pursuant to a writ of execution, transferred to him the one-half interest in the joint tenancy property which had been owned by Oscar S. Wilcox, the bankrupt employer.

Respondent claims that her husband's discharge in bankruptcy discharged the debt; that the lien of appellant "by virtue of the abstract of the judgment and the Marshal's execution sale is of no force," and that as surviving joint tenant she is the owner of the entire property free and clear of any claim asserted by appellant.

It is agreed that the sole question for determination on this appeal is: "Does a discharge in bankruptcy operate to discharge a judgment arising out of an award of the Industrial Accident Commission of the State of California given to an employee against a wilfully uninsured employer?"

Appellant argues that the employer's failure to procure workmen's compensation insurance "was a violation of the law; it was willful; it was malicious because it was wrongful and intentional without just cause or excuse; and it resulted in injury to the employee by depriving him of financial benefits which he would otherwise have received. Hence, the judgment debt is within the exception from discharge in bankruptcy."

Under the Bankruptcy Act certain debts are not affected by a discharge. The statute upon that subject, in so far as is pertinent herein, reads as follows:

"A discharge in bankruptcy shall release a bankrupt from *all of his provable debts * * * except such as * * ** (2) *are liabilities for * * * willful and malicious injuries to the person or property of another*." 11 U.S.C.A. § 35, as amended in 1938. (Emphasis added.)

[1, 2] Prior to 1934, a claim based on a workman's compensation award was *not provable* against the estate of his bankrupt employer. Lane v. Industrial Com'r, 2 Cir., 54 F.2d 338, annotated in 86 A.L.R. 770. In 1934 the provision of the Bankruptcy Act relating to provable debts was amended to read: "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment * * *; (6) an award of an industrial-accident commission, body, or officer of any State having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication." 11 U.S.C.A. § 103. Under this amendment, a claim based on an award for workman's compensation is provable in bankruptcy. Gale v. Freidenrich, 9 Cir., 71 F.2d 1006; In re Dearborn Mfg. Corp., 2 Cir., 92 F.2d 417. In the Dearborn case, supra, it was held that the intent of the amendment to the bankruptcy statute, making a debt founded upon an award of an industrial accident commission provable in bankruptcy, is to grant a remedy to an injured workman, who prior to the amendment could not participate as a claimant against the bankrupt.

[3, 4] The injury, upon which the award to the employee herein was based, arose out of his employment and not as the result of any act on the part of the bankrupt employer; hence, such award is not embraced within the exception from discharge of debts for "wilful and malicious injuries to the person or property of another." 11 U.S.C.A. § 35. However, appellant makes the claim that the additional ten per cent award made pursuant to section 4554, Labor Code, on account of the willful failure of the employer to procure insurance, is in the nature of a penalty and is neither provable nor dischargeable in bankruptcy. In support of this contention, appellant cites the case of In re Dearborn Mfg. Corp. 18 F.Supp. 763, a decision by the U. S. District Court for the Eastern District of New York, on the question of non-dischargeable penalties. As a matter of fact, on an appeal therefrom, the U. S. Circuit Court of Appeals for the Second Circuit reversed the judgment of the district court and held that an additional award made to an injured workman by the State Industrial Commission of New York State for double compensation, because the workman was illegally employed while a minor, was provable in the employer's bankruptcy, notwithstanding the statute prohibiting allowance of claims for mere penalties. In re Dearborn Mfg. Corp., 92 F.2d 417.

The bankruptcy act expressly makes industrial accident awards provable in bankruptcy and provides that all provable debts shall be discharged through bankruptcy except for a few enumerated exemptions. In the instant cause, it was not established that the award here involved, although a provable debt, came within any of the exceptions.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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81 Cal.App.2d 348

In re PIATT'S ESTATE.

PIATT v. NORTON et al.

Civ. 13398.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1947.

Rehearing Denied Sept. 25, 1947.

Hearing Denied Oct. 23, 1947.

1. Wills 🔑783

Where decedent executed a prenuptial will which was not changed after marriage and which did not provide for husband and which did not mention husband in such a way as to show an intention not to provide for husband, and where provision was not made for husband by marriage contract whatever interest surviving husband would have taken if decedent had died intestate would go to surviving husband under the statute unaffected by provisions of will. Probate Code, § 70.

2. Appeal and error 🔑931(1)

On appeal evidence would be taken in the light most favorable to respondent.

3. Frauds, statute of 🔑4

A prenuptial agreement not in writing that all property of the parties should be held in common was invalid. Civ.Code, § 178.

4. Frauds, statute of 🔑1, 144

The statutory prohibition against entering into oral prenuptial agreement is for the benefit of the wife to prevent a fraud upon her, and not being malum in se, is a prohibition which wife may waive after marriage by special agreement, or by affirmance. Civ.Code, § 178.

5. Frauds, statute of 🔑158(4)
Husband and wife 🔑264

Evidence sustained finding that an invalid oral prenuptial agreement that all property of the spouses should be held in common was ratified by wife after marriage and that property of the parties was community property so as to entitle surviving husband after wife's death to distribution of one half thereof as against surviving brothers and sisters of the wife claiming under a prenuptial will, where will did not dispose of the one half subject to the wife's testamentary disposition, because the will was invalid in that the surviving husband was not provided for therein or by the marriage contract. Probate Code, §§ 70, 201–203, 223; Civ.Code, §§ 164, 178.

6. Husband and wife 🔑264

Evidence of circumstances under which deed to real property was placed in name of wife together with circumstances of spouses' marital conduct supported implied finding that statutory presumption that property conveyed in name of a married woman is her separate property was rebutted, so as to entitle the surviving husband to distribution of one half thereof on the ground that the property was community property of himself and the deceased wife. Civ.Code, § 164.

7. Appeal and error 🔑1011(1)

Conflicts in the evidence are matters for the trier of facts.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Petition by J. H. Piatt for a decree distributing to petitioner certain real and personal property of the estate of Mona M. Skinner Piatt, deceased, wherein Carrie S. Norton and others, the surviving brothers and sisters of deceased, filed objections. From a judgment granting the petition, objectors appeal.

Judgment affirmed.

King, King & Ghidella, of Napa, and A. Dal Thomson, of San Francisco, for appellants.

Boynton & Boynton, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The surviving husband of Mona Piatt filed his petition for a decree distributing to him certain real and personal property on the ground that it was community property of himself and the deceased. The surviving brothers and sisters of the deceased filed objections claiming under a prenuptial will. They are the appellants from a decree granting the petition.

The decedent executed her will on June 18, 1928, naming the appellants herein as beneficiaries. On July 12, 1930, the decedent and the petitioner herein intermarried. They lived together as husband and wife until the death of decedent on March 10, 1942. She made no changes in the will. The surviving husband, asserting that the will was revoked by the subsequent marriage, and that the entire estate was community property, sought a decree distributing it to him. In the appeal from the decree granting this petition appellants state these two issues—whether the will as a whole was revoked, and whether the property is separate or community. The solution of the first question (as modified by the existing conditions) rests on section 70 of the Probate Code which reads: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." Hence the issue here is really whether the will was revoked in so far only as it affects the interest of the petitioner in the estate.

[1] The section, in so far as it relates to the rights of the surviving spouse, has been interpreted in Re Estate of Derruau, 133 Cal.App. 769, 24 P.2d 865; In re Estate of Rozen-Goldenberg, 1 Cal.App.2d 631, 37 P.2d 132; In re Estate of Haselbud, 26 Cal. App.2d 375, 79 P.2d 443; In re Estate of Russell, 43 Cal.App.2d 319, 110 P.2d 718; and In re Estate of Piatt, 57 Cal.App.2d 211, 134 P.2d 321. In the Piatt case, 57 Cal.App.2d at page 212, 134 P.2d at page 322, the court, relying on the earlier citations, said: "The proper construction to be placed upon the quoted words is that the surviving spouse shall receive that part of the estate to which he or she would be entitled had the other died intestate." In re Estate of Bendell, 59 Cal.App.2d 165, 138 P.2d 378, 379, is not out of harmony with any of the cases cited. It was there held that section 70 revoked a pre-nuptial will "only as to the surviving spouse." The result of these holdings is that whatever interest the petitioner herein would have taken if the deceased had died intestate goes to him as the surviving spouse unaffected by the provisions of the will.

The interest of the surviving spouse in this case which is unaffected by the will depends upon whether the property is community or whether it was the separate property of the deceased. If community his rights are fixed by section 201 of the Probate Code reading: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code." If the property is separate and the decedent leaves a surviving spouse and brothers or sisters, as survivors of the parents of the deceased, (as is the case here) the property goes one-half to the surviving spouse and one-half to these other heirs (Probate Code section 223). The application of these code provisions to the case at hand determines the rights of the petitioner to be this: that, if the property is community, one-half goes to petitioner absolutely by reason of section 201; the other half was subject to decedent's testamentary disposition. But not having made a valid will, as to the interest of the surviving spouse because of section 70, the remaining one-half of the community stands undisposed of by will and hence goes to petitioner under the exception made in section 201. This is so because the interest of the surviving spouse to inherit the portion of the community not disposed of by will is an interest which rests in him on the death of the wife not leaving a valid will. Where the conditions mentioned in section 70 arise, and the will stands revoked as to the interest of the surviving spouse, it is revoked as to all interest he would have had if the decedent had died intestate.

[12] The question relating to the character of the property is one of fact only. Taking the evidence in the light most favorable to respondent as we are required to do it appears that, prior to their marriage, the parties orally agreed that all their property should be held in common. Each then had a home with furniture and other personal property, though the holding of the petitioner was of comparatively small value. Three months prior to the marriage the decedent borrowed $3,000 on her property which she turned over to petitioner. The parties continued to live in decedent's house until 1934 when they purchased a home on Boynton Avenue, which is the bulk of the estate in controversy. The deed to this property was taken in the name of Mrs. Piatt. But the property was purchased entirely on credit with the joint notes of husband and wife. No portion of the purchase price was paid at the time of the transfer and the evidence is not clear whether the notes then given have been paid. The testimony of petitioner seems to indicate, because of failure to make direct answer, that the bulk of such payments as were made came from the funds of decedent. However evidence was had showing that both parties were employed—the husband as an engineer, the wife as a school teacher. They apparently kept their earnings in separate bank accounts, but otherwise used them for their common needs.

[3-5] Of course the oral prenuptial agreement was invalid because not in writing. Civil Code, section 178. But the evidence shows unmistakably that such oral agreement was fully confirmed, ratified, and executed after the marriage.

This is not a case of a contract malum in se. The prohibition is for the benefit of the wife—to prevent a fraud upon her. It is a restriction which she may waive after marriage by special agreement or by affirmance. In Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398, the supreme court affirmed an oral contract made both before and after marriage. In Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905, and Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708, this doctrine was affirmed. These cases do not hold directly that an oral prenuptial contract is enforceable. In the Kenney case the contract was made both before and after marriage but nothing was said about the invalidity of the prenuptial contract, and the succeeding cases merely followed the rule of law of the Kenney case. Here no specific evidence was offered of a second contract made after the marriage. The question then arises whether such a contract may be implied from the conduct of the parties and the circumstances in evidence. We are satisfied that the evidence recited supports such finding particularly since there is nothing in the evidence indicating that the parties had any quarrel over the status of their respective property rights. To the contrary the evidence is that throughout the marriage the decedent indirectly confirmed the terms of the prenuptial agreement and orally affirmed that all these properties were held in joint ownership.

[6] The circumstances under which the deed to the Boynton Avenue property was placed in the name of the wife together with all the circumstances of their marital conduct were sufficient to support the implied finding that the presumption mentioned in section 164 of the Civil Code, that property conveyed in the name of a married woman is her separate property, was rebutted.

[7] True it is that there are conflicts in the evidence and that the testimony of petitioner is somewhat evasive. But these were matters for the trier of the facts.

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.

81 Cal.App.2d 297

CALHOUN v. CALHOUN.

Civ. 3666.

District Court of Appeal, Fourth District, California.

Aug. 21, 1947.

Rehearing Denied Sept. 18, 1947.

Hearing Denied Oct. 16, 1947.

1. Trial 🔑158

A motion to exclude evidence based on insufficiency of the complaint is in the nature of a general demurrer and must be determined on that principle.

2. Divorce 🔑331

Plaintiff's right to support from defendant, if such right existed at time defendant obtained a decree of divorce in a foreign state, was a right existing by reason of the marital status or contract and was classifiable as a "property right".

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

3. Divorce 🔑231

The permanent allowance provided for by statute authorizing suitable allowance to wife for her support where a divorce is granted for an offense of the husband is not "permanent alimony", nor is it merely a substitute for the wife's interest in the common or separate property of the husband, but is allowed by way of compensation for a wrong done to the wife. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent Alimony".

4. Divorce 🔑331

Where a divorce is obtained in a foreign state upon substituted service, and there remains community property within California not disposed of by parties or any court of competent jurisdiction, parties thereafter hold such property as tenants in common, if divorce is granted for any cause other than adultery or cruelty, and each becomes owner of an undivided one-half interest in such property, and if not estopped, respective rights of parties may be enforced in an independent action.

5. Pleading 🔑6

Complaint need not allege facts of which the court will take judicial notice.

6. Evidence 🔑43(3)

District Court of Appeal will take judicial notice of former proceedings in the court bearing generally upon the same subject, between the same parties.

7. Divorce 🔑331

In action against former husband who had obtained final divorce decree in Nevada, plaintiff could not obtain permanent alimony wherein former action by plaintiff against former husband plaintiff accepted plaintiff's proportionate share of community property awarded without complaint and in connection with the distribution of the community property plaintiff was denied permanent support and maintenance. Civ.Code, §§ 141, 142; Comp. Laws Nev. § 9467.06.

8. Estoppel 🔑68(2)

Plaintiff was estopped from relying on validity of foreign divorce decree obtained by plaintiff's former husband and from seeking alimony where in a previous action plaintiff had sought separate maintenance knowing that a final decree of divorce, legal on its face, had been obtained by plaintiff's former husband and knowing that burden was upon her to establish the illegality of decree before plaintiff could obtain separate maintenance.

9. Election of remedies 🔑14

A party having two or more co-existing modes of procedure and relief allowed by law on the same state of facts, one of which is inconsistent with the other, may not pursue both but must choose between them, and when, with knowledge of the facts, he has clearly elected to proceed upon one, he is thereby bound and will be estopped from invoking the other.

10. Divorce 🔑255

Plaintiff was estopped from obtaining alimony from former husband where any claim plaintiff might have had for permanent support, whether by way of alimony or separate maintenance was considered and disposed of in a previous action between the same parties.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Ritchie Calhoun against Samuel Wilson Calhoun for alimony as of date of a Nevada divorce decree. From judgment of dismissal, plaintiff appeals.

Judgment affirmed.

Clarence Harden, of San Diego (Henry F. Walker, of Los Angeles, of counsel), for appellant.

Monroe & McInnis, of San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff and defendant, after several years of married life, separated in November, 1939. On January 3, 1941, defendant herein brought an action for divorce in San Diego County, alleging wilful desertion by his wife. The court found that Mr. Calhoun had deserted his wife without cause and denied the divorce in a decree entered November 13, 1941. In February, 1943, Mr. Calhoun left California and on March 21, 1943, he filed an action for divorce in Nevada under section 9467.06, Nevada Statutes, on the ground that the parties had lived separate and apart without cohabitation for more than three years. Under that section a cause of action arose without regard to either party's fault or wrong doing. Mrs. Calhoun was personally served with summons and complaint in California. She did not appear and a divorce was granted to Mr. Calhoun on April 22, 1943. That decree became final. Thereafter, on August 17, 1943, Mrs. Calhoun filed an action for injunction, separate maintenance, and sought a division of the community property. She attacked the validity of the Nevada divorce decree. See Calhoun v. Calhoun, 70 Cal.App.2d 233, 160 P.2d 923. The trial court there found and concluded that the Nevada court, although it did not acquire jurisdiction over the person of plaintiff, had jurisdiction of the subject matter of the divorce and that the decree as entered was entitled to full faith and credit; that the parties ceased to be husband and wife at the time of the entry thereof; and that plaintiff was not entitled to an award of separate maintenance. That judgment has become final.

These general facts are more specifically alleged in three counts of plaintiff's complaint herein. She now seeks alimony from defendant in the sum of $150 per month commencing as of April 27, 1943, the date of the Nevada divorce decree. A general demurrer was interposed and overruled. After answer filed and on trial, after the first witness was sworn, defendant immediately objected to the introduction of any evidence on the ground that the plaintiff failed to state a cause of action. The court sustained the objection, refused to take any evidence, and entered a formal judgment of dismissal. The appeal comes to us on a settled statement in lieu of both reporter's and clerk's transcripts.

[1] A motion to exclude evidence based on insufficiency of the complaint, as here made, is in the nature of a general demurrer to the complaint and must be determined on that principle. Venturi v. Zurich General A. & L. Co., 14 Cal.App.2d 89, 57 P.2d 1002; Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 151, 157 P.2d 1.

Plaintiff first argues from the facts stated in the complaint that the Nevada decree was based on constructive or substituted service and that that court at no time acquired jurisdiction over plaintiff's person, citing Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; Matter of McMullin, 164 Cal. 504, 129 P.2d 773; Davis v. Davis, 70 Colo. 37, 41, 197 P. 241; 2 Nelson on Divorce and Separation, pp. 896–898; and Esenwein v. Commonwealth of Pennsylvania, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608, 157 A.L.R. 1396.

It is further argued that a foreign divorce decree, although fully valid insofar as the determination of the marital status is concerned, does not necessarily constitute a defense to an action for alimony, citing the concurring opinion of three justices in DeYoung v. DeYoung, 27 Cal.2d 521, 527, 165 P.2d 457, 460, in which it is said:

"Separate maintenance differs from alimony in that it presupposes a continuing marital status. The right to it cannot be established without proof that such status is existent as of the time of trial. Proof of prior dissolution of the marriage is, therefore, a complete defense to such an action."

"* * * rights to support in the form of alimony as of the date of divorce (which alimony may continue into the single status), at least where there is no adjudication of fault * * * may well be subject to judicial determination in a subsequent action in a proper forum having personal jurisdiction over both parties. Such an action, being based on the marital status as it existed prior to the divorce, would have to be instituted before the statute of limitations or laches barred it."

From these and other authorities cited, plaintiff concludes that her right to alimony, a right in personam, could not be and was not determined or destroyed by the ex parte Nevada decree; that an action for alimony is in personam and not in rem, and that since a wife could not obtain alimony in a suit brought by her upon constructive service alone, the law should not and does not then allow the husband to bar the wife's right to alimony in an action based upon such service; that to hold otherwise would be contrary to and violative of the due process requirements of the federal constitution.

Respondent argues that since the husband established a bona fide residence in the State of Nevada and there secured a divorce from his wife, based upon summons served upon her within the State of California, that judgment has become final as to the marriage status and the wife may not thereafter maintain an action against the husband for alimony, since the parties are no longer husband and wife, citing Calhoun v. Calhoun, supra; Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351; Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897. While we may be impressed with the supporting authorities cited and the general conclusion reached by the three concurring justices in that portion of their opinion in DeYoung v. DeYoung wherein they state that in a divorce action obtained in a foreign state based upon constructive service, the court there may have authority to adjudicate the marital status (in rem) of persons residing in that state but has no jurisdiction to adjudicate away (in personam) any of the then vested property rights of the absent spouse who does not reside in such state, who is not personally served with process in that state, and who does not appear in the action; and that it would then follow that the personal rights of the spouses in property not located within the jurisdiction of the court of foreign jurisdiction remain subject to litigation in the proper forum, we do not deem it necessary in this proceeding to determine that question.

[2, 3] Defendant Calhoun did obtain a decree of divorce in Nevada based upon substituted service, which decree became final in so far as it affected the marital status. The ground for obtaining the divorce was the fact that the parties lived separate and apart without cohabitation for more than three years. Who was at fault was not determined nor was it necessary to determine that question in that action under the law of Nevada. Plaintiff's right to support, if such right existed at the time, was a right existing by reason of the marital status or contract and may be classified as a property right. Ponsonby v. Sacramento Suburban Fruit Co., 210 Cal. 229, 291 P. 167. Civ.Code secs. 14 and 155; Crouch v. Crouch, supra, 28 Cal.2d at page 262, 169 P.2d 897. Such right to support, if existent, is enforceable (1) under section 137 of the Civil Code, where the legislature has provided, by technical description, the manner in which the husband or wife may be required to pay as alimony any money necessary for his or her support, as the case may be, when an action for divorce is pending, and for permanent support without divorce. The section is entitled "Alimony pendente lite." (2) Section 139 of the Civil Code provides that where a divorce is granted for an offense of the husband the court may make "suitable allowance to the wife for her support". The legislature did not classify this latter form of support as alimony in that section although it has been referred to as such by the courts. See Ex parte Spencer, 83 Cal. 460, 23 P. 395, 17 Am.St.Rep. 266, wherein it is held (quoting from the syllabus) that: "The permanent allowance provided for by section 139 of the Civil Code is not, properly speaking, permanent alimony, nor is it merely a sub-

stitute for the wife's interest in the common or separate property of the husband, but is allowed by way of compensation for a wrong done to the wife."

The final divorce decree obtained in Nevada did not find that the divorce was granted for any wrong that was done to the wife, but merely determined that the parties had been separated for more than the three-year period without cohabitation.

[4] As there was admittedly community property within this state which had not been disposed of by the Nevada decree, plaintiff had property rights other than her claimed right for permanent support. It has been repeatedly held that where a divorce is obtained in a foreign state upon substituted service, and there remains community property within this state not disposed of by the parties or any court of competent jurisdiction, the parties thereafter hold such property as tenants in common, if the divorce is granted for any cause other than adultery or cruelty, and each becomes the owner of an undivided one-half interest in such property, and if not estopped, the respective rights of the parties may be enforced in an independent action. Lorraine v. Lorraine, 8 Cal.App.2d 687, 48 P.2d 48. Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074; 5 Cal.Jur. p. 360, sec. 32; 3 Cal.Jur. Ten-Year Supp. 673, § 153.

In the settled statement on appeal, respondent contends, in addition to the previous contentions mentioned, that plaintiff seeks in this action again to have adjudicated and determined the same issue which was expressly adjudicated against her in a previous action (Calhoun v. Calhoun, supra), and that the judgment and decisions of this court and the ruling of the Supreme Court denying a hearing constituted an adjudication and determination of the rights of the parties hereto and constituted an adjudication that the plaintiff is not entitled to recover alimony for her support. This point is referred to in both appellant's and respondent's briefs. We will therefore consider this question first.

[5, 6] It is not necessary to allege facts in a complaint of which the court will take judicial notice. French v. Senate, 146 Cal. 604 80 P. 1031, 69 L.R.A. 556, 2 Ann.Cas. 756. This court will take judicial notice of the former proceedings had before this court. Calhoun v. Calhoun, supra. The record on appeal in the former action shows that it was brought by the wife for the purpose of obtaining permanent support (denominated separate maintenance) and for the purpose of determining property rights of the parties. The action was based upon the same set of facts as here presented. The parties in the former and present actions are the same. Under such circumstances it has been held that this court may take judicial notice of other proceedings in the same court bearing generally upon the same subject, between the same parties. Gay v. Gay, 146 Cal. 237, 241, 79 P. 885. See, also, Sewell v. Johnson, 165 Cal. 762, 134 P. 704, Ann.Cas.1915B. 645; 10 Cal.Jur. p. 728, sec. 52.

With these rules in mind, we will proceed to analyze the allegations of the complaint. Plaintiff knew, at the time she filed her previous action (Calhoun v. Calhoun, supra), that defendant had obtained a decree of divorce in Nevada on the grounds stated, and that the decree had become final and on its face was a valid and binding decree as to the marital status of the parties. She likewise knew and alleged that the parties had property rights within this state, both separate and community, that were not determined, and sought permanent support for herself. Plaintiff, knowing all of these facts, filed the action referred to in her complaint (Calhoun v. Calhoun, supra), and by its very terms she there sought relief, in an action entitled "Complaint for Separate Maintenance, to Set Aside Judgment, for an Injunction, and for Other Relief". She then proceeded to allege the necessary jurisdictional facts, that there were no children the issue of the marriage, that the parties owned certain described community property, that defendant husband owned certain described separate property, and that defendant was able to "support" plaintiff.

As a second cause of action she alleged certain facts in reference to a prior action instituted on January 3, 1941, by the husband, which action was contested by the wife, and the ultimate determination thereof in the wife's favor; that the husband later, in 1943, instituted the divorce proceedings in Nevada and she claimed that the decree obtained was void; that the defendant Calhoun intended to dispose of "all property of every kind and character owned by him" in california, with the intention of depriving plaintiff of "support and maintenance", and if accomplished her "right to support and maintenance" would be imperiled and probably lost. The prayer for relief as for a "decree of separate maintenance", for a division of the community property, a restaining order, for costs, and "general relief".

Defendant answered and denied that the parties were husband and wife; claimed the validity of the Nevada decree; that he had remarried; that he became a bona fide resident in that state, and was still residing there when this action was instituted. He alleged that the property described in plaintiff's complaint was community property; that he returned to California merely for the purpose of attempting to negotiate and secure a division of the properties formerly owned by them, and was then served with a complaint and summons in that action.

In his cross-complaint he set up the Nevada decree as a defense, alleged that the parties acquired their residence, household furnishings and certain other described properties mentioned, as community property, and that it had not been divided between the parties; that plaintiff refused to recognize the validity of the Nevada divorce and now is asking for separate maintenance or alimony"; that there is a dispute between the parties in that Mrs. Calhoun "claims to be the wife of cross-complainant" and "claims to be entitled to support or alimony from him". The prayer of the cross-complaint seeks a decree "adjudicating the marital status" of the parties and "also making proper adjudication of their rights in and to the property acquired by them", and for general relief.

The court found that Mr. Calhoun became and was a bona fide resident of Nevada; that the decree of divorce rendered by the court there was valid as to the marital status; that no fraud was practiced by him; and that the parties still owned the described real and personal community property. It awarded to plaintiff the dwelling house and furnishings and certain other community property, together with an award of $1,000 cash (which was immediately paid into court by the defendant), and an automobile. The court then found that said properties and monies fairly equaled the value of plaintiff's community interest. It then concluded that "plaintiff is entitled to no other relief in this action".

The judgment as entered recites the fact that the property thus awarded is "in lieu of her share of the community property", and that which is awarded to plaintiff is "in full satisfaction of all of her community interest and that the remaining property of every nature, standing in defendant's name, shall be his sole and separate property" and that plaintiff "recovered no other or further relief from defendant".

There is a stipulation in that record, between the parties reciting that "Whereas, the above entitled cause came on for trial upon the issues claimed by the pleadings" and "Whereas, the parties are satisfied with the division of the property" and that the acceptance of the money and property shall not operate against her in her right to appeal from the remaining portion of the judgment.

It appears to us that notwithstanding any possible legal right to alimony plaintiff may have had at that time, she should now be estopped from again prosecuting this action for claimed permanent alimony, for several reasons.

[7] (1). Plaintiff has accepted her proportionate share of the community property without complaint. In connection with this equitable distribution of the community property and court denied her permanent support and maintenance. If, after having accepted her share thereof, she should now be permitted to obtain permanent alimony from defendant it would be but an after-acquired means of obtaining and securing for herself his one-half of the community property in the form of a judgment for permanent alimony under sections 141 and 142 of the Civil Code.

[8, 9] (2). It further appears that plaintiff sought permanent support (denominated separate maintenance) from defendant in the previous action, knowing full well that a final decree of divorce, legal on its face,

had been obtained in Nevada, and knowing that the burden was upon her to establish its illegality before she could obtain separate maintenance. If she elected her remedy by seeking such separate maintenance rather than relying upon the validity of the decree and seeking alimony, she should now be estopped in this action from again pursuing the remedy she may have been entitled to seek at that time. This general rule is stated in 10 Cal.Jur. p. 1, sec. 1, to the effect that: "* * * a party having two or more coexisting modes of procedure and relief allowed by law on the same state of facts, one of which is inconsistent with the other, may not pursue both but must choose between them, and when, with knowledge of the facts, he has clearly elected to proceed upon one, he is thereby bound and will be estopped from invoking the other * * *. This doctrine is generally regarded as being an application or extension of the law of estoppel. And it has been said that it rests also upon one of the underlying or fundamental concepts of the reformed procedure, to wit, the prevention of a multiplicity of suits." See, also, Sanguinetti v: Sanguinetti. 9 Cal.2d 95, 99, 69 P.2d 845, 111 A.L.R. 342.

[10] (3). Furthermore, from an examination of the facts pleaded in the instant complaint and the settled statement on appeal, it appears that such property rights as plaintiff and defendant then possessed, whether community or otherwise, and whether such rights arose from the marriage contract, by way of a right to separate maintenance or claimed right to alimony, were disposed of in the former action. Brown v. Brown, 170 Cal. 1, 5, 147 P. 1168. Metropolitan Life Insurance Co. v. Welch, 202 Cal. 312, 318, 260 P. 545. A recitation of the pleadings, findings and judgment are more than convincing that any claim plaintiff might have had for permanent support, whether by way of alimony or separate maintenance, was considered and disposed of by the trial court. From defendant's answer and cross-complaint it is clear that he did not know whether plaintiff was seeking separate maintenance or alimony under her pleadings. He defended his action predicated upon either ground and asked for a clarification and an adjudication of any claimed rights she may have had, either for permanent support or alimony. The question of her permanent support or alimony was directly raised by those pleadings and the court found that plaintiff was not entitled to any relief in this respect.

Judgment affirmed.

BARNARD, P. J., concurs.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

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81 Cal.App.2d 352

PETERSON v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 3676.

District Court of Appeal, Fourth District, California.

Aug. 26, 1947.

1. Workmen's compensation 🔑1319

While a claim for both ordinary compensation and for compensation for misconduct of employer may be included in a single application, the provisions of the Labor Code indicate an intention that some definite step, other and different from the filing of a general application, must be taken to raise an issue of employer's willful misconduct, and that an application setting up only the ordinary issues is not sufficient for the purpose. Labor Code, §§ 4553, 5405, 5407, 5410, 5500, 5501.

2. Workmen's compensation 🔑1319

Original application for compensation merely setting forth as cause of injury that a cave-in of trench in which claimant was working resulted because the walls of the trench were not properly shored up and stating the only question presented as being whether or not the claimant had entirely recovered or had suffered permanent disability, was not sufficient to raise issue of willful misconduct of employer in not adequately bracing the trench as required by safety orders. Labor Code, §§ 4553, 5405, 5407, 5410, 5500, 5501.

3. Workmen's compensation ⚿1215

Rule of Industrial Accident Commission that where new issues are raised at hearing and formally stated in record, application or answer shall be deemed amended to conform to such subsequent statement of issues and proof thereon, if effective under some circumstances as a substitute for the statutory requirement that a proceeding for compensation on ground of willful misconduct of employer be "commenced", it would be at least necessary that the issue be clearly raised, that it should be understood by all concerned that the rule was being applied, and that the Commission should then act in accordance with it and in reliance upon it. Labor Code, §§ 4553, 5407.

4. Workmen's compensation ⚿1215

Record established that at hearing on application for ordinary compensation, neither parties nor referee deemed issue of willful misconduct of employer to have been raised so as to constitute the commencement of proceeding for willful misconduct within 12 months from date of injury under rule of Industrial Accident Commission providing that where new issues are raised at hearing and formally stated in record, application should be deemed amended to conform to such subsequent statement of issues and proof thereon. Labor Code, §§ 4553, 5407.

5. Workmen's compensation ⚿1215

Where application for ordinary compensation was insufficient to include issue of compensation for employer's willful misconduct, application filed more than a year after date of the injury bringing in issue of employer's willful misconduct could not relate back and be effective as of a date within the statutory 12 month period in face of clear provisions of Labor Code that proceeding for compensation on ground of serious and willful misconduct of employer must be commenced within 12 months from date of injury and that period should not be extended by filing of application for compensation benefits under other provisions of the Code. Labor Code, §§ 4553, 5407.

Proceeding by H. H. Peterson, employer, to review an award of the Industrial Accident Commission, awarding additional compensation on account of serious and willful misconduct on the part of the employer to Melvin Barckley, employee.

Award annulled.

Luce, Forward, Lee & Kunzel and Don P. Fogarty, all of San Diego, for petitioner.

R. C. McKellips and E. B. Connolly, both of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is a proceeding to review an award of the Industrial Accident Commission, awarding additional compensation on account of serious and willful misconduct on the part of the employer.

The applicant, Melvin Barckley, was injured on January 13, 1941, when one wall of a hole or trench in which he was working caved in and pinned him against the opposite wall. He was paid compensation until September 22, 1941, when a dispute arose as to whether he had entirely recovered. On October 30, 1941, he filed an application for an adjustment of his claim with the respondent Commission stating that he "sustained injury * * * as follows: the excavation in which applicant was working caved in due to the fact that the walls of the excavation were not properly shored up." He further stated in the application that the reason for filing the claim was that a question had arisen as to whether "the applicant has recovered and is now able to resume work and does not suffer from any permanent disability."

At the hearing on December 4, 1941, the referee reviewed the admitted facts and stated the sole issue as "nature, extent and duration of disability." Counsel for all parties then agreed that the facts and issues were thus correctly stated. The referee then asked the applicant questions relating to the nature of his injury and his present condition. Counsel for the applicant, after asking similar questions, started to ask questions relating to the size and depth of the hole in which the injury occurred. When he asked whether the dirt thrown up to the top of the hole was allowed to remain at the edge, the referee asked "What is the materiality of this?" Counsel replied: "Just a suggestion about this matter of shoring up." The referee then said: "That is not in issue. If you want to raise the issue, you will have to do it." Counsel replied: "Yes, I think we probably should raise that." The referee then said: "Additional Issue: Was injury proximately caused by serious and willful misconduct of the employer?" The referee then stated that the case would be continued, to be reset on notice, and after a short discussion about having the applicant examined by medical experts and as to what medical evidence would be available the referee said to applicant's counsel "Will you file a supplemental application setting forth the basis on which you are claiming serious and willful misconduct, the violation of the particular Safety Orders. We require that now, so the employer will be put on notice," with a further statement as to the reasons for this. Counsel for applicant replied that he would do so.

The matter was continued several times and finally ordered off calendar in 1942. On February 27, 1946, the applicant, through a different attorney, asked to have the matter put back on the calendar. On March 21, 1946, it was set and noticed for April 29, 1946. On April 23, 1946, the applicant filed notice that he had discharged both his first and second attorneys and that he then had no attorney. A different referee filed a report as to the hearing on April 29, 1946. After referring to the fact that no amended application had been filed as suggested by the referee at the original hearing in 1941, he stated that at this hearing he had suggested to the applicant "that he should have this filed and that he get an attorney to represent him as long as he insists on going ahead with the issue of serious and willful misconduct."

On May 7, 1946, a notice was given that a further hearing would be had on July 19, 1946. On July 3, 1946, a notice was given that a further hearing "on serious & willful misconduct" would be had on July 19, 1946. At the beginning of the hearing on July 19, 1946, an order was made "vacating application No. LA 85-297, and the application will be considered as an amended application in the present pending application No. LA 56-457", and an additional issue, "statute of limitations", was stated. A further hearing was then had on all issues, including serious and wilful misconduct. The referee found that the employer was guilty of serious and wilful misconduct in that he did not adequately brace the trenches as required by three designated Safety Orders. Two separate "findings and award" were made and entered. In one, denominated "(Normal issues)", the applicant was awarded $4,467.02 for partial permanent disability. In the other, designated "(Serious and Willful misconduct)", the applicant was awarded an increased benefit in the sum of $2,333.51. The latter award only is here attacked.

The petitioner contends that in making this award the Commission acted in excess of its jurisdiction in that the issue of serious and willful misconduct was not raised within the time required by section 5407 of the Labor Code, which requires that such a proceeding may be commenced within twelve months from the date of injury, and that said period shall not be extended by the filing of an application for compensation under other provisions of the act.

The respondents contend that it was not necessary to file a separate written application to recover additional compensation because of willful misconduct; that only one proceeding is contemplated by the act; that a claim for such additional compensation is sufficiently raised if such a cause of action can be ascertained from the general facts as to the cause of the injury; that the original application here alleged a claim for compensation which involved an injury caused by improper shoring of an excavation; that the employee thus commenced the proceeding to recover both normal compensation and additional compensation, because of willful misconduct, by filing his original application; that there is no statutory requirement that such issues be specifically alleged or pleaded separately; and that the original application here was sufficient to raise the issue of willful misconduct if nothing else had been done.

The respondent Commission further contends that under its rule-making power it had adopted a rule providing that "Where new issues are raised at a hearing and formally stated in the record the application or answer, as the case may be, shall be deemed amended to conform to such subsequent statement of issues and proof thereon"; that the misconduct matter was raised as an issue and formally stated in the record at the hearing on December 4, 1941; that this eliminated the necessity of filing any amended application since the original application was deemed amended, as of that date, to include the issue of willful misconduct; and that the amended application filed in 1946 related back to the date the original application was filed, bringing it within twelve months of the date of the injury.

[1, 2] With respect to the first of these contentions, the pertinent statutes of the Labor Code seem to require some definite step, in the way of allegation or pleading, to raise the issue of compensation for misconduct under section 4553, in addition to what is required for raising the issue of ordinary compensation. Section 5405 provides that proceedings to collect ordinary benefits may be commenced within six months from the date of injury. Section 5407 provides that proceedings to collect extra compensation for willful misconduct may be commenced within twelve months from the date of injury, and that this period shall not be extended by filing an application for benefits under other provisions of the act. Section 5410 allows a still longer period for instituting proceedings for the collection of benefits covering new and further disabilities arising from the original injury, but again provides that this shall not extend the limitation with respect to willful misconduct provided by section 5407. While a claim for both sorts of benefits may well be included in a single application, the language of section 5407 indicates an intention that some definite step, other and different from the filing of a general application, must be taken to raise an issue of willful misconduct, and that an application setting up only the ordinary issues shall not be sufficient for that purpose. The respondents contend that sections 4553 and 5407 contain no provisions as to how such a proceeding for the raising of such an issue shall be commenced, whereas sections 5500 and 5501 provide for the application on the ordinary issue. The latter sections are contained in a chapter devoted to pleading and it is nowhere stated therein that they relate only to applications on the ordinary issues. Section 5500 states that the application shall be in writing and shall state the general nature of the controversy concerning compensation, or any right or liability arising out of or incidental thereto. This would seem to have been intended to apply to both of these kinds of issue. In any event the original application here merely set forth as the cause of the injury that a cave-in resulted because the walls of the excavation were not properly shored up. It also stated the only question presented as being whether or not the applicant had entirely recovered or had suffered permanent disability. That this was the only issue raised, was recognized by the referee at the first hearing and concurred in by all parties. In our opinion, the application as originally filed was not sufficient to raise the willful misconduct issue.

[3] The further contention is that subsequent happenings, in two respects, sufficiently raised this issue within twelve months of the date of injury. In this regard it is first contended that under the rule adopted by the Commission the issue of willful misconduct was raised and stated at the hearing on December 4, 1941, and may therefore be deemed to be an amendment to the application as of that date, raising that issue. While this rule may be effective with respect to the normal issues which may be incidental to and within the scope of the original application for ordinary benefits, it may well be questioned whether any such rule can be used as a basis for, or be substituted for the requirement that one be commenced, a proceeding for the special purpose named in section 5407. If it be assumed that this rule could be effective for such a purpose under some circumstances, it would at least be necessary that the issue be clearly and definitely raised, that it should be understood by all concerned that the rule was being applied, and that the Commission should then act

in accordance with it, and in reliance upon it.

[4] The respondents argue in their brief that at the hearing on December 4, 1941, the applicant claimed that his injury "was proximately caused by the serious and willful misconduct of his employer, in that the petitioner herein had failed to comply with the Safety Orders of the Commission relating to the shoring of trenches and excavations," and that the issue thus raised was formally stated by the referee. We cannot find in the record that anything was said at that time about this petitioner having failed to comply with any Safety Orders, whether relating to the shoring of trenches and excavations or otherwise. The grounds or "general nature" of the claim that there had been willful misconduct were not stated orally, nor does it clearly appear that the issue of wilful misconduct was intended to be definitely raised at that time. When asked as to the materiality of a question which could relate to the general issue, the applicant's attorney replied that it was just a suggestion about the matter of shoring up. The referee, apparently thinking of the issue of willful misconduct although it had not been mentioned, stated that it was not in issue and that if the attorney wanted to raise that issue he would have to do so. The attorney, instead of saying he was raising that issue or attempting to do so, replied: "Yes, I think we probably should raise that." The referee then said: "Additional issue: Was injury caused by the serious and willful misconduct of the employer." That this was merely a statement of the issue that he thought should be raised if the attorney so desired, and was not "deemed" as an amendment, is indicated by what was then done. Immediately thereafter the referee continued the case, to be reset on notice, and asked the attorney if he would file a supplemental application setting forth the basis on which he was claiming serious and willful misconduct, including a statement of the particular Safety Orders which he might claim had been violated and which had in no way been mentioned, and stating that such a supplemental application was required so the employer would be put on notice. It clearly appears that neither the referee nor the parties "deemed" what had occurred as constituting an amended or supplemental application raising the new issue, that they did not so consider it or act upon it, and that they proceeded on the assumption that something further would be done if it was desired to raise that issue.

Nothing further was done with respect to this new issue until July, 1946. Again, the referee did not "deem" that the original application had been amended in December, 1941, to raise the issue of willful misconduct but he then ordered the application raising this issue, which had been filed in response to his further suggestion made on April 29, 1946, vacated and ordered that it be considered as an amendment to the original application. This was the first time the original application was actually deemed to have been amended, raising the issue of willful misconduct, and this was because of the new application filed in 1946.

[5] The hearing leading to the award here in question was then held, based on the new application thus deemed to be an amendment to the original application, on the theory that it related back to the date of filing the original application. While there is, and should be, great liberality in the matter of amendments this amendment in 1946, bringing in a new and different issue which must be separately "commenced", could not relate back and be effective as of a date in 1941, in the face of the clear provisions of section 5407 of the Labor Code. While considerable informality in proceedings before the Commission is permitted, and properly so, the meaning and effect of these statutory provisions cannot be entirely set aside, and some attempt must be made to comply with them and to raise issues in the manner and within the time there provided. We conclude that the respondent Commission exceeded its jurisdiction in making the particular award which is here in question.

The award is annulled.

GRIFFIN, J., concurs.

81 Cal.App.2d 306

DIVISION OF LABOR LAW ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, v. DENNIS.

Civ. 3670.

District Court of Appeal, Fourth District,
California.
Aug. 21, 1947.

1. Contracts 🔑187(1)

The interests of third-party beneficiaries of a contract between other parties are recognized and may be enforced by action upon the contract executed by the other parties though parties to be benefited are not named in contract, if terms thereof show that contract was made for their benefit. Civ.Code, § 1559.

2. Limitation of actions 🔑24(2)

In order for an action to be founded upon an instrument in writing within the four-year statute of limitations, instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought. Code Civ.Proc. § 337.

3. Limitation of actions 🔑24(2)

The promise upon which action is based must be one arising directly from the writing itself and included in its terms in order for action to be founded upon an "instrument in writing" within four-year statute of limitations, but, in determining whether obligation is supported by an express promise or stipulation in written instrument, all obligations and promises which its words necessarily import must be regarded as included in the terms of the writing. Code Civ. Proc. § 337.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument in Writing".

4. Limitation of actions 🔑24(2)

Action for unpaid wages due under written collective bargaining agreements providing for payment of specified wages to anyone working for employer in designated capacities was founded upon an "instrument in writing" within four-year statute of limitations, and was not subject to two-year statute, though parol evidence was necessary to prove hiring of individual employee and his interest under bargaining agreement, particularly since Labor Code makes it unlawful to intentionally withhold any part of wages provided for in such agreement. Civ.Code, § 1559; Code Civ.Proc. §§ 337, 339; Labor Code, § 222.

◆

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by Division of Labor Law Enforcement, Department of Industrial Relations, State of California, against V. R. Dennis, individually and doing business under the fictitious name and style of V. R. Dennis Construction Company, etc., to recover difference between wages paid plaintiff's assignors as employees of defendant and amount allegedly due them under collective bargaining agreements. From a judgment sustaining defendant's demurrer to the complaint without leave to amend, plaintiff appeals.

Judgment reversed with directions.

Pauline Nightingale, of Los Angeles, and Edward M. Belasco, of San Francisco, for appellant.

Wright, Thomas, Dorman & Fox, of San Diego, for respondent.

BARNARD, Presiding Justice.

This action was brought by the appellant, as assignee of certain former employees of the respondent, to recover the difference between the wages paid these employees and the amounts claimed to have been payable to them under the provisions of two collective bargaining agreements previously entered into between the respondent and various unions. It is alleged that these collective bargaining egreements were in writing; that by their terms the respondent agreed to pay certain wage rates to the employees covered therein, a copy of these wage rates being attached to the complaint; that these agreements were entered into for the benefit of respondent's employees and remained in full force and effect during all times in question; and that the appellant's assignors were employees of the respondent under the terms of these agreements. It is further alleged that each of appellant's assignors was verbally employed by the respondent pursuant to the terms of these collective bargaining agreements, and that each performed specified labor for the respondent in pursuance of said agreements. It further appears on the face of the complaint that all of the services here in question were performed for the respondent more than two years, but less than four years, prior to the filing of this action on March 23, 1946.

The respondent's demurrer to the complaint was sustained without leave to amend, on the ground that it appears on the face of the complaint that all claims alleged are barred by the provisions of section 339 of the Code of Civ.Proc. A judgment was entered accordingly and this appeal followed.

The sole question presented is whether the two-year statute (Sec. 339, Code Civ. Proc.) or the four-year statute (Sec. 337, Code Civ.Proc.) is here applicable. The appellant contends that the action is based upon these collective bargaining agreements rather than upon the oral contracts of hiring; that these collective bargaining agreements were made expressly for the benefit of plaintiff's assignors and under section 1559 of the Civil Code may be enforced by or for these employees; that the action is thus based upon a contract, obligation or liability founded upon an instrument in writing, within the meaning of section 337 of the Code of Civ.Proc.; and that the two-year statute does not apply. On the other hand, the respondent contends that an action against an employer by an individual employee, under a verbal contract of hiring, to enforce a written collective bargaining agreement is governed by the provisions of section 339, Code Civ. Proc., and is barred within two years after the cause of action accrues.

While conceding the right of an employee to maintain a suit under these circumstances, the respondent contends that the collective bargaining agreement and the individual contract of hiring are separate and distinct contracts as held in J. I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762; Rentschler v. Missouri Pacific R. Co., 126 Neb. 493, 253 N.W. 694, 95 A.L.R. 1; and Yazoo & Mississippi Valley R. Co. v. Webb, 5 Cir., 64 F.2d 902, and as recognized in Levy v. Superior Court, 15 Cal.2d 692, 104 P.2d 770, 129 A.L.R. 956; that a collective bargaining agreement is incomplete in itself, furnishing no basis for a right of action to an individual employee; and that the employee's cause of action to recover such wages must, of necessity, arise out of his separate contract of employment, which in this case was verbal. It is further contended that this action could not be considered as one based upon a written agreement, since extrinsic evidence would be necessary to establish the causes of action of the appellant's assignors, citing such cases as Novosk v. Reznick, 323 Ill.App. 544, 56 N.E.2d 318. In that case, which was somewhat similar to the one now before us, the court held that the contracts to pay certain wages which were sued upon were for the benefit of the plaintiffs and that, as third party beneficiaries, they were entitled to maintain an action. However, it was further held that under the decisions in that state the contract could not be considered as one in writing if it was necessary to use parol evidence to sustain the action, and that since parol evidence must be resorted to, in order to show the existence of a contractual relationship between the employees and the employers, the action was barred by the shorter statute of limitations.

While the question here presented has not been directly decided in this state, we feel impelled to the conclusion that under our statutes and decisions a different rule must be here applied with respect to both of the contentions urged by the respondent. While it was held, in Levy v. Superior Court, 15 Cal.2d 692, 104 P.2d 770, 129 A.L.R. 956, that a collective bargaining agreement, covering the duties or obligations to be observed between the employer and the union, is distinct and separable from a contract of hiring, the fact that these are separate and distinct contracts is not necessarily controlling on the question here presented. The effect of section 1559 of the Civil Code, providing that a contract made expressly for the benefit of a third person may be enforced by him, must be considered. In actions brought under that section it frequently happens that two separate and distinct contracts are involved, but this has not prevented the action from being considered as one brought on the contract made for the benefit of the third party, although he also had another contract with one of the parties to the contract sued upon, and it has been held in a number of such cases that the four-year limitation applied.

[1, 2] In this state, the interests of third party beneficiaries of a contract between other parties are recognized, and the enforcement of those interests through actions upon the contract executed by the other parties is permitted. Sublett v. Henry's, etc., Lunch, 21 Cal.2d 273, 131 P.2d 369. In Sherwood & Sherwood v. Gill & Lutz, 36 Cal.App. 707, 173 P. 171, it was held that it was not necessary that the parties to be benefited by the other contract be named therein; that it need only appear by the terms of the written contract that it was made for the benefit of such parties; that where a creditor sued upon such a contract made for his benefit the cause of action arose directly out of the written agreement to pay the debt rather than out of the original debt; and that the four-year statute applied. In Garratt v. Baker, 5 Cal.2d 745, 56 P.2d 225, it was held that a party may enforce a contract where he shows that he is a member of a class of persons for whose benefit the contract was made. In Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045, it was held, in effect, that an action by a creditor to collect an obligation from a corporation which had in writing agreed with the debtor to pay this debt was one on the written contract and that the action outlawed four years after its accrual. In Pitzer v. Wedel, 73 Cal.App.2d 86, 165 P.2d 971, it was held that in such a case an action by a third party beneficiary is based upon the contract made for his benefit insofar as the statute of limitations is concerned. In McCarthy v. Mt. Tecarte L. & W. Co., 111 Cal. 328, 43 P. 956, 959, the test is thus given: "In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought." In the instant case, the written contract contained an agreement by the respondent to pay certain designated wages to anyone working for him in certain capacities, listing the exact wages to be paid to each such employee. The complaint alleged that appellant's assignors did certain work for the respondent in certain of these classifications as listed and in accordance with the contract, and that certain amounts thus became due under the contract. There was a definite promise to pay to anyone of a certain class, and all that was required was for the appellant's assignors to identify themselves as members of that class and show the amount of work done.

[3, 4] In O'Brien v. King, 174 Cal. 769, 164 P. 631, 633, the court said: "The promise must be one arising directly from the writing itself, and included in its terms. But in determining whether the obligation is 'supported by an express promise or stipulation in the written instrument,' we must regard, as included in the terms of the writing, all obligations and promises which its words necessarily import." Under this rule and under section 1559 of the Civil Code it could hardly be held that this action was not based upon an obligation or liability founded upon an instrument in writing within the meaning of section 337, Code Civ.Proc. Not only is such an employee a member of the class beneficially interested under such a collective bargaining contract but he seems to be given a direct statutory interest therein by section 222 of the Labor Code, which provides that it is unlawful to intentionally withhold from him any part of the wage provided for in such an agreement.

While the point was not directly involved or decided therein, the conclusion that the four-year statute is applicable under the circumstances of this case is inferentially supported by the decision in Sublett v. Henry's, etc., Lunch, 21 Cal.2d 273, 131 P.2d 369.

Under our decisions, and the rules here applied under similar circumstances, it cannot be held that the rule relied on in such cases as Novosk v. Reznick, 323 Ill. App. 544, 56 N.E.2d 318, to the effect that an action cannot be considered as one upon a written contract where parol testimony is necessary to show a contractual relationship between the plaintiff and one of the parties to the written contract, is applicable in this state. Under our rules an action where section 1559 of the Civil Code is applicable is or may be one upon an obligation or liability founded upon a written instrument, within the meaning of section 337, Code of Civ. Proc., even though parol evidence may be necessary to show that the party maintaining the action is within the class intended to be benefited by the other contract, and to show the extent of his interest.

Considering the nature of labor contracts, and the circumstances surrounding them, good reasons could well be advanced for providing a rather short period of limitation applicable to actions thereon, and for not permitting actions, based upon matters which were not within the contemplation of the parties during the time the work was in progress, to be filed long after the transactions have been completed. However, that is a matter for legislative rather than judicial action. While such contracts probably were not contemplated when section 1559 of the Civil Code was adopted, the meaning and scope of that section, under our decisions, seems broad enough to cover such actions as this.

For the reasons given the judgment is reversed, with directions to permit the respondent to answer within a reasonable time.

GRIFFIN, J., concurs.

81 Cal.App.2d 286

STOLL v. SELANDER.

Civ. 15569.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1947.

Hearing Denied Oct. 16, 1947.

1. Limitation of actions 🔑197(2)

Evidence established that plaintiff, as one of three stockholders in corporation and as an employee thereof, was justified in failing to discover alleged fraudulent acts of president of corporation, including misappropriation of property of corporation, until about January 1, 1942, so that stockholder's derivative action brought within three years thereafter was not barred by limitations. Code Civ.Proc. § 338, subd. 4.

2. Records 🔑19

The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value.

3. Limitation of actions 🔑95(1)

Fact that an examination of records of county recorder would have revealed that individual defendant, as president of corporation, took title to real property occupied by corporation in his own name rather than the corporation, did not constitute constructive notice, so as to bar stockholder's derivative action to quiet title to the property in the corporation commenced more than three years after title to property was placed on record in name of defendant. Code Civ.Proc. § 338, subd. 4.

4. Limitation of actions 🔑102(3)

The statute of limitations does not run in favor of a trustee as against the beneficiary while the latter is in possession of the property. Code Civ.Proc. § 338, subd. 4.

5. Limitation of actions 🔑102(3)

Where it was found on substantial evidence that although individual defendant in stockholder's derivative action, who was president of the corporation, was record owner of real property title to which was sought to be quieted in corporation, he had held it only as trustee for corporation, the corporation being actually in possession thereof, and that individual defendant's occupation of property was in capacity of an officer and agent of the corporation only, the statute of limitations would not commence to run against the corporation. Code Civ.Proc. § 338, subd. 4.

6. Corporations 🔑320(3)

Where no legal prejudice against president of corporation, who was found to be holding title to real property as trustee for the corporation, resulted from delay in bringing action to quiet title in the property in the corporation, defense of laches was not available to president in stockholder's derivative action.

7. Corporations ⚷320(6)
Trusts ⚷75

Where president of corporation testified that he borrowed money for down payment on property thereafter occupied by corporation, and that he repaid the borrowed money and paid balance of purchase price from earnings of business conducted by corporation, the corporation became the equitable owner, and president held title thereto as trustee for corporation, and stockholder had right to sue to quiet title in the corporation.

8. Corporations ⚷320(5)

Although it was not alleged or proved that demand had been made that corporation bring suit against its president for an accounting and to quiet title to certain property in the corporation before bringing of a stockholder's derivative action for such relief, such demand was unnecessary where it was clear that it would have been unavailing.

9. Account ⚷20, 20(1)

The practice in accounting suits is for court to determine first whether an accounting is due and then to either take the account or make a reference for that purpose, and, where a reference will be required, an interlocutory judgment is entered and final judgment which follows the accounting determines the amount of the recovery.

10. Appeal and error ⚷1178(1)

Where judgment in stockholder's derivative action ordered individual defendant to render a comprehensive accounting to corporation, and to plaintiff for benefit of all stockholders, without directing that a judgment be entered in accordance with accounting, but plaintiff did not appeal therefrom, District Court of Appeal could not reverse judgment with directions that an accounting be had and that judgment be entered in accordance therewith, instead of merely ordering defendant to account.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Stockholder's derivative action by Fred W. Stoll, as a stockholder of Associated Material Company, Inc., against Fred Selander and the Associated Material Company, Inc., for an accounting and quiet title to real and personal property alleged to belong to the defendant corporation. From a judgment for plaintiff, the individual defendant appeals.

Affirmed.

J. Russell Myers, of Los Angeles, for appellant.

Clayton B. Thomas, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Appeal is taken by defendant Selander only from a judgment rendered following the institution of an action on November 3, 1944, by plaintiff in a derivative capacity as a stockholder of Associated Material Company, Inc., against defendant Selander and the corporation for an accounting and to quiet title to real and personal property alleged to belong to that corporation. Another action was filed on November 6, 1944 (No. 15510), by plaintiff, in which he individually sought and obtained judgment for damages from Selander for fraud alleged to have been committed by him. By stipulation of the parties the two cases were consolidated for the purposes of trial and for the receipt of evidence, but otherwise they necessarily were and are treated as separate cases covering entirely different issues. The appeal by defendant in the second case will therefore be considered in an opinion which will immediately follow. 81 Cal. App.2d 294, 183 P.2d 940.

The complaint herein is in two counts, the first being for an accounting and the second to quiet title to real and personal property. Plaintiff alleges, and the trial court found to be true, that plaintiff is a stockholder in the defendant corporation, and brought this action for the use and benefit of himself and of such corporation; that at all times defendant was president of the corporation, controlled the business policies thereof, and during the period of about two years prior to the filing of the action, and at all times since, arbitrarily refused to divulge to plaintiff as an officer and stockholder the details of the business operations of the corporation; that during said period defendant transferred to other persons all the assets of the corporation without the consent or nomination of plaintiff or the other shareholder of record, and without any authority of the board of directors; that defendant fraudulently committed said acts for the purpose of appropriating to his personal use and benefit the assets of the corporation and the money invested therein by plaintiff and one George E. Bridges; that some of the items of personal property appropriated by defendant were: 1 roller, 3 drill presses, miscellaneous hand tools, 1 brake, 1 1925 Ford truck, 1 advertising sign, books of account, records and corporate seal, filing cabinets, accounts receivable in the sum of $17,919, and stock materials valued at $127; that continuously from the time of moving the place of business of the corporation on July 1, 1936, to July 13, 1945, defendant appropriated and used for his own personal benefit the credit rating and standing, the goodwill, trade name and all other assets of said corporation and said defendant continued until about December 1, 1942, to obtain loans of money in the name of said corporation, on its credit, and appropriated and accepted for his own benefit bank accounts belonging to and maintained by the corporation in its name in various banks; that defendant has failed and refused to furnish any accounting whatsoever to plaintiff or to said corporation regarding the disposition of its assets.

It was alleged in count II of the complaint, and found true by the court, that the corporation, and plaintiff as a stockholder therein, were the owners of real property located at 754 East Florence Avenue, Los Angeles, California, together with the accounts and personal property previously enumerated; that defendant claims an interest in and to said real and personal property adverse to plaintiff and the corporation, but defendant has no estate, right, title or interest whatsoever therein, excepting as a shareholder in said corporation; that it is not true that the corporation has not engaged in business since March 4, 1936, nor since said date has been insolvent, nor were the business operations of the corporation exercised under the joint control of plaintiff and defendant on or prior to March 4, 1936; that it was not true that the corporation was unable to meet the demands of the holder of the mortgage of certain corporate real property located on 61st Street, Los Angeles, California, but it is true that a deed in lieu of foreclosure was entered into under which such property was deeded to the mortgage holder.

Defendants, in separate answers, set up certain affirmative defenses and the findings of the trial court thereon were substantially that it is not true that the facts and circumstances alleged in plaintiff's complaint were known to him on or before March, 1936, or at all until about January 1, 1942, or that either of plaintiff's causes of action is barred by the provisions of section 338 of the Code of Civil Procedure, or that plaintiff has been guilty of laches or that defendants have been prejudiced or injured by any delay in the bringing of this action; that although defendant Selander has been the record owner of the real property located on Florence Avenue, Los Angeles, California, since July 3, 1936, he has held such property only as a trustee for the corporation, the latter being actually in possession thereof and his occupation of the property was in his capacity as an officer and agent of the corporation only; that such defendant has paid all taxes on the property since the above date; that plaintiff had no knowledge or sufficient notice to put him on inquiry or opportunity to investigate or discover the nature of the foregoing circumstances, or of the fraudulent conduct of Selander, nor did plaintiff work as an employee of such defendant from March, 1936, to December, 1942, but during said period plaintiff did work as an employee of the corporation receiving regular compensation for his services therefrom. The court thereupon directed judgment to be entered in favor of plaintiff on behalf of the corporation, ordering Selander to render an accounting for all assets, moneys and properties of the corporation which have come into his possession, together with the income and expenses of said corporation from January 1, 1936, to date, and requiring him to deliver to the corporation all property, assets and money found to belong to it; that the corporation be declared the absolute owner of the Florence Avenue real property and that Selander has no right, title or interest therein.

In support of the findings and judgment the record discloses that in 1925 plaintiff and defendant Selander entered into a business as copartners under the name Associated Material Company. Each contributed assets thereto and received an equal monthly income therefrom. On December 31, 1928, the partnership was converted into a corporation which continued to do business under the same name with "Inc." added. Bridges then entered the business by purchasing a third interest, investing a sum approximately equivalent to that previously put in by the partners. One share of stock only was issued to each of the three investors, and they were the only stockholders and officers during the life of the corporation, Selander serving as president, and plaintiff as secretary-treasurer. The corporation then purchased the lot on 61st Street, plaintiff contributing, personally, $3,000 therefor, for which he took a second mortgage on the subsequently erected building. The builder accepted a first mortgage in the sum of $6,000 covering the cost of construction. In 1936 the first mortgage note became delinquent and in order to avoid foreclosure the property was deeded to plaintiff and by him to the mortgagee. Defendant thereupon advised plaintiff that he had a new location for the business on Florence Avenue and would rent it. The physical properties of the corporation were thereupon moved to the new location, both parties taking part therein. The corporation sign, showing its full business name, was removed from the 61st Street location and installed on the new building. The same general type of business continued at the new location, and plaintiff continued to work for and receive a weekly pay check from the corporation as its employee. All billheads, payroll, financial statements, bank accounts and other transactions were carried continuously in the name of the corporation until January 15, 1942.

Selander was at all times dominating in his attitude toward plaintiff, and to frequent suggestions by the latter that a meeting of the board of directors should be held, such defendant replied that they were not necessary and refused to hold them, always giving plaintiff the impression that the corporation was making little, if any, money.

In June, 1942, plaintiff chanced to receive a telephone message for Selander that an installment for the purchase of the Florence Avenue property, occupied by the corporation, was overdue. This was the first information plaintiff had ever received indicating that this property had been purchased or that Selander was the record owner of the property, rather than the corporation. Plaintiff thereupon commenced an investigation and learned that such property had been purchased by defendant in his own name shortly before the corporate assets were removed to that location. He also learned that an International truck used by the corporation had been registered in the name of Selander, even though both a Ford truck, which had been turned in on a Chevrolet truck, and the latter given as part payment for the International truck, had stood in the name of the corporation. Plaintiff's part in the operations of the business, both as a partnership and as a corporation, had to do entirely with the manual labor aspect of it and he was not familiar with books of account, nor had he had any experience as an executive in the handling of business or corporation affairs. Selander had been a personal friend of plaintiff and his wife and visited them in their home, and by his words and actions had consistently lulled plaintiff into believing that the business of the corporation was proceeding reasonably well, although little money was being made.

Selander conceded that all the foregoing described personal property was removed from the old location to the Florence Avenue site and that the corporation sign was likewise moved, installed and still stands on the new location. He further conceded that up to the time the plaintiff left the employment of the corporation in December, 1942, he had freely used the corporation checking bank account and had also executed financial statements, income tax and social security returns and payroll records, as president of the corporation. Bank records disclosed that various loans had been extended to the corporation to and including the year 1941 on financial statements signed by defendant as president, carrying the corporation seal, and listing substantial assets, including the Florence Avenue real estate, as being corporate property.

In September, 1944, plaintiff through his counsel, demanded the right to examine the corporate books and records and Selander denied that any such existed. Later, however, he made available for examination such books and records, although at the time of the trial he denied knowing their whereabouts subsequent to such examination. Selander further conceded that since moving to the new location he had not permitted plaintiff to take any part in the conduct of the business other than as an employee; that the total cost of the Florence Avenue real estate was $5,400, and that he had never paid any rent to the corporation for its use, nor had the corporation paid him therefor. Plaintiff testified that the character of the business conducted by the corporation at the new location was of the same general nature as at the old.

[1] The foregoing evidence sufficiently supports the findings of the court based upon the issues presented by the complaint and the affirmative defenses in the answers, including that of the statute of limitations. Under the particular circumstances here existing the court was entitled to find that plaintiff was justified in failing to discover the fraudulent acts of Selander, including the misappropriation of both the real and personal property of the corporation, until about January 1, 1942. If, as contended by such defendant, section 338, subdivision 4, Code of Civil Procedure, providing for a three-year limitation upon an action for relief on the ground of fraud, is applicable, the cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud. The complaint herein was filed well within the three-year period following such discovery.

[2, 3] It is further argued that plaintiff must show that he made diligent inquiry to discover whether or not he or the corporation had been defrauded and that, having the means of knowledge, particularly the available information through the records of the county recorder as to the taking of title to the real property in the name of Selander rather than the corporation, such means are equivalent to knowledge. As to this subject our Supreme Court, in Seeger v. Odell, 18 Cal.2d 409, 414, 415, 115 P.2d 977, 980, 136 A.L.R. 1291, said: "The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery (Rest. Torts, sec. 540; see cases cited in 12 Cal.Jur. 758, 759), and it is well established that he is not held to constructive notice of a public record which would reveal the true facts. Rest. Torts, sec. 540 (b); see cases cited in 12 Cal.Jur. 759, 764; Prosser, Torts, 750, 751. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value." See Rogers v. Warden, 20 Cal.2d 286, 289, 125 P.2d 7; Anderson v. Thacher, 76 Cal.App.2d 50, 70, 172 P.2d 533; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 437, 438, 159 P.2d 958.

[4, 5] In any event the court has found, on substantial evidence, that although Selander has been the record owner of the involved real property since 1936, he had held it only as trustee for the corporation, the latter being actually in possession thereof, such defendant's occupation of the property being in the capacity of an officer and agent of the corporation only. The same situation, under the evidence, holds true as to the personal property of the corporation so appropriated to himself. As said in the recent case of Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557, 563: "The statute of limitations never runs in favor of a trustee as against the beneficiary while the latter is in possession of the property. Gilbert v. Sleeper, 71 Cal. 290, 294, 12 P. 172; McClure v. Colyear, 80 Cal. 378, 380, 381, 22 P. 175; Peixouto v. Peixouto, 40 Cal.App. 782, 786, 181 P. 830." Such being the case the statute of limitations has

never commenced to run as against the corporation in the within action.

[6] As to the defense of laches, the finding in plaintiff's favor on this issue is likewise sustained by the evidence. On this point we again quote from Berniker v. Berniker, supra, 30 Cal.2d at page 448, 174 P.2d at page 563: "Nor is the defense of laches available here, for it is plain that no legal prejudice was caused to appellant by reason of the delay in making a demand nor by reason of the nonenforcement of the trust. Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 486, 111 P. 360. Moreover, the facts and circumstances of this case suggest other grounds for the rejection of the doctrine of laches * * * '(it) is not designed to punish a plaintiff' but is 'invoked only where a refusal would be to permit an unwarranted injustice.' Hiett v. Inland Finance Corporation, 210 Cal. 293, 300, 291 P. 414, 417. To this latter point, the court said in Hovey v. Bradbury, 112 Cal. 620, at page 625, 44 P. 1077, 1078: '* * * it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong.'"

[7, 8] Defendant testified that he borrowed money for the down payment on the Florence Avenue property, which he purchased for $5,400, and that he repaid the borrowed money and paid the balance of the purchase price from the earnings of the business. The corporation thus became the equitable owner. No question was raised as to the right of a stockholder to sue to quiet title in the corporation, under these circumstances. Plaintiff's right to maintain the action was disputed only upon the ground that no demand had been made upon the corporation to bring the action. While it was not alleged or proved that demand had been made that the corporation bring suit, such demand is unnecessary where it is clear that it would have been unavailing, as it would have been here. Ashton v. Dashaway Association, 84 Cal. 61, 22 P. 660, 23 P. 1091, 7 L.R.A. 809.

[9, 10] The judgment ordered defendant to render a comprehensive accounting to the corporation, and to plaintiff for the benefit of all stockholders, and that upon such accounting he "deliver and pay to said corporation for the benefit of its stockholders all property, assets and money found to belong to said corporation." The practice in accounting suits is for the court to determine first whether an accounting is due and then to either take the account or make a reference for that purpose. Where a reference will be required an interlocutory judgment is entered and the final judgment which follows the accounting determines the amount of the recovery. The issues here have only been partly tried, but plaintiff has not appealed from the judgment and we therefore cannot reverse it with directions that an accounting be had and that judgment be entered in accordance therewith, as should have been done instead of merely ordering defendant to account. Affirmance of the judgment should not be deemed an approval of the procedure which was followed.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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81 Cal.App.2d 294

STOLL v. SELANDER.

Civ. 15510.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1947.

1. Judgment 🔑19

A judgment cannot be sustained which rests for its validity and support upon some particular finding which is unsupported by the evidence.

2. Fraud 🔑58(1)

In action for fraud based on defendant's alleged wrongful appropriation of property belonging to corporation of which plaintiff was stockholder, where plaintiff in a stockholder's derivative action had secured a judgment against present defendant requiring a full accounting and reconveyance and redelivery of all property wrongfully taken by him from corporation, a judgment for damages representing moneys invested by plaintiff in purchase of his corporate stock was without support in evidence and could not be sustained.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Fred W. Stoll against Fred Selander for fraud. From a judgment for plaintiff, the defendant appeals.

Reversed.

J. Russell Myers, of Los Angeles, for appellant.

Clayton B. Thomas, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

This appeal is by defendant from a judgment rendered against him in the sum of $10,500 as damages for fraud. Although a separate suit, with different issues, from that numbered 15569, Stoll v. Selander & Associated Material Co., Inc., Cal.App., 183 P.2d 935, (opinion immediately preceding), both cases were, by stipulation, tried at the same time and by the same evidence. In the interest of brevity we therefore adopt, for purposes of this opinion, the statement of factual evidence recited in the opinion in that case.

Reference to the other numbered case shows it to have been instituted by plaintiff in a derivative capacity as a stockholder, against the corporation and Selander, for an accounting and to quiet title to real and personal property belonging to that corporation. The instant suit was filed three days later, in which plaintiff seeks damages against Selander, individually, for fraud alleged to have been perpetrated by him. The complaint recites that plaintiff, prior to the date of organization of the above named corporation, delivered to defendant the sum of $10,500, for which he subsequently received one share of the common stock thereof; that Selander and one George E. Bridges transferred assets to the corporation sufficient to bring the total investment of the three named stockholders to $37,955.79, and for which defendant and Bridges each was likewise issued one share of the capital stock of the corporation; that although plaintiff is and at all times has been an officer and director in the company, defendant has been the president thereof, has controlled its business policies, and during the preceding two years has arbitrarily refused to divulge details of its business operations; that defendant has fraudulently transferred to other persons assets belonging to the corporation, the nature and amount of which are unknown to plaintiff, without his consent or resolution of the directors of the corporation and for the purpose of appropriating to the personal use and benefit of defendant its assets and the money invested by plaintiff and Bridges, to plaintiff's damage in the sum of $10,500.

The findings of the trial court generally found as true the facts alleged in plaintiff's complaint, and that by reason of the fraudulent acts and conduct of defendant plaintiff has sustained damage in the amount prayed for. The judgment followed.

It will be noted from a reading of the opinion in the preceding case (No. 15569), that the plaintiff herein, suing in that case for the benefit of the corporation, has been successful in obtaining a judgment and having it affirmed on appeal quieting title in the corporation to the real property wrongfully appropriated by Selander, as well as the requiring by the latter of a full accounting with the corporation of all his dealings during the period in question. It is readily apparent, therefore, that a full accounting, reconveyance and delivery by defendant to the corporation of all property, both real and personal, wrongfully taken by him, is fully reflected to plaintiff's benefit to the extent and in the proportion that the share owned by him bears to the total of the three shares issued by the corporation. Consequently, in order to sustain the judgment for damages herein it is encumbent upon plaintiff to prove damage other than that represented by the moneys invested by him in the purchase of his share of stock. It is self-evident that he cannot be permitted to retain his share of stock, now proved to be of substantial value, and at the same time be awarded as damages for fraud the full purchase price thereof. A review of the record fails to bring to our attention any supporting evidence by way of damages to the plaintiff individually for the fraud of the defendant.

[1] A judgment cannot be sustained which rests for its validity and support upon some particular finding which is unsupported by the evidence. See cases cited in 2 Cal.Jur. 1028, par. 612; and 24 Cal.Jur. 990, par. 216; Ryan v. Vawter, 131 Cal.App. 722, 21 P.2d 990.

[2] The finding as to damages being without supporting evidence, a reversal of the judgment is indicated. Consequently, it is unnecessary for us to consider the other points raised by defendant on appeal, including those relating to the statute of limitations, laches and estoppel.

The judgment is reversed.

SHINN, Acting P. J., and WOOD, J., concur.

HEESY v. VAUGHN et al. *

Civ. 15399.

District Court of Appeal, Second District, Division 3, California.

Aug. 6, 1947.

Rehearing Denied Sept. 3, 1947.

Hearing Granted Oct. 2, 1947.

1. War 🔑4

A noncommercial consumer is not to be regarded as being in pari delicto with seller in a sale at a price above OPA ceiling price and is therefore entitled to maintain statutory cause of action for treble damages against seller. Emergency Price Control Act of 1942, §§ 4(a), 205(e), 50 U.S.C.A.Appendix, §§ 904(a), 925(e).

2. War 🔑4

Casual or occasional uses which are merely incidental to, and unnecessary in, the actual operation of a business, are not uses in the "course of business", within provision of Emergency Price Control Act giving Price Administrator, rather than purchaser, the right to recover statutory damages for sale over ceiling price where purchase was for use in course of trade or business. Emergency Price Control Act of 1942, §§ 4(a), 205(e), 50 U.S.C.A.Appendix, §§ 904(a), 925(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Business".

3. War 🔑4

To be in the "course of business", within provision of emergency price control giving Price Administrator, rather than purchaser, right to recover statutory damages for sale over ceiling price where purchase was for use in course of trade or business, a use must be essential and indispensable to operation of a business in the customary manner. Emergency Price Control Act of 1942, §§ 4(a), 205(e), 50 U.S.C.A.Appendix, §§ 904(a), 925(e).

4. War 🔑4

Use of automobile by purchaser to drive to and from her place of business and for running occasional business errands was not in the "course of business", within provision of Emergency Price Control Act giving Price Administrator, rather than purchaser the right to recover statutory damages for sale over ceiling price where purchase is for use in course of trade or business, and, hence, purchaser was not precluded from maintaining action for statutory damages. Emergency Price Control Act of 1942, §§ 4(a), 205(e), 50 U.S.C.A.Appendix, §§ 904(a), 925(e).

5. War 🔑4

In action by purchaser of automobile against sellers to recover treble damages on ground that sale was over the ceiling price, where plaintiff's evidence made prima facie case of overcharge based on the additional finance charges, burden was upon defendants of proving that excess of installment price over cash price represented only their customary charges for financing, and refusal of testimony offered for such purpose was error. Emergency Price Control Act of 1942, §§ 4(a), 205(e), 50 U.S.C.A.Appendix, §§ 904(a), 925(e).

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* Subsequent opinion 192 P.2d 753.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Mary Heesy against Richard E. Vaughn and another, individually and doing business as Vaughn's, and others, to recover possession of automobile, for damages for breach of contract for sale of automobile to plaintiff and for treble damages and attorney's fees for alleged sale at a price above the OPA ceiling price. From that portion of judgment for defendants which denied claim for treble damages and attorney's fees, the plaintiff appeals.

Reversed.

Cantillon & Glover, of Los Angeles, for appellant.

Albert G. Bergman, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

This is an appeal by plaintiff from a judgment which denied her claim to the possession of an automobile, her claim for damages for breach of contract of sale of the automobile to her and her claim for treble damages and attorneys' fees for the alleged sale at a price above the OPA ceiling price. Reversal of the judgment is sought only as to the portion of the judgment which denied the claim for treble damages and attorneys' fees.

Plaintiff's version of the transaction was that she purchased a Cadillac car for $2,250, paying $766.67 down and being informed that she could pay the balance at any time within thirty days; that she tendered payment of the balance of some $1,500 within thirty days, which was refused by defendant upon the ground that plaintiff had signed an installment purchase contract which called for $766.67 cash and fifteen monthly payments of $154.03 each, or a total purchase price of $3,077.12. Plaintiff had, indeed, signed such a contract and moreover had written upon it at the dictation of the salesman the following statement: "I understand my deal to be as follows: My deal is $766.67 down and fifteen payments of $154.03 each the cash selling price acceptable to Vaughns was $2,250.00. I was not required to buy on time. I was not required to finance with Vaughn's or Vaughn's Finance Co. Mary Heesy." Defendant was willing to accept $2,310.45, the balance of the installment purchase price, but was unwilling to accept only the balance of the cash price. Plaintiff was unwilling to pay the difference of $827.12 and the present litigation ensued.

The theory of the complaint upon which plaintiff mainly relied was that while defendant knew she was intending to buy the car for cash she was induced to sign the installment contract by false representations and promises that she could have it at the cash price, and that the scheme of defendant of inducing cash buyers to sign installment contracts and insisting on payment of the full price, was a device to evade the Price Control Act and regulations thereunder. The findings on this issue were against plaintiff; they were made on conflicting evidence and may not be disturbed. The question remains, however, assuming that plaintiff voluntarily signed the agreement, whether the nature of her purchase and the price charged were such as to render the sale one made in violation of the Emergency Price Control Act of 1942, 56 Stats. 23, 50 U.S.C.A.Appendix, §§ 901–946, hereafter called Price Control Act. Section 925(e) of this act creates a statutory cause of action against any person selling a commodity in excess of the prescribed maximum price for that commodity. This cause of action runs in favor of the buyer if the purchase was "for use or consumption other than in the course of trade or business." Otherwise it runs in favor of the Price Administrator only.

[1] The initial question presented then is what purchasers possess this statutory cause of action. It is to be noted in this connection that the key and qualifying words which we quoted appear also in section 904(a) of the act. That section places in pari delicto both parties to a sale in excess of the prescribed maximum price only when the purchase involved is made "in the course of trade or business." In other words the noncommercial consumer, as Congress described him, is not to be regarded as being in pari delicto with his seller and is therefore entitled to the statutory cause of action provided by section 925(e) against his seller. Bowles v. Trul-

linger, 9 Cir., 1945, 152 F.2d 191, 192; Bowles v. Glick Bros. Lumber Co., 9 Cir., 1945, 146 F.2d 566, 568, 569. But it is to be noted further that the disqualification as to the cause of action under section 925 (e) extends not only to those who purchase for use or consumption in the course of trade, that is for resale, but also to those who purchase as ultimate consumers in the course of business, that is for an essential use in their business. Bowles v. Seminole Rock & Sand Co., 5 Cir., 1944, 145 F.2d 482, 483; Bowles v. Whayne, 6 Cir., 1945, 152 F.2d 375; Lightbody v. Russell, 1944, 293 N.Y. 492, 58 N.E.2d 508, 510. Thus to determine whether plaintiff was entitled to sue under section 925(e), we must ascertain whether the use she made of the automobile constituted a personal or noncommercial use, as opposed to a use in the course of business.

Plaintiff alleged that she did not purchase the car for use or consumption in her business. Her testimony on the subject was meager. She was conducting a cocktail bar and cafe as a business. She testified as follows:

"Q. When you purchased this car, Mrs. Heesy, did you purchase it for use in your business or trade? A. Yes, I did.

"Q. And what is your business or trade? * * * A. Cafe and cocktail bar and also some small real estate. * * *

"Q. You were not in the business of buying or selling automobiles? A. No.

"Q. After you purchased the car did you use it to go to and from your place of business and things like that? A. Yes, I did."

There was no other evidence as to the purpose of plaintiff in the purchase of the car nor as to the use which she made of it. Her answers merely show that she used the car as a means of transportation to and from her place of business, and for similar purposes, and considered that to be a use in her business. The question is one of law and the answer is not to be found in the belief of plaintiff as to what constituted use in "the course of business." The court found, however, that plaintiff did not purchase the car for use other than in the course of business.

Our first question is whether the use of the automobile by plaintiff as a means of transportation to and from her cocktail bar and cafe business, which was the only use definitely shown, was a use in the course of that business. Respondent has cited no authority and we have found none in which it has been held that the use of a vehicle as a means of transportation to and from a place of business is a use in the course of business. It is well settled in workmen's compensation law that although an employee is engaged in the business of his employer when he is doing what might reasonably be expected of him under the employment, he is not engaged in his employer's business when he is merely going to and from work. The rule is too familiar to require citation of authority. It is applicable here only to illustrate a common situation in which it is understood that work or the transaction of business does not include coming and going to and from the place of work. An example familiar to many will be found in the laws and regulations relating to the federal income tax; traveling expenses to and from the place of business are not allowed as expenses of business. As stated in Commissioner of Internal Revenue v. Flowers, 326 U.S. 465, 474, 66 S.Ct. 250, 254, 90 L.Ed. 203, before such expense may be allowed as a deduction "the exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors." Professional and office workers, mechanics, artisans, and many other classes of people whose work requires no travel, use automobiles as a means of transportation to and from work. While they are engaged in their various occupations their cars remain idle and are not then being used in the business or work of their owners, or otherwise. We cannot refuse to recognize the distinction between such use and the use of vehicles by deliverymen, salesmen, collectors, itinerant workers, and others who must necessarily travel by vehicle in order to carry on their work.

[2] If plaintiff purchased the car as a means of transportation to and from her place of business she did not purchase it for use in the course of the business. If it may be inferred from plaintiff's ambiguous testi-

mony that she also used the car occasionally for business errands, this would not, of itself, constitute a use in the course of business. Casual or occasional uses which are merely incidental to, and unnecessary in, the actual operation of a business, are not uses in the course of business and do not fall within any definition of the term which we have found. The phrase "in the course of business" is defined as "what is usually done in the management of trade or business." Black's Law Dictionary. Bouv.Law Dic., Rawle's Third Rev., P. 695 gives the same definition to "course of business" and Cyclopedic Law Dictionary defines "course of business" as "the ordinary custom or practice observed in business in general or in a particular class of business."

[3] After extended search we have not discovered an instance of a construction of this section of the Price Control Act as applied to the purchase of an automobile which was used incidentally and casually in the owner's business. But the terms to be construed are common ones and have often been defined by the courts. It has been held in insurance law that a car used casually in attending to work is not thereby being subjected to business use. In Automobile Ins. Exch. v. Wilson, 144 Md. 249, 124 A. 876, 877, it is said that if this were not so "no man engaged in business, who occasionally used his car to go to his place of business or for any errand he might have during the day, although such use was merely incidental, and these occasions were opportunities for deriving pleasure from the ownership of the car, could safely insure his automobile as 'used for pleasure.'" There was a similar holding in Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 152 N.E. 345, in which the occasional use for business was merely incidental to the use of the car for pleasure. "In the course of business" obviously means more than "in business." "In the course of" implies more than an occasion or casual use which is merely incidental to the business. To be in the course of the business a use must be essential and indispensable to the operation of the business in the customary manner.

[4] It appears to be the purpose of the law to distinguish generally between personal use and business use. We would think that as applied to automobiles those which are used as a means of transportation to and from the place of business, or casually upon business errands, as well as those used exclusively for pleasure, are being put to a personal use, rather than one in the course of business or trade. Such a use is a convenience but certainly not a necessity when the business is carried on in its usual and customary manner, without other and further use of the car. In using the term "personal use" as distinguished from use in the course of trade or business, we have in mind the distinction between costs which must be borne by the purchaser and those which he directly or indirectly passes on to others in one form or another. In a purchase for personal use the purchaser, a noncommercial consumer, suffers damage from the overcharge and is therefore allowed to bring suit under the act. In the second case the consuming public suffers the damage and the right to sue is in the Administrator exclusively. Bowles v. Googins, Utah Dist.Ct. 1944, 1 Price Control Cases par. 51,176; Bowles v. Trullinger, supra, 152 F.2d 192; Bowles v. Glick Bros. Lumber Co., supra, 146 F.2d 569. We conclude therefore that the finding that plaintiff did not purchase the car for use other than in the course of trade or business is not supported by the evidence.

[5] The court found that the car was not sold for a price in excess of the established selling price. It could have been sold without a warranty for $1,800, or if warranted by the seller, as it was, for a price of $2,250. Under Regulation 4540, Office of Price Administration, a seller was not permitted to require the purchaser to make an installment purchase or to finance a purchase through any particular lending agency or to make "the terms and conditions of sale more onerous to purchasers than they have customarily been, except to the extent allowed by this regulation." Defendants sought to prove that the excess of the installment sales price over the cash price represented only their customary charges for financing. Defendant Richard A. Vaughn was asked the question, "To your knowledge, does the total amount of

the monies to be paid by Mrs. Heesy as the purchaser under that contract violate Regulation 540 in any respect whatsoever?" An objection that the question called for a legal conclusion was sustained. Counsel for defendants then made an offer to prove that the financing charges in plaintiff's contract were defendants' customary charges before the enactment of the price control law. The court raised an objection to the offered evidence although plaintiff's attorney not only made no objection but insisted that the facts sought to be proved were material and, if proved, would constitute a good defense to the action. In spite of the arguments of both counsel that the evidence should be received and that plaintiff should then have the right to inquire further into defendants' past transactions for the purpose of determining what defendants' customary financing charges had been, the court persisted in the refusal to receive any evidence on the subject, stating that it did not agree with either counsel. The attorneys were agreed that plaintiff's evidence made out a prima facie case of an overcharge and that the burden of proof was upon defendants to show that the financing charges were not greater than had been customarily made in defendants' business. This, we think, was a proper view to take of the situation. The matter was one peculiarly within the knowledge of defendants and the burden of going forward with proof rested upon them. If there was any question as to the sufficiency of plaintiff's prima facie case it was waived by defendants. Plaintiff's attorney expressed a willingness to have the witness testify that only defendants' customary financing charges were made and expected then to inquire further on cross-examination, based upon defendants' business records as to whether defendants' testimony was supported by such records. We are unable to determine from the record upon what theory the offered evidence was excluded. The court found the purchase price of $3,077.22 was not in excess of the ceiling price under the Price Control Act or in violation of the regulations of the Office of Price Administration. This finding is not supported by the evidence. The insufficiency of the evidence does not result from the failure of counsel for either plaintiff or defendants to make proof of the essential facts. It is a most unusual and unfortunate situation. Defendants must suffer a reversal of the judgment in their favor because of the insufficiency of the evidence to establish a pleaded defense, although they did their utmost to prevail upon the court to receive their offered evidence, and in their efforts had the earnest cooperation and support of their adversary. The findings upon the material issues being without support in the evidence the judgment must be reversed and it is so ordered.

WOOD, J., and KINCAID, J., pro tem., concur.

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In re ADES' ESTATE.

ADES v. ADES.

Civ. 13321.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1947.

Hearing Denied Oct. 23, 1947.

1. Appeal and error 🔑1001(1), 1010(1)

The sufficiency of evidence is generally for trial court or jury, whose findings or verdict will not be lightly set aside on appeal.

2. Appeal and error 🔑1010(1), 1011(1)

The trial court's finding that property is one spouse's separate property or both spouses' community property is conclusive on appellate court, if supported by sufficient evidence or based on conflicting evidence or evidence subject to different inferences.

3. Appeal and error 🔑1010(1)

A trial court's finding against a presumption is binding on appellate court, unless evidence to rebut it is so weak and improbable that finding is without substantial support.

4. Appeal and error 🔑1008(1)

Whether evidence is sufficient to overcome presumption that property is spouses' community property, rather than separate property of one of them, is fact question for court or jury.

5. Appeal and error 🔑901

On widow's appeal from distribution decree holding that there was no community property of widow and her deceased husband, burden is on widow to establish absence of real conflict in evidence and entire failure of any substantial evidence to support trial court's conclusion.

6. Husband and wife 🔑262(1)

Evidence was sufficient to overcome presumption that increase in husband's net worth during marriage was community property, if presumption applied to such increase in absence of showing of source thereof.

7. Husband and wife 🔑262(1)

Spouses' family expenses are presumed to be paid from community earnings.

8. Husband and wife 🔑264

Evidence that spouses' community income did not exceed their living expenses is as effective to prove that all assets of deceased husband's estate are separate property as specific showing of separate sources from which each asset flowed.

9. Husband and wife 🔑249

In determining extent of husband's accumulation of property during marriage for purpose of ascertaining whether there was increase in his net worth, constituting community property, value of life policies retained by him until his death and amounts of joint bank accounts maintained by him with one or more of his children must be considered, though correctly omitted from comparative balance sheet, offered in evidence by executor of his estate, because they did not form part of estate, but became property of policy beneficiaries and surviving children.

10. Husband and wife 🔑264

Evidence of depletion of spouses' community income by their living expenses and of husband's habit of secreting important amounts of money in safe deposit and strong boxes supported finding that there was no community property of spouses at time of husband's death, as showing that sources of unexplained increase in his net worth during marriage may have been hidden personal assets disclosed only after his death.

11. Evidence ⚷591

The executor of deceased husband's estate was not bound by his contentions, based on husband's accountant's report of audit as to amount of increase in husband's net assets during marriage, that all of his assets were separate, not community, property, since such report was purely evidentiary and evidence is not so conclusive on party introducing it as to require court to accept it as true, if there is other conflicting evidence.

12. Husband and wife ⚷264

Evidence sustained finding that there was no community property of husband and wife at time of husband's death.

13. Homestead ⚷150(1)

Evidence that there was no excess of spouses' community income over their family expenses, and hence no community property at time of husband's death, supported finding that certain realty was acquired by husband as his separate property and hence could be set apart to widow as probate homestead only for a limited period. Probate Code, § 661.

14. Appeal and error ⚷1050(1)

Admission of item of amount of deceased husband's cash in safe deposit box, as shown in his accountant's report of audit, was not error prejudicial to his widow, claiming part of husband's estate as community property, since evidence that spouses' community income did not exceed their finding of absence of community property independently of such item.

15. Appeal and error ⚷970(2)

Determination of relevancy or remoteness of evidence offered is within discretion of trial court, whose reception thereof will not be reversed on appeal, unless evidence was without any weight in determining issue. Code Civ.Proc. § 1868.

16. Trial ⚷43

The tendency is to admit any evidence tending to illustrate or throw any light on transaction in controversy or to have any weight in determining issue, leaving strength of such tendency or amount of such weight for jury to determine.

17. Husband and wife ⚷263

Testimony as to amount of husband's assets in year 17 years before his marriage to second wife was admissible on question whether his income before second marriage was sufficient to permit accumulations required to sustain contentions of executor of his estate that there was no community property of husband and surviving second wife at time of his death.

18. Appeal and error ⚷1050(1)

Erroneous reading in evidence of statement in deceased husband's will that sum bequeathed to his widow exceeded her community interest in his estate was not prejudicial to widow, claiming part of estate as community property, where will was part of evidence before court with respect to distribution decree and court's finding that there was no community property was sufficiently supported by evidence independently of such statement.

◆

Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Saul N. Ades, deceased. From a decree of settlement of the second and final account of Samuel Ades, as executor of the estate, and final distribution thereof, and from an order granting for a limited time only the petition of Mary Ades, testator's widow, to set aside a probate homestead, she appeals.

Affirmed.

Marcel E. Cerf and Robinson & Leland, all of San Francisco, for appellant.

McNab, Gavin, Schmulowitz, Aikins, Wyman & Sommer, by Nat. Schmulowitz, Peter S. Sommer, Sidney F. DeGoff, and Sidney Rhein, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by Mary Ades, widow of Saul N. Ades, from a decree of settlement of second and final account and final distribution of the estate of her deceased husband holding that there was no community property of appellant and decedent, and overruling the objection of appellant who seeks to share in the distribution of part of the estate as such community property, and also from an order granting, for a limited time only, her petition to set aside probate homestead.

Saul N. Ades died testate on July 12, 1943, leaving assets appraised in excess of two hundred thousand dollars. He was survived by Sultana Ades, his first wife, whom he married in 1910 and from whom he was divorced in 1934, by three children the issue of this prior marriage and by appellant whom he married on February 23, 1939. By his last will executed on January 21, 1942, he left the bulk of his estate to his three children. A cash legacy of $5500 to appellant was conditioned on her waiving her rights to her share of the community property, homestead rights and widow allowance, the will reciting that this bequest was in excess of any community property interest appellant might have. Appellant elected not to take this legacy but to seek widow's family allowance, homestead rights and a share in alleged community property.

Appellant specifies some minor errors allegedly committed as to admittance of evidence which will be noticed later but her chief contentions are two. The first is that during her marriage with decedent there was an important increase in his net worth which increase is presumed to be community property, that this presumption was not overcome by any evidence presented by respondent and that therefore it was error for the trial court to hold that all of the assets of the estate were the separate assets of decedent, except for rights of his first wife Sultana recognized in another suit.

[1-4] The law with respect to this point is well stated in Re Estate of Trelut, 26 Cal. App.2d 717, 723, 80 P.2d 147, 150, as follows:

"The sufficiency of the evidence is generally a matter for the trial court or jury, and the findings or verdict will not be lightly set aside. Following the general rule, a finding of a trial court that property is either separate or community in character is binding and conclusive upon the appellate court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences. 3 Cal.Jur.Supp. 573. Further, a finding against a presumption is binding upon the appellate court ([In re] Estate of Cronvall, 220 Cal. 503, 31 P.2d 372), unless the evidence to rebut it is so weak and improbable that the finding is without substantial support. Olson v. Cornwell, 134 Cal.App. 419, 25 P.2d 879. It is finally in each case a question of fact for the court or jury to determine whether the evidence is sufficient to overcome the presumption. The rule has been expressed as follows: 'If upon an analysis of evidence of substantial character, in the light of established rules, the mind of the trial judge, exercising reasonable discrimination, is satisfied that the naked presumption in favor of community property has been outweighed, then the findings of the trial court must prevail.' 3 Cal.Jur.Supp. 575, citing [In re] Estate of Tompkins, 123 Cal.App. 670, 11 P.2d 886."

[5] In Re Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174, 179, it is said with respect to a point of this same character: "Upon this appeal, therefore, contestant is confronted with the added task of establishing the fact that there is no real conflict in the evidence and an entire failure of any substantial evidence to support the conclusion of the trial court, for, of course, the question of the sufficiency of the evidence is primarily a question for the trial court to determine, and if there be a conflict of the evidence, the finding of the lower court is not open to review on appeal."

[6] Appellant has not sustained this additional burden. The record contains substantial evidence adduced by respondent which can reasonably be held to have overcome the presumption in favor of community property, assuming but not deciding that this presumption applies to any increase during marriage in the net worth, when the source of such increase has not been shown. Compare 3 Cal.Jur.Supp. 554, 555.

Respondent offered in evidence a Report of Audit by the witness Felix, accountant of decedent, containing over and above a comparative balance sheet of decedent as per February 23, 1939, and July 12, 1943, about which later more will be said, a statement of his earnings during the years 1939 to 1943. No objection was made to the introduction of this statement of earnings. It shows a total net income of $35,960.79 including both community and separate income, during the four and one half years of the marriage. Moreover there were received in evidence without objection copies of the federal income tax returns both of decedent and appellant during the period of the marriage. Each of the spouses reported one-half of the community income. For the four years from the marriage until the end of the year 1942 appellant reported as her half of the community income in 1939 $2,638.89; in 1940 $2,739; in 1941 $4,325.06 and in 1942 $2,808.33 or a total of $12,511.28. With respect to the year 1943 until the death of Saul N. Ades no return of appellant was introduced but the return made for decedent showed half of the community income to have been $1,373.23. On the basis of these returns the total community income during marriage amounted to $27,767, or an average of little over $6000 a year. With respect to the community expenses, testimony was introduced given by appellant earlier in these proceedings in connection with her family allowance—she prayed for an amount of $2,500 per month—stating her husband's large expenses for dwelling, entertaining and travelling, which "used to cost him more than $1200 a month." She also mentions expenditure for many clothes, servants (maid, chauffeur, nurse) and gifts.

[7] It is presumed that the expenses of the family are paid from community earnings. Huber v. Huber, 27 Cal.2d 784, 792, 167 P.2d 708, and cases cited there. From the above evidence an inference could fairly be drawn that during appellant's marriage the living expenses must at least have equaled the total of the community income, in which case there could be no possibility of any accumulation of community property. Appellant introduced some evidence as to some minor sources of business income of decedent allegedly not comprised in the above statement of earnings and income tax returns and of some alleged conversations of decedent in which he is said to have mentioned much higher amounts for his income in the year 1941 than are contained in these exhibits. Clearly such evidence only created a conflict resolved by implication against appellant in the trial court.

[8-10] Appellant bases her argument on a criticism of the comparative balance sheets at the time of the second marriage and of the death of decedent, trying to ignore respondent's evidence as to community income during marriage compared to living expenses. In this attempt she cannot succeed. Evidence that there was no excess of community income over living expenses is as effective to prove that all assets of the estate are separate property as a specific showing from which separate source each asset flowed. Van Camp v. Van Camp, 53 Cal.App. 17, 26, 27, 199 P. 885, and see the application of the same method in Re Estate of Tompkins, 123 Cal.App. 670, 11 P.2d 886. There is some truth in appellant's contention that the increase of only $2,000 in net worth during marriage shown by the comparative balance sheet offered by respondent is not decisive as to possible accumulation of community property. The balance sheet as per the date of death does not contain the value of certain life insurance policies amounting to approximately $15,000 which decedent retained until his death, whereas a value of $13,500 of such policies was shown in the initial balance sheet. Neither does the balance sheet as per the date of death show two joint bank accounts which decedent maintained with one or more of his children amounting together to more than $28,500 contributed solely by decedent. Although the omission of these items may technically be correct as they did not form part of the estate but at death became the property of the beneficiaries and survivors, they must be considered with regard to the extent of the accumulation during marriage. It must also be conceded that the sources of these important increases not contained in the comparative balance sheet are not specifically clarified by the evidence. The explanation of the accountant Felix which mentions over and above increase in value of sepa-

rate property contained in the balance sheets "Inventory and the moneys accumulated before marriage that were not disclosed until after death" does not seem very clear and specific. Nevertheless it cannot be said that the finding that there was no community property of decedent and appellant is not supported by the evidence; not only is the evidence as to the depletion of the community income by the living expenses sufficient to show that the increase must necessarily have originated from some other source than accumulation of community property, but moreover there is competent evidence which tends to show that decedent was in the habit of secreting important amounts of money in safe deposit boxes and strong boxes. Appellant's witness Max Jackson testified that in the year 1942 he saw an amount of money in bills of thousand and five hundred dollars in a strong box of decedent and that decedent told him that nobody knew about it. Appellant herself estimated the amount kept by decedent in a strongbox at the time of his death at close to a hundred thousand. Albert N. Ades, brother of decedent, testified that from January, 1936, until July, 1938, he kept $50,400 belonging to decedent in a safe deposit box in the witness's name at the Canadian Bank of Commerce in San Francisco. In March, 1942, Sam Ades, son of decedent, visiting decedent's safe deposit box at that bank at his father's request, found more than seventeen thousand dollars in the box. Such evidence supports the findings of the lower court in that it shows that the source from which the unexplained increase came may very well have consisted of hidden personal assets of decedent, disclosed only after his death.

The same reasoning applies to other objections directed by appellant against the comparative balance sheet of accountant Felix, of which the principal is the following: The initial balance, as per February 23, 1939, contains an item "Cash in Safe Deposit Box $50,400" which item admittedly was not based on any book entry or admissible record but only on a hearsay declaration of Albert N. Ades as to the presence of that amount in his safe deposit box in the Canadian Bank of Commerce in the first half of the year 1938. It may be conceded that under these circumstances the inclusion of this item in the balance sheet has no probative significance and also that the testimony of Albert N. Ades as to presence of $50,400 in that safe deposit box in July, 1938, and of Sam Ades as to the presence of $17,000 in such a box in March 1942 cannot in itself support the conclusion that $50,400 was present in a box on February 23, 1939. However, the presence of this specific amount in a safe deposit box at the time of decedent's second marriage is no essential part of respondent's case and on the basis of the evidence related above the court could hold that there were no sources available for community assets, and that in so far as the original separate assets actually proved and their increase during marriage were insufficient to explain the assets found at death the source must necessarily have consisted of undisclosed separate assets, probably hidden in safe deposit boxes or strongboxes.

[11] Appellant argues that respondent is bound by his contentions based on the Felix report and that therefore other reasonings inconsistent with the Felix report, which report shows only an increase of $2000 in net assets during marriage, are not available. This is not so. The report is purely evidentiary in character and the conclusiveness of evidence on the party who introduces it does not go to the extent of requiring the court to accept it as true if there is other conflicting evidence. Bellus v. Peters, 165 Cal. 112, 119, 130 P. 1186; Worthington v. Peoples State Bank, 106 Cal.App. 238, 241, 288 P. 1086; 32 C.J.S., Evidence, § 1040, p. 1106.

[12] We conclude as to the first point that the finding of the trial court that there was no community property of appellant and decedent is based on sufficient though conflicting evidence and is binding on this court.

[13] Appellant's second major contention, that it was error to set aside the probate homestead for a limited time only, as the property in question was bought during marriage and was presumed to be community property, must fail on the same grounds as her first contention. If the

trial court's finding that there was no community property whatever was supported by evidence that there was no excess of community income over family expenses, then that same evidence supports the finding that the parcel of real property in question must have been acquired as separate property of decedent. Such property the court can set apart only for a limited period. Section 661, Probate Code.

[14] Appellant's specifications of error as to admittance of evidence are without merit. Appellant contends that it was error to admit the Felix report over appellant's objection that one item "Cash in Safe Deposit Box $50,400" was not based on any admissible record. However, at the trial appellant declared expressly that the report might go in with the exception of that one item and the court then stated: "You can't exclude the whole thing. We are not going to accept that he had $50,000 in every box he told somebody else he did. There are lots of other ways of proving it. I will allow it." Our understanding of this somewhat informal ruling is that the one item objected to was excluded as evidence, in accordance with appellant's objection. Even if the item were improperly admitted in evidence we would not consider this error prejudicial to appellant as the evidence that there was no excess of community income over family expenses sufficiently supports the findings independent of the allegedly improperly admitted item. Roy v. Salisbury, 21 Cal.2d 176, 187, 130 P.2d 706; Frazure v. Fitzpatrick, 21 Cal.2d 851, 858, 136 P.2d 566.

[15] Appellant complains that testimony as to decedent's assets in 1922 was erroneously admitted over her objection, this evidence being irrelevant and immaterial. The relevancy or remoteness of evidence offered is in the first place within the discretion of the trial court. Section 1868, Code of Civil Procedure; 10 Cal.Jur. 806. "Unless it can be seen that the evidence is without any weight whatever in determining the issue, the action of the court in receiving it shall not be reversed.

[16, 17] "The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or any weight in determining the issue, leaving the strength of such tendency, or the amount of such weight, to be determined by the jury; and, in determining the relevancy of evidence that may be offered upon an issue of fact, much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not." Moody v. Peirano, 4 Cal.App. 411, 418, 88 P. 380, 382. This principle should apply a fortiori where the court sits without a jury. In this case appellant had raised the point whether decedent's income before his second marriage had been sufficient to permit the accumulations required to sustain respondent's contentions. We cannot say that his accumulations until 1922 cannot throw any light whatever on the question and that admittance of evidence as to this point was an abuse of discretion.

[18] Finally appellant contends that it was error to allow to be read into evidence over her objection the statement made by decedent in his will that the legacy of $5,500 bequeathed to appellant was in excess of her community interest. Although such declaration is not competent against appellant and must be disregarded (In re Estate of McCarthy, 127 Cal.App. 80, 86, 15 P.2d 223, and cases there cited), the reading can in no way have been prejudicial to appellant. The will was at any rate part of the evidence before the court with respect to the decree of distribution and as stated above the findings of the court were sufficiently supported independently of the attacked statement in the will.

In view of our conclusions as to the major issues it is unnecessary to consider the other points raised by the parties on this appeal.

The decree and order are affirmed.

GOODELL and DOOLING, JJ., concur.

81 Cal.App.2d 380

**FARNSWORTH v. FARNSWORTH et al.
(FARNSWORTH, Intervener).**

Civ. 15749.

District Court of Appeal, Second District,
Division 1, California.

Sept. 3, 1947.

1. Divorce 🔑253

Record justified refusal to award wife, obtaining a divorce, a community interest in apartment house owned by husband before marriage or in insurance policies in favor of husband's children by former marriage issued before marriage to plaintiff on ground that premiums were paid from community funds.

2. Divorce 🔑286

What constituted one-half or more than one-half of community property to be awarded wife obtaining a divorce was for trial court to determine.

3. Divorce 🔑235

Refusal to award wife, capable of earning her own livelihood, alimony of $1 per year in order that court might retain jurisdiction to award more substantial alimony in the future should the circumstances justify, was not an abuse of discretion, where court found that husband due to poor health was incapable of earning a livelihood.

4. Divorce 🔑223

Award of attorney's fees in divorce action was not an abuse of discretion.

5. Divorce 🔑252

Wife obtaining a divorce was entitled as part of her share of community property to an automobile, which husband admitted was community property but which trial court erroneously found to be the separate property of husband.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action for divorce by Mary Walton Farnsworth against Tom Keller Farnsworth and another, wherein Helen M. Farnsworth intervened to protect a lien arising by order of court to insure monthly payments by named defendant for support of his minor children by former marriage to intervener. From judgment other than interlocutory decree dissolving the marriage, plaintiff appeals.

Judgment modified in accordance with opinion and as modified affirmed.

Howlett & Elson, of Los Angeles, by Eugene M. Elson, of Los Angeles, for appellant.

Joseph A. Ball, of Long Beach, for respondents.

DORAN, Justice.

This is an appeal from the judgment in a divorce action, "with the exception of the interlocutory decree dissolving the marriage."

The parties were married July 16, 1936; they separated March 30, 1945. There are no children, the issue of the marriage. Respondent husband was a practicing physician and following the marriage appellant worked in respondent's office. Quoting from appellant's brief: "She continued to work in that fashion after separation and until sometime in 1945. The reason that she continued to work after separation was that she had taken care of the business for so many years; that there was no one competent to take her place. Respondent was not there and she endeavored to keep his practice going and take care of things as well as she could. At no time did she receive any salary or compensation for any of the work that she performed in his office from the inception thereof to the conslusion. Prior to her marriage to respondent, appellant had worked for him in the same capacity for three years." The divorce was sought and granted on the grounds of extreme cruelty.

It will be noted that Cora K. Farnsworth is named as a defendant and that Helen M. Farnsworth appears as intervenor; the former is the respondent's mother and the latter is the respondent's wife by a former marriage. There are three minor children, the issue of this first marriage, and Helen M. Farnsworth, the mother of the chidren, filed the complaint in intervention to protect a lien existing by order of court to insure the payment of $300 per month by respondent for their support. Cora K. Farnsworth, the respondent's mother, is named as a defendant because, as plaintiff alleges, certain property of record in her name is in truth the community property of the parties.

The court found in substance, quoting from appellant's brief: "That since the marriage of the parties respondent has without provocation inflicted grievous physical and mental suffering upon appellant and has thereby made the further continuance of the marital relations of said parties intolerable. That certain real and personal property has been acquired by the parties subsequent to their marriage and that said property had been purchased with funds acquired by them from community earnings." The findings recite in detail that which was found as a fact to be community property and that which was found as a fact to be separate property. Part of the community property was awarded to plaintiff free and clear of the lien existing in favor of the former wife. The court further found that, "It is true that plaintiff is in sufficiently good health and has sufficient training and experience in business activities to be capable, and that plaintiff is capable of earning her own livelihood." No alimony was awarded. The court also found that, "It is true that for a long time prior to the separation of the plaintiff and defendant Tom Keller Farnsworth, and continuously from said time until the present," defendant "has been and now is a victim of alcoholism, and in poor physical health, and incapable of earning a livelihood."

It is appellant's contention that the findings are unsupported by the evidence; and that, "Appellant is entitled to substantially more than one-half of all the community property," which, it is argued, was not received; also that the court abused its discretion in not awarding alimony and also in the award of counsel fees.

[1, 2] Appellant argues, "We are concerned in this appeal not in the court failing to have given appellant more than one-half of the community property as determined by the court, but its failure to determine that there was a community interest in the apartment house property, and a community interest in the insurance policies herein referred to and the making of the proper division thereof." It appears from a review of the record that respondent husband was the owner of a 13-unit apartment house before the parties were married; it also appears that certain insurance policies in favor of respondent's children "were taken out, before marriage of the parties herein," in which appellant claims an interest because, it is contended, the premiums were paid from community funds. And appellant argues that, "The only conclusion we can reach is that the trial court in disregard of the undisputed facts failed to make the proper finding as to the community interests of the parties, and in failing to do so thereby failed in making the division thereof as required by law." Manifestly, from appellant's viewpoint such an argument may be sound, but the trial court is non-partisan and quite obviously reached different conclusions from a consideration of all of the evidence. It appears from the record that the trial included a comprehensive inquiry into all of the income of the parties and its disposition together with an investigation of the character of the property in dispute and there appears no valid reason for disturbing the trial court's judgment in this regard. As to what constitutes one-half or more than one-half of the community property was for the court to determine.

[3, 4] With regard to alimony appellant argues, "Appellant is not asking for alimony in any sum other than $1.00 per year in order that the trial court may retain jurisdiction to award her alimony in the future should the circumstances justify a more substantial amount to be paid." The issue too was for the trial court's determination and there is nothing in the record to suggest that the court's judgment constituted an abuse of discretion. The same conclusion is inevitable with respect to the court's award of attorneys fees.

There was a certain 1940 Lincoln Zephyr automobile among the various items of property involved in the controversy which the court erroneously found to be the separate property of the respondent. Quoting from respondent's brief: "With respect to this item of property, we must concede that the appellant in her complaint has alleged that the Lincoln automobile was community property, and that respondent in his answer has failed to deny the allegation. We further concede that the respondent by stipulation admits the community character of the automobile. The trial court no doubt based its finding that the automobile in question was not the separate property of respondent by reason of the evidence given by appellant that respondent at the time of his marriage to appellant had some money in the bank, and upon her further testimony that when she married respondent he owned two Packard 120 automobiles, a sedan and a coupe".

With the foregoing exception, the record presents no reason for disturbing the judgment of the trial court.

[5] The judgment is therefore modified to the extent only of awarding the Lincoln Zephyr automobile to appellant and, as so modified, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

81 Cal.App.2d 404

PEOPLE v. GONAWAY.

Cr. 4136.

District Court of Appeal, Second District, Division 1, California.

Sept. 4, 1947.

1. Criminal law 🔑1159(2)

Where there is evidence of commission of crime and defendant's perpetration thereof, appellate court, on appeal from conviction, will not determine weight of evidence, but will decide only whether, on face of evidence, sufficient facts could not have been found to warrant inference of defendant's guilt.

2. Burglary 🔑41(6)

Evidence sufficiently identified defendant as guilty person, so as to support judgment of conviction for second degree burglary.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Henry Gonaway was convicted of second-degree burglary, and he appeals.

Affirmed.

Marshall Denton, Jr., of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant was charged by information with the crime of burglary. A jury trial having been waived, the trial court found him guilty of burglary of the second degree. This appeal is prosecuted from the judgment of conviction on the ground that the evidence is insufficient to support the same.

The prosecution's case was submitted on the transcript of the preliminary examination; the defendant took the stand and several witnesses testified on his behalf. An examination of such evidence discloses that Mr. Earl Lovett, owner of the Lovett Service Station at 990 East Slauson, closed and locked his station at 6:00 on Christmas Eve of 1946, leaving $130 in the safe which was set in cement in the floor of a building, "eight by ten" with a ceiling between seven and nine feet in height, located "between the pumps." Thirty to fifty feet to the rear of the service station and on the same lot was a garage or repair shop which did not belong to Mr. Lovett. This service station was patrolled and watched by the Golden State Detective Bureau and its special officers endeavored to make two trips there before midnight and two trips after midnight. Special Officer Pruitt of said detective bureau inspected all the doors and windows and the safe on his trip at 2:00 or 3:00 in the morning of December 25th and saw no one in or about the premises.

On his next trip around 5:00 he parked his car in front and heard hammering like "someone was breaking into something," whereupon he told his partner, "Something is wrong around here," and observed a broken window in the garage. Officer Pruitt told his partner to keep guard while he called the Los Angeles Police Department, and as officer Pruitt passed the service station he saw that the lights were out and the front door was broken, whereupon he opened the door, flashed his light on the defendant and said. "Come out. We got you covered. * * * As I opened the door, the defendant kneeled down near the floor and he sprung up there like a rabbit and meanwhile he threw the fire extinguisher at me * * * And knocked me down, and while I was down I got my gun and fired"; that defendant also threw a hammer which missed the witness; that defendant then ran out of the service station, across Slauson and climbed over a fence eight feet high; that defendant was dressed in a light hat, light overcoat, dark trousers and black shoes. When the Los Angeles Police officers arrived, officer Pruitt gave them a description of defendant, and officer De Moulin arrested him about 5:30 on Christmas morning on the west side of Central Avenue between 56th and 57th Streets, or about a block and a half from the Lovett service station; that at the time of the arrest, said officer observed another man across the street who was dressed the same as the description given by Mr. Pruitt, so officer De Moulin took both men to the Lovett Service Station where officer Pruitt identified defendant as the man he had seen coming out of the Service Station and who threw a fire extinguisher and a hammer at him. Defendant said, "You must be mistaken. * * * That's a lie." When it got daylight, the officers examined the premises where the defendant climbed over the fence, which was a foundry or something similar thereto, where "they have a lot of casts and aluminum dies and airplane rivets and airplane metal"; pieces of planed-off aluminum, the purpose of this examination being to recover the money bag which contained about $82.72 when it was taken from the safe. The bag was not found. In the afternoon of December 26, 1946, at the 77th Street Police Station, defendant's shoes were removed and taken to the crime laboratory and on the soles thereof were found six or eight small particles of aluminum metal.

Mr. George L. Snow, foreman or superintendent for Cook Brothers Equipment Company, manufacturers of trucks, testified that defendant worked for said company as a janitor, and that they used "all kinds of iron and steel and copper and brass and a lot of aluminum" in their construction work; that he saw defendant the day before Christmas but not in the evening.

Defendant took the stand in his own defense and testified that he had two pairs of shoes and that the shoes taken from him by the officers were shoes which he wore on the job in rainy weather; that he was wearing them that day because it was raining or drizzling on Christmas Eve; that when he was arrested he had approximately $29.50 on his person; that he lived on 22nd Street between Wall and Trinity Streets, about two or three miles from the filling station he was accused of entering; and that he had just left the Zombie Cafe at 5433 Central Avenue, where he had been for two hours, when the officers picked him up.

It is here urged that "A careful study of the entire record fails to disclose such evidence as the law requires to prove appellant's guilt beyond a reasonable doubt." And that "appellant's guilt or innocence turns on the sufficiency of his identification by Pruitt, one of the People's witnesses." In this connection appellant points out that "The short space of approximately ten (10) seconds within which time the witness Pruitt claims he saw the features of the defendant and the articles of clothing which said defendant was then supposedly wearing raises a question of serious doubt as to this witness' ability to have reliably catalogued defendant's features so as to make the latter's identification positive."

On cross-examination, officer Pruitt testified that when he entered the service station he saw appellant in a stooped position inside; that appellant "was facing north, facing the door when I opened the door"; that the glass in the door was broken, as was the lock, and that he "opened it and stuck my head in there, and threw my light around and I threw my light on the defendant"; that about ten seconds elapsed between the time he focused his light on the appellant's face and the time when the latter ran out of the service station with the witness in pursuit; that appellant was dressed in a light hat, a light overcoat, dark trousers and black shoes; that about twenty minutes later the police officers returned with appellant in custody, at which time said witness walked to within two or three feet of appellant, looked at him and stated: "This is the fellow. Where did you get him?"

Officer Pruitt by the foregoing testimony positively identified appellant as the man whom he found in the service station stooped over the safe. However, appellant cites several cases wherein the identity of the accused was held sufficient, and he points out that in those cases the period of observation was either more extensive, or part of the stolen property was found in the possession of the accused, or his connection with the crime was shown by other convincing evidence. This argument is directed at the weight of the identifying evidence and not at its sufficiency.

[1] As stated in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779: "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.'"

[2] The evidence adduced at the trial herein sufficiently identified appellant as the person who burglarized Lovett's Service Station.

No error appearing in the record, the judgment of conviction is affirmed.

DORAN and WHITE, JJ., concur.

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81 Cal.App.2d 363

ASSETS RECONST. CORPORATION, Limited, v. MUNSON, Tax Collector, et al.

Civ. 15651.

District Court of Appeal, Second District, Division 1, California.

Sept. 2, 1947.

Hearing Denied Oct. 27, 1947.

1. Municipal corporations 🔑981

City ordinance providing a new method for terminating right to redeem land deeded to city for nonpayment of taxes, entirely inconsistent with state law prohibiting, before designated date, termination of such right as to land deeded to state, repealed by implication provisions of previous ordinance adopting state plan for termination of right to redeem tax-deeded property. Revenue and Taxation Code, §§ 3494, 3495; Gen.Laws, Act 5233, § 871.

2. Statutes 🔑131

An "amendment" is a legislative act designed to change some prior and existing law by adding or taking from it some particular provision.

See Words and Phrases, Permanent Edition, for all other definitions of "Amendment".

3. Statutes 🔑141(2)

A provision which repeals by implication a portion of prior statute or adds new sections to a code or statute is not properly an "amendment", within rule that acts or sections revised or amended must be reenacted and published at length as revised or amended.

4. Statutes ⚷158, 159

Repeals by implication are not favored and are only found to exist where Legislature apparently did not intend former act to remain in force, but, where a subsequent act is inconsistent or repugnant to prior act, the later act operates without any repealing clause as a repeal of earlier act.

5. Municipal corporations ⚷981

City ordinance providing for termination of right to redeem land deeded to city for nonpayment of taxes upon four months' notice is not invalid, though it permits termination of such right sooner and by a different method than under ordinance in force when land was sold to city, since it provides for adequate notice to taxpayer and fair opportunity to redeem property. Gen.Laws, Act 5233, § 871.

6. Municipal corporations ⚷981

Finding of board of supervisors that improvement district is a distressed assessment district as defined by statute is conclusive as to whether district is a distressed assessment district in which right to redeem tax-deeded property could not be terminated until after January 1, 1947. Revenue and Taxation Code, § 133.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Suit by Assets Reconstruction Corporation, Limited, against Thomas L. Munson, Tax Collector for the City of Azusa, a municipal corporation, and City of Azusa to enjoin defendants from terminating plaintiff's right of redemption in land deeded to defendant city for nonpayment of taxes. From judgment dismissing the action after demurrer to the complaint had been sustained without leave to amend, plaintiff appeals.

Judgment affirmed.

Leland S. Bower, of Los Angeles, for appellant.

P. J. Tscharner, City Atty., of Azusa, and John F. Bender, Sp. City Atty., of Los Angeles, for respondents.

YORK, Presiding Justice.

This is a suit in equity to enjoin defendants from terminating plaintiff's right of redemption in certain lots owned by it in Tract 8507 which were deeded to defendant city for nonpayment of taxes.

The complaint alleges that said municipality had been engaged in levying and collecting municipal taxes against property situate within its boundaries under Ordinance 154, adopted by its board of trustees on February 24, 1914, until about July 6, 1936, when the city council of said city adopted Ordinance 323, establishing a plan for the redemption of property sold to the city for delinquent taxes in conformity with the plan set up by State law on the same subject.

Section 1 of Ordinance 323 reads: "In all cases where real estate has been or may hereafter be sold to the City of Azusa for delinquent tax and/or assessment, and the property so sold is subject to redemption, the person whose real estate is so sold * * * may redeem said property from said sale, in the manner prescribed by State law in force at the time of said redemption * * * insofar as such State law is applicable, * * * it being the intention of this ordinance to hereby adopt and make effective as to the City of Azusa, the same plan, insofar as the same is applicable, for redemption of real property sold to the City of Azusa for delinquent tax and/or assessment, as is in force, at the time of such redemption, under State law, for redemption of real property sold for delinquent County or State tax and/or assessment."

Section 2, thereof, provided that "Any provisions of any ordinances heretofore adopted by and now in effect in the City of Azusa, contrary to the provisions of this ordinance, shall be and the same are, insofar only as the same inhibit the carrying into effect of the provisions hereof, repealed; but as to all other matters and things, such ordinances shall be and remain in full force and effect."

By section 3 it was declared "that this ordinance is an emergency ordinance, and that an emergency exists, by reason of the fact that the plan provided by State law for redemption of real property, sold for delinquent County or State tax or assessment, differs from the plan for redemption of real property sold to the City of Azusa for delinquent City tax or assessment; that this difference in plans brings about confusion among the taxpayers of the City of Azusa and renders it difficult for the City of Azusa to collect delinquent taxes by way of redemption or otherwise, and that the adoption of the provisions of this ordinance is necessary to preserve the peace and general welfare of the City of Azusa."

The complaint herein further alleges that on or about February 17, 1928, a street improvement bond was issued by the treasurer of said city to represent the unpaid assessment levied against each lot in Tract 8507, to pay its apportionment of the total amount of the costs and expenses for the improvement of certain streets in said city; that none of these bonds has ever been paid and each is a lien upon the property affected thereby; that more than 30% of the original assessment parcels were delinquent on June 30, 1940, and that the lots owned by plaintiff represent more than 60% of the original number of assessment parcels in the district; that the said property was deeded to the City of Azusa on or about April 20, 1944, for nonpayment of taxes and assessments which were levied thereon by the tax collector of said city; and that on September 6, 1945, defendant tax collector caused to be published in the Azusa Herald a notice to the effect that if the property therein described, including plaintiff's lots, which had theretofore been deeded to defendant city for nonpayment of taxes and assessments was "not redeemed on or prior to four months after this notice of termination of right of redemption is sent, the time set for the termination of the right of redemption, the right of redemption as to such property will cease."

It is further alleged that at the time of the publication of aforesaid notice of termination of the right of redemption, plaintiff's lots "were situated in a distressed assessment district"; that said notice of termination of the right of redemption is illegal and void, and unless defendants are restrained from terminating plaintiff's right of redemption and enjoined from selling the real property thereby affected, plaintiff will suffer great or irreparable injury and damage.

Defendants' demurrer to the complaint was overruled and a preliminary injunction was granted. Thereafter, defendants filed their answer in which they alleged that on August 7, 1944, the city council of defendant city adopted Ordinance 377 "providing for a method of termination of right of redemption as to all real property deeded to the city for nonpayment of taxes"; that said ordinance "is now and was, at all times mentioned in plaintiff's complaint, in full force and effect and has not been repealed or amended."

When the cause came on for trial, the objection of defendants to the introduction of evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained. At the same time defendants interposed a general demurrer to the complaint which was sustained by the court without leave to amend, and the temporary restraining order was dissolved. From the judgment which was thereafter entered, plaintiff has perfected this appeal.

Appellant claims that the termination of its right to redeem its property which was deeded to the respondent city on April 20, 1944, is prohibited by the terms of section 3495, Revenue and Taxation Code, as amended in 1945, to-wit:

> "The right of redemption of property deeded to the State on and after October 6, 1942, shall not be terminated after the effective date of this act (May 23, 1945) and prior to June 1, 1947, except by sales permitted under Section 3494 of this code."

In this connection it is argued that by the enactment of Ordinance 323, respondent city *adopted* all the laws of the State relating to the subject of redemption of tax-deeded property, and that section 2 thereof *repealed* all provisions of any city ordinances therefore enacted, including Ordinance 154, which were contrary to or inconsistent with such State laws. Also, that Ordinance 323 remained at all times in full force and effect, notwithstanding the enactment on August 7, 1944, of Ordinance 377, for the reason that the latter purported to amend certain sections of Ordinance 154, which sections had theretofore been repealed by Ordinance 323.

As a matter of fact Ordinance 377, insofar as it affects the subject here under discussion, to-wit, the termination of the right of redemption of tax-deeded property, *instead of amending* the original Ordinance 154, *adds a new section thereto* which reads as follows:

"Sec. 36a. On and after June 1st, 1945, on execution of the deed to the City, the right of redemption is terminated as to all such property deeded. The right of redemption of property which was or is deeded to the City before June 1st, 1945, shall be terminated as provided under this Section, if such right of redemption has not already been terminated. Within six months after the effective date of this Ordinance, or within six months after the execution of a deed to the City, if said deed is executed to the City subsequent to the date of this Ordinance, and prior to June 1st, 1945, the Tax Collector shall send a notice of termination of right of redemption to the last assessee of every assessment of such tax deeded property. The notice shall be sent by registered mail * * * shall state, (a) The time of termination of the right of redemption, (b) A description of the property, (c) That if the property is not redeemed before the time set for termination of the right of redemption, the right of redemption will cease. The Tax Collector shall also publish the notice of termination of right of redemption * * * The publication by the Tax Collector * * * shall be made within ten days after the notice as to such property is mailed * * * The time set for the termination of the right of redemption shall be four months after the notice of termination of the right of redemption is sent. If any property is not redeemed before the time set for termination of the right of redemption, the right of redemption as to such property is terminated."

Under section 871 of the Municipal Corporation Bill, 2 Deering's Gen.Laws, Act 5233, respondent city was given the power "to provide by ordinance a system for the assessment, levy and collection of all city taxes."

[1] When respondent city by Ordinance 377 added section 36a to the original Ordinance 154, a new and revised method for the termination of the right of redemption was effected entirely inconsistent with the prevailing State law on the subject, notably section 3495 of the Revenue and Taxation Code which prohibits such termination prior to June 1, 1947. As a consequence this new section repealed by implication those sections of Ordinance 323 which incorporated and adopted the State plan for the termination of the right to redeem tax deeded property.

[2, 3] An amendment may be defined "as a legislative act designed to change some prior and existing law by adding or taking from it some particular provision. A provision which operates to repeal by implication a portion of a prior statute is not, properly speaking, an amendment. *Nor is an act which adds new sections to a code or statute an amendment* within the meaning of the provisions requiring that acts or sections revised or amended shall be reenacted and published at length as revised or amended." 23 Cal.Jur. p. 680, sec. 71; emphasis added.

[4] As heretofore stated, Ordinance 323 was enacted as an emergency measure in order "to preserve the peace and general welfare of the City of Azusa," because of the confusion existing by reason of the difference between the city and state plans on the subject of redemption of tax deeded property. Although repeals by implication are not favored (23 Cal.Jur. 694), and are only found to exist where "it becomes apparent that the legislature did not intend the former act to remain in force" (23 Cal. Jur. 691), it is well settled that where a subsequent act is inconsistent or repugnant to a prior one, the last operates without any repealing clause as a repeal of the first (Stockburger v. Jordan, 10 Cal.2d 636, 646, 76 P.2d 671) and that the latest legislative expression is controlling (Pierce v. Riley, 21 Cal.App.2d 513, 519, 70 P.2d 206, 209, where it is stated: "* * * it is recognized as a rule of construction in determining which act is controlling * * * that the statute last approved, particularly if it be a special act applicable to a particular

subject, will be controlling over one which was previously approved, on the theory that it is the latest utterance of the Legislature.").

[5] Appellant urges that the right of redemption is a vested right and must be governed by the law in force at the time of sale.

In Mercury Herald Co. v. Moore, 22 Cal. 2d 269, 272, 138 P.2d 673, 147 A.L.R. 1111, where it was contended that the termination of the right of redemption impaired the obligation of a contract, it was held:

"There is no contractual relationship, however, between the taxpayer and the state. Southern Service Co., Ltd., v. Los Angeles County, 15 Cal.2d 1, 11, 97 P.2d 963; Perry v. Washburn, 20 Cal. 318, 350; Spurrier v. Neumiller, 37 Cal.App. 683, 174 P. 338. The position of the taxpayer is not that of a purchaser who enters into a contract with the state in purchasing the property. The taxpayer's own failure to pay the tax leads to the sale of the land as an exercise of the sovereign power to collect the tax. Wood v. Lovett, 313 U.S. 362, 371, 61 S.Ct. 983, 85 L.Ed. 1404; Yates v. Hawkins, 46 N.M. 249, 126 P.2d 476, 478; see Anglo California Nat. Bank v. Leland, 9 Cal.2d 347, 70 P.2d 937; Robinson v. Howe, 13 Wis. 341; Muirhead v. Sands, 111 Mich. 487, 69 N.W. 826, 828. * * * Even if there were no distinction between the right to redeem before deed to the state and after, a change in the method of redemption would not necessarily be contrary to due process of law. While the law in effect at the time of the sale to the state governs the redemption of the property when the Legislature does not provide otherwise, it is settled that the Legislature may make retroactive changes in the method of redemption. * * * This power is not unlimited, however. The changes cannot be arbitrary or capricious but must be reasonable when measured in the light of the public interest to be served and the effect of the changes upon the rights of the property owner. * * * By providing for the redemption of the property after sale to the state in the event of delinquency, the state does not take the property outright from the owner but allows him not only to retain the title but the right to remove the tax lien and clear his title to the property. It does not follow that because the state could provide in the first instance for a complete taking of the property that it may with impunity provide retroactively for such a taking without giving the owner notice or a fair opportunity to prevent forfeiture of his property. See Wood v. Lovett, 313 U.S. 362, 371, 61 S.Ct. 983, 85 L.Ed. 1404. *It is settled, however, that the Legislature may validly limit the time within which an existing* right may be exercised if the period remaining for its assertion is a reasonable one. Alexander, Inc., v. United States, 5 Cir., 128 F.2d 82. * * * In the present case the redemptioner clearly received adequate notice and a fair opportunity to regain the property." 22 Cal. 2d at page 275, 138 P.2d at page 674, 147 A.L.R. 1111.

Likewise, in the instant cause, the property was deeded to the city on April 20, 1944; section 36a was added to Ordinance 154 by the enactment of Ordinance 377 on August 7, 1944 which became effective on September 6, 1944. Respondents waited for one year, to-wit, until September 6, 1945, before giving notice that if the property was "not redeemed on or prior to four months after this notice of termination * * * is sent * * * the right of redemption as to such property will cease."

[6] While appellant's complaint alleged that the property here in question was situated "in a distressed assessment district", there is no allegation that the Board of Supervisors found by resolution, or otherwise, that the improvement district came within the definition of a distressed assessment district, as defined by section 133, Revenue and Taxation Code, which finding is conclusive as to whether a district is or is not within a distressed assessment district.

In the light of the allegations of the complaint herein and the law in effect with respect to the termination of the right of redemption of property deeded to respondent city for nonpayment of taxes, the trial court's action in sustaining respondents' general demurrer to the complaint without leave to amend and dismissing the action was proper.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

81 Cal.App.2d 412

STANBERRY v. STANBERRY.

Civ. 15696.

District Court of Appeal, Second District, Division 3, California.

Sept. 4, 1947.

1. Divorce 🔑236, 245(1)

A property settlement agreement and interlocutory decree of divorce should have been construed together in order to determine whether reserved power of the court to modify the decree related only to the provision for the parties' children, and, if there was a contract obligation arising out of the settlement to pay support to the wife, the husband could not be relieved thereof by a court order.

2. Divorce 🔑245(2)

Where property settlement agreement was not before the court on proceedings to modify support provisions of divorce decree and husband conceded that he was obligated under agreement to pay some amount monthly for the wife's support, court should not have ignored husband's request that amounts payable for the wife's support and that of the children be specified and should not have relieved husband of all obligation under agreement when he was requesting only partial relief.

3. Divorce 🔑303(3)

Right of husband's visitation under interlocutory judgment of divorce was subordinate to welfare of children and on husband's application for modification of judgment, so as to excuse husband from making payments for support of children while children were residing with their mother outside jurisdiction of trial court, exclusion of evidence tending to show a reasonable necessity because of health of children, for removal of children to another state was error.

4. Divorce 🔑303(2)

On husband's application to modify interlocutory judgment of divorce so as to excuse husband from making payments for support of children while the children were residing with their mother outside jurisdiction of trial court, the husband's motives in making the application were an important factor for consideration.

5. Divorce 🔑303(3)

On husband's application for modification of interlocutory judgment of divorce, so as to excuse husband from making payments for support of children while children were residing with their mother outside jurisdiction of trial court, trial court was required to make findings on issues of fact whether good grounds existed for allowing children to live outside California, and as to whether children would be in need of receiving support from their father while children were living outside California, and trial court could not act upon the recommendations of a commissioner in such matters.

6. Divorce 🔑299

Under interlocutory judgment of divorce granting wife custody of children and husband right of visitation, husband would be required to properly conduct himself on his visits.

7. Divorce 🔑303(2)

Order relieving husband from supporting children as required by interlocutory judgment of divorce while the children were residing outside jurisdiction of trial court was error, where because of housing shortage there was no assurance that a suitable home would be available to children within jurisdiction of court and the practical effect of the order would be to leave the children outside the jurisdiction without support.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Suit by Gladys M. Stanberry against Jim L. Stanberry for divorce. From orders modifying interlocutory judgment of divorce, plaintiff appeals.

Orders reversed.

Kenneth Sperry, of Long Beach, for appellant.

Leo Friedman, of Long Beach, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by plaintiff, Gladys M. Stanberry, from orders of court modifying an interlocutory judgment of divorce so as to relieve the defendant from paying any sum to plaintiff for the support of herself and the three minor children of the parties so long as plaintiff and the children are residing outside of Los Angeles County.

By the terms of a property settlement agreement, which was approved by the court, and by judgment of divorce rendered in favor of plaintiff on July 23, 1945, defendant was ordered to pay to plaintiff for the support of herself and the minor children, Jimmy, age twelve, Arthur, age eight, and Gladys, age two years, $100 per month until the further order of the court, and was given the right of reasonable visitation of the children. At that time plaintiff owned a home in Long Beach where the parties had been residing. In November of 1945 she sold her home and returned to her former home in Texas, where she owns a residence, in which she has since resided with the children. Defendant thereupon ceased all payments to plaintiff under the judgment.

In January, 1946, defendant filed an affidavit setting forth that plaintiff had removed to Texas with the children and made request that the court specify the amounts to be paid to plaintiff for her support and for the support of the children and that the decree be modified so as to excuse him from making payment for the support of the children while they were residing outside the State of California. An order to show cause was thereupon issued directed to plaintiff. It was served only upon the attorney who had represented her in the divorce action but plaintiff later appeared in the proceeding. In February, 1946, upon the affidavit of plaintiff that defendant was in arrears in the amount of $300 in payment of support money, an order was issued for defendant to show cause why he should not be found in contempt. After various continuances the matters came on for hearing on March 25, 1946, and defendant's application was referred to a court commissioner. The application for modification was heard before the commissioner, who made findings of certain statistical facts, which included findings that the requirements of plaintiff and the children were $173.89 per month, the earnings of defendant $300 per month, and his estimated expenses $195 per month. The findings stated that "[P]laintiff and minor children moved to Dennison, Texas, during November, 1945; now residing at 730 E. Chestnut St. in Dennison; no order of court permitting plaintiff to take the children to the State; * * * Impossible for defendant to visit children while they reside out of Los Angeles County." The commissioner made a recommendation reading as follows: "That interlocutory judgment heretofore entered on July 26, 1945, be modified to provide that defendant pay to plaintiff the sum of $100 per month for the support and maintenance of plaintiff and minor children so long as plaintiff and minor children reside in Los Angeles County; that defendant be relieved from payments on account of alimony and support of children while said children are residing outside of Los Angeles County, unless order of Court has been obtained permitting plaintiff to take the children from Los Angeles County." This recommendation was followed by the words, "So Ordered," to which the trial judge subscribed his name.

In the afternoon of the day of the hearing before the commissioner, the contempt matter was heard before the judge. Defendant was found guilty of contempt of court, was fined $10 and the fine was suspended. The minutes of that hearing concluded as follows: "The court orders that no further payments are due from defendant to plaintiff until such time as plaintiff returns the children to the jurisdiction of the court."

On April 2nd, a further minute order was entered in the exact language of the commissioner's recommendation. It may be noted here that the relief awarded defendant was in excess of that which he requested. Under the property settlement agreement and the judgment he was required to pay plaintiff the sum of $100 per month for the support of herself and the children until the further order of the court and his obligation was not limited to the times when plaintiff and the children were residing in Los Angeles County. He asked the court to specify the amount he should pay to plaintiff for her support and the amount he should pay for the children. The court did not do this but relieved him from all obligation except when the plaintiff and children resided in Los Angeles County.

The appeal is sustainable upon several grounds:

[1, 2] (1) Defendant apparently conceded that he was obligated under the property settlement agreement to pay some amount monthly for plaintiff's support even though she was residing in Texas. The agreement and the decree should have been construed together in order to determine whether the reserved power of the court to modify the decree related only to provision for the children. If there was a contract obligation arising out of a property settlement to pay support to plaintiff, defendant could not be relieved of it by court order. So far as shown by the record the agreement was not before the court. In view of defendant's implied admission, the court should not have ignored his request that the amounts payable for plaintiff's support and that of the children be specified and should not have relieved him of all obligation when he was requesting only partial relief.

[3] (2) The controversy was not solely between plaintiff and defendant; the children were interested parties but their interest seemed to have been overlooked. In the hearing before the commissioner plaintiff offered to prove by her deposition that she suffered from sinus trouble and one of the boys suffered from asthma in Long Beach; that she had been advised by her physician to move to a drier climate; that she had endeavored to find a home near the foothills of Los Angeles County but had been unable to do so; that her physician then advised her to move with the children to Texas; that she had thereupon sold her home in Long Beach and moved to one she owned in Texas; and that her health and that of the children had been good since her change of residence. The commissioner, upon defendant's objection, refused to receive any evidence upon the subject of the health of plaintiff and the children in Long Beach or Texas and excluded all evidence as to the advice she had received from her physician as to the advisability of leaving Long Beach. The exclusion of this evidence was error. The right of defendant to visit his children was subordinate to the welfare of the children and the court should have considered all evidence tending to show a reasonable necessity for their removal to Texas.

[4] (3) The only inference that may reasonably be drawn from the evidence is that defendant was not less interested in being relieved of his obligation to support the children than he was in an opportunity to visit them. He testified that from the time the decree was rendered in July of 1945 until plaintiff left in November, plaintiff had refused to allow him to see the children. Plaintiff testified that upon the first occasion when defendant came to the home he forced his way into the house and knocked her down. Defendant, in his testimony, did not deny this. Plaintiff also testified that upon one other occasion when defendant came to the house he was abusive, started quarrelling with her, made no effort to visit with the children and caused them all to become highly nervous and excited. Defendant did not deny this but, upon the contrary, testified that when he went to the home he accused plaintiff of misconduct with another man and that this resulted in an alteracation in the presence of the children. Plaintiff did not deny having refused defendant admission to the home and testified that she told defendant to take the matter up in court. Defendant did not take his grievance to court and if he had done so he would not have been permitted to enter the home for the purpose of quarrelling with plaintiff under the pretense

that he wished to visit the children. All of this evidence had a bearing upon the good faith of defendant, and his motives in making the present application were an important factor for the court to consider.

[5] (4) The evidence referred to in the two preceding paragraphs bore directly upon the merits of defendant's application and the grounds upon which it was resisted by plaintiff. While plaintiff's offers of proof were made to the commissioner and the other evidence was introduced in the hearing before him, no part of these proceedings was before the court directly or in the report of the commissioner. The judge heard only the contempt matter. The court may not act upon the mere recommendation of a commissioner in matters involving issues of fact tried before him. There should be findings upon all the material issues. Here there should have been findings as to whether good grounds existed for allowing the children to remain in Texas and as to whether they would be in need of receiving support from defendant while they were there. In the contempt proceeding the judge directed that defendant be required to make no more payments until the children had been returned to Los Angeles County, although it was called to his attention that plaintiff's deposition had been given and that it was not before the court. If, perchance, the judge did see the deposition, outside of the hearing, it must be presumed that he agreed with the commissioner that it was immaterial whether the health of plaintiff and the children made it reasonably necessary for them to move to Texas. But upon the record before us we cannot assume that the judge was aware of the fact that plaintiff was justifying her removal from the Long Beach upon that ground.

[6, 7] Finally, irrespective of the matters we have discussed, we are unable to see how the order appealed from could have accomplished a just result. The unfortunate situation of the interested parties was brought about by the actions of the parents. While the children were in California defendant could have enforced his right through the court to visit them. He would have been allowed to visit them so long as he behaved himself on his visits, but only on that condition. According to his admission he went to the home for the purpose of quarrelling with plaintiff. Whether his conduct had an influence upon plaintiff's decision to take the children away can only be conjectured. Plaintiff testified that defendant had often urged her to return to Texas. Defendant did not deny this, although he testified that he thought she was only intending to visit in Texas, notwithstanding the fact that she had sold her Long Beach home. Plaintiff, nevertheless, should not have taken the children to Texas without the court's permission. The children were helpless in this situation and they are the ones who will suffer if the order should be allowed to stand. The sensibilities of defendant, assuming that they have been offended in a measurable degree, weigh lightly against the right and the necessity of the children to be adequately clothed and fed and to have their health and welfare conserved by all available, reasonable means. The practical effect of the order would be to leave the children in Texas without support from their father. Plaintiff endeavored without success to find a suitable home in Los Angeles County. In any event, considering the prevailing local housing shortage, defendant's efforts to force the return of the family to California should not have excited the sympathy of the court in the absence of assurance that a suitable home would be available to them.

The orders are reversed.

WOOD, J., concurs.

PEOPLE v. STEIN et al. *

Cr. 4124.

District Court of Appeal, Second District, Division 1, California.

Sept. 2, 1947.

Hearing Granted Oct. 2, 1947.

Criminal law ⚷1202(7)

Defendants pleading guilty of robbery and kidnapping were not entitled to appeal from judgment declaring them habitual criminals on grounds that crime of breaking and entering, of which one defendant was previously convicted in New Jersey, was only a high misdemeanor, that one of crimes of which codefendant was previously convicted was only second-degree burglary, and that information only alleged that such defendant was convicted of burglary without stating degree thereof. Pen. Code, §§ 644, 1096, 1097.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Bernard Stein, Morris Leder, and Joe Ladden were charged with robbery and kidnapping, and, from a judgment declaring them habitual criminals after their pleas of guilty, defendants Stein and Leder appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and William E. Simpson, Dist. Atty., and Jere Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

DORAN, Justice.

Defendants were charged by information with robbery and kidnapping in count one, and with the crime of robbery in counts two and three; prior convictions also were alleged. Following a plea of guilty defendants were adjudged habitual criminals and sentenced accordingly. Defendants "appeal from the judgment adjudging each of them as habitual criminals."

It is contended, "That the court erred in finding that they were habitual criminals, since one of the counts on which said Bernard Stein was convicted was breaking and entering, a high misdemeanor in the State of New Jersey, and one of the counts against Morris Leder was second degree burglary.

"The defendants pleaded guilty to the charge of robbery. Defendant Stein also admitted that he had been convicted of breaking and entering in the Circuit Court of the State of New Jersey, Hudson County, on or about April 19, 1928, a matter of twenty years before, and also that he had been convicted of robbery.

"The crime of 'breaking and entering' as defined by the New Jersey law is a high misdemeanor. Besides, it did not come within the Statutory requirement for habitual criminals, which only makes persons convicted of 'burglary of the first degree, or burglary with explosives' within the definition of habitual criminals as described by Penal Code Section 644.

"The same is true with reference to Morris Leder. Morris Leder admitted the crime of robbery in Arizona in 1932 and second degree burglary in the Superior Court of Los Angeles in 1936.

"Since the burglary that is involved in Section 644 of the Penal Code is only burglary of the first degree, Statute of 1945, Chapter 934, Section 1, the habitual criminal statute does not apply to this defendant and appellant either.

"As a matter of fact, the information in this case only alleges that the defendant was convicted of the crime of burglary, a felony. The degree is not stated in the information, but the presumption is that it is the lowest degree, and Sections 1096–1097 of the Penal Code would apply, and the failure to allege first degree burglary would therefore fail to allege that the offense comes within the category of Section 644 of the Penal Code."

The foregoing, with the exception of one paragraph which is immaterial, constitutes appellants' opening brief.

Defendants pleaded guilty and admitted the prior convictions on October 10, 1946.

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* Subsequent opinion 191 P.2d 409.

On December 11, 1946, a motion was made to vacate the "finding and judgment that defendants are habitual criminals." On January 19, 1947, said motion was denied and on January 20, 1947, defendants appealed. There was no appeal from the original judgment.

A review of the record reveals that there is no merit to the appeal. See People v. Simms, 41 Cal.App.2d 466, 107 P.2d 86.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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81 Cal.App.2d 343

OAKLAND CALIFORNIA TOWEL CO., Inc., v. ZANES.

Civ. 13369.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1947.

1. Evidence 🔑351

The purpose of Uniform Business Records as Evidence Act is to enlarge operation of business records exception to the hearsay evidence rule. Code Civ.Proc. §§ 1953e–1953h.

2. Evidence 🔑351

The common-law business records exception to hearsay evidence rule is based on assumption that records kept in general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded.

3. Evidence 🔑351

Tags prepared in quadruplicate in plaintiff's office which itemized linen to be delivered to customers and pieces of soiled linen to be returned wherein each tag was double-checked by plaintiff and a pink carbon copy given to driver, who exhibited it to customer if present, or if not present copy was returned to plaintiff's file and a rose-colored carbon copy of original tag left for customer on each delivery of clean linen, so that compilation of the tags would disclose shortages in amount of linen returned, were admissible in evidence under the Business Records as Evidence Act. Code Civ.Proc. §§ 1953e–1953h.

4. Appeal and error 🔑1008(1)

Whether tags prepared by plaintiff linen supply company, showing exact number of pieces of linen supplied to defendant, and exact number returned by defendant, were properly identified as being complete and correct statements of respective deliveries and returns so as to be admissible as to shortages in amount of linen returned by defendant, was a question for the trial court to resolve from evidence. Code Civ. Proc. §§ 1953e–1953h.

5. Appeal and error 🔑926(5)

Where there was no evidence which would call for a rejection of the ruling of trial court admitting business records, it must be assumed on appeal that trial court held the foundation satisfactory.

◆

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Action by the Oakland California Towel Company, Inc., a corporation, against George Zanes, doing business under the name of Gold Mine Cafe, for breach of contract allegedly arising from defendant's failure to return linen supplied to defendant under a written contract. From an adverse judgment, defendant appeals.

Affirmed.

John J. O'Sullivan, of San Francisco, for appellant.

Ernest J. Livengood, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for breach of contract arising from defendant's failure to return linen supplied to defendant under a written contract. Claim was also made for attorney's fees chargeable to defendant under the express terms of the contract. Judgment went to plaintiff for $2018.01, and attorney's fees assessed at $225.

The appeal presents the single issue whether the tags prepared by plaintiff showing the delivery and return of linen supplied by plaintiff were admissible in evidence, or more specifically whether, on the evidence depicting the method of preparation, the use and acceptance of the records throughout the business transactions of the parties, the trial court committed error in receiving them in evidence. These tags, which were admitted over the objection of defendant, show the exact number of the several pieces of linen supplied to defendant daily and the exact number returned. The shortage was estimated on the agreed value of the pieces not returned.

Plaintiff was engaged in the business of supplying laundered towels, sheets and similar articles to hotels, rooming houses and restaurants. Defendant was engaged in the business of operating a restaurant and rooming houses. Under the terms of three written contracts plaintiff supplied the clean linen to defendant and on each delivery took back the soiled linen. The practice over the period of three years of the life of the contracts was this: Tags, or tickets, were prepared in quadruplicate in plaintiff's office; these itemized the several pieces of clean linen to be delivered to the customers and the pieces of soiled linen returned by him. Each delivery tag was double checked by plaintiff and a pink carbon copy was given to the driver who exhibited it to the customer on delivery of the linen. Sometimes this tag was signed by the customer, but when no one was present to sign, the copy was returned by the driver to plaintiff's files; a rose colored carbon copy of the original tag was left with the customer on each delivery of clean linen. The written contracts contained a provision reading: "Lessor's delivery tags shall be deemed correct as to the number of articles delivered unless objection in writing is made by Lessee within ten days after delivery of articles." There was no evidence that any such objection was made by defendant. The compilation of these receipts or tags disclosed the shortages in the amount returned. The value was fixed, and on this there is no controversy.

The question of law is whether business records kept in this manner, the use of which was accepted by both parties over a period of years, are admissible in evidence under sections 1953e–1953h of the Code of Civil Procedure. This act became effective in 1941 and is interpreted in Loper v. Morrison, 23 Cal.2d 600, at page 608, 145 P.2d 1, at page 5 where the court said:

[1-3] "The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. The common law exception is based on the assumption that records kept in the general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded." In accord are: Doyle v. Chief Oil Co., 64 Cal.App.2d 284, 292, 148 P.2d 915; Brown v. County of Los Angeles, 77 Cal.App.2d 814, 176 P.2d 753.

Appellant ignores these authorities and relies to some extent on cases decided before the code amendment and upon Tabata v. Murane, 76 Cal.App.2d 887, 174 P.2d 684. That case involved the question of the admissibility of similar evidence to prove a book account. But this case is not a suit on a book account and the cited case has no bearing.

[4, 5] It is also argued that the tags or tickets were not properly identified as complete or correct statements of the respective deliveries. This, of course, was a question for the trial court to resolve from the evidence given by the office force which prepared and kept the records. We find no evidence which would call for a rejection of the ruling admitting the records, from which ruling it must be assumed that the trial court held the foundation satisfactory. Egan v. Bishop, 8 Cal.App.2d 119, 123, 47 P.2d 500; Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914.

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.

PEOPLE v. DOTY et al. *

Cr. 4116.

District Court of Appeal, Second District,
Division 1, California.
Aug. 29, 1947.

Rehearing Denied Sept. 10, 1947.
Hearing Granted Sept. 25, 1947.

1. Burglary 🔑41(1)

Evidence sustained convictions of second-degree burglary.

2. Criminal law 🔑742(1)

Witnesses' credibility is for triers of fact.

3. Criminal law 🔑736(2)

Whether confessions of burglary were elicited by threats, brutality, or other form of coercion was fact question for jury on conflicting evidence.

4. Criminal law 🔑531(3), 1134(3)

Where confession is claimed to have been unlawfully elicited, appellate court should scrutinize record on appeal from conviction to determine whether trial court properly held that there was sufficient evidence that confession was free and voluntary to warrant its admission, but defendant's mere claim or testimony that confession was coerced is insufficient to require exclusion of evidence thereof.

5. Criminal law 🔑736(2)

The trial court must primarily determine fact question whether defendant's confession, sought to be introduced in evidence, was freely and voluntarily made, and jury must determine ultimately whether confession was so made and hence is entitled to consideration.

6. Criminal law 🔑531(3)

The trial court is not required to strike out defendant's confession because defendant testifies that it was made involuntarily, his credibility being matter for jury's determination.

7. Criminal law 🔑1158(4)

Where evidence of methods employed to obtain confession is conflicting and court and jury resolve issue involving answer to due process question, though denial of due process is not an issue, appellate court accepts determination of triers of fact, unless it is so lacking in evidentiary support that to give it effect would work fundamental unfairness denying due process.

8. Criminal law 🔑1144(14)

The appellate court must assume that jury was properly instructed as to limited purpose for which evidence of offenses not charged against defendants was received, in absence of contention that jury was not fully, fairly, and correctly instructed.

9. Criminal law 🔑935(1)

A trial court, believing that defendant was convicted on insufficient evidence or denied fair and impartial trial, owes duty to set verdict aside by granting new trial.

10. Criminal law 🔑921

The trial court's statements, in granting defendants permission to file applications for probation after convictions of burglary, that there was strong evidence that police exercised force and brutalities on defendants to procure confessions introduced in evidence, did not show that court believed defendants were convicted on insufficient evidence or denied fair and impartial trial, so as to entitle them to new trial on ground that confessions were inadmissible, where court subsequently remarked that he had no criticism of verdict and that jury, perhaps rightly, disregarded confessions and still arrived at result.

11. Criminal law 🔑1144(18)

The appellate court may presume from trial court's denial of defendants' motions for new trial after convictions of burglary that such court entertained no doubt that verdicts were justifiable and fully supported by substantial evidence and that defendants were fairly tried and justly convicted.

12. Criminal law 🔑1144(14)

Where trial court's instructions to jury are not before appellate court and no claim is urged that they were not full, complete, and correct, appellate court must assume that jury was correctly instructed on its duty not to consider defendants' confessions, if jury believed that confessions were obtained by force, violence, or threats.

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* Subsequent opinion 192 P.2d 454.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge Assigned.

Kenneth I. Doty and Edgar Scott Flohr were convicted of burglary in the second degree, and they appeal.

Affirmed.

Paul E. Tapley and E. W. Miller, both of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In each of four counts of an information filed by the District Attorney of Los Angeles County the defendants were accused jointly of the crime of burglary. Each count charged the defendants with the burglary of a different Safeway grocery store in the City of Los Angeles on the night of August 2 or morning of August 3, 1946. To each of the four counts the defendants entered pleas of not guilty. Trial before a jury resulted in verdicts of guilty of burglary in the second degree against both defendants as to each count. A motion for a new trial was denied. From the judgments of conviction thereupon entered the defendants prosecute this appeal.

[1] It is urged that there is no evidence to sustain the verdicts on any of the four counts of the information. The following summary of the evidence adduced on behalf of the prosecution renders this contention unavailing.

At approximately 2:30 on the morning of August 3, 1946, two West Los Angeles police officers in a patrol car observed the defendants in a Safeway store located at 2090 Westwood Boulevard, the defendant Flohr being then crouched in front of a safe. The defendants attempted to flee, but surrendered when the officers opened fire. Upon being questioned, one of the defendants gave the location of their automobile, which was found parked on a side street a block from the store. In the vehicle were found three paper bags, containing respectively $950, $162 and $707.45 in bills of various denominations, as well as coins rolled in paper wrappers.

On the night of August 2, 1946, three other Safeway stores, located on Third Street, Robertson Boulevard, and Melrose Avenue, had been burglarized. These three burglaries form the basis of Counts I, II and III of the information, count IV charging the burglary of the Westwood Boulevard store. In connection with the burglaries of the three stores first above mentioned, the prosecution introduced evidence that in one of the paper bags of money was a bundle of 12 checks which were identified by the manager of the Robertson Boulevard store as checks of his customers; that a bolt cutter found in the rear of the Westwood Boulevard store had been used to cut the hasp on the Melrose Avenue store; that in each of the four crimes, all of which occurred on the same evening, the hasp of the door had been cut in a similar manner; and finally, that under questioning at the police station, defendants admitted that they were guilty of all four burglaries.

[2] Appellants' contention that the evidence is insufficient to support the verdicts amounts to no more than an argument against the credibility of the police testimony and in favor of the explanation offered by the defendants at the trial. It is urged, for instance, that the police could have "planted" the incriminating checks in one of the bags of money. Such a contention does not justify the reversal of a judgment. The question of credibility of witnesses was for the triers of fact. People v. Day, 71 Cal.App.2d 1, 4, 161 P.2d 803.

In explanation of their presence in the Westwood Boulevard store, the defendants testified in substance that they attended a theatre in Hollywood on the night of August 2nd, and afterwards went to a restaurant; that about 1:30 they drove to Westwood Boulevard to meet a young lady with whom defendant Flohr had made an appointment for 2 o'clock; that they went to the intersection of Westwood and Olympic Boulevards and drove around the block looking for the girl, parked the car on Glendon Avenue one block east of Westwood Boulevard, walked to Westwood Boulevard and past the Safeway store looking for a street number. At this point they noticed that the door of the store was open and that there was a sign on the door, "something about a $25.00 reward for any information"; that they entered the store to telephone the store manager and also the young lady, but were apprehended before they did any telephoning. Defendant Flohr accounted for the money in his car by stating that he had left his hotel with $2,500 wrapped in a newspaper, and after purchasing some liquor transferred the money into the paper bags which contained the liquor. He carried this large sum, according to his testimony, because he intended to play cards that evening.

Defendants produced as a witness one Harris Johnson, who at the time of his testimony was a resident of the county jail and who had occupied the same cell as defendant Flohr. Johnson testified that he and another man were attempting to rob the Westwood Boulevard store about 2 o'clock in the morning of August 3, 1946, but fled upon the arrival of the defendants, leaving behind the bolt cutters found on the premises and the gloves which, according to the police officers' testimony, were being worn by defendants at the time of their apprehension. This witness did not want to give the name of his companion, but when pressed for an answer, stated that his name was "Joe Blow"; that he first met "Joe Blow" on the afternoon of August 2; that they visited some bars and restaurants in the afternoon and evening before attempting the burglary; that after fleeing the store he never saw "Joe Blow" again. Johnson's testimony threw no light on the burglaries of the three other stores during the same evening. Nor did any evidence on behalf of the defense support the story of defendants as to their activities during the evening when the other three stores were burglarized.

[3] It is next contended that the asserted confessions or admissions, testified to by several police officers, were not free and voluntary, but were obtained by threats, violence and brutality, and that even though the evidence be sufficient to support the verdicts exclusive of the confessions, that the placing of such confessions in evidence resulted in the denial of a fair trial, citing People v. Dye, 119 Cal.App. 262, 270, 273, 6 P.2d 313.

When evidence of defendants' confessions and admissions, as testified to by three police officers, was offered by the prosecution, no objection was raised by the defense. The officers who testified stated that the confessions were "freely and voluntarily" made. A written statement, not signed by the defendants, but the truth of which it was testified they had admitted, was read to the jury without objection by defendants and introduced in evidence by stipulation. The defense made no voir dire examination of the prosecution witnesses as to the voluntary nature of the alleged admissions and confessions. In presenting their defense the defendants testified at length to a course of brutal conduct by the arresting officers and by a third officer, which resulted in a confession by defendant Doty. Defendant Flohr denied making any confession. The treatment described by the defendants unquestionably would render the confessions inadmissible. On the other hand, their testimony was flatly contradicted by that of the police officers involved. It was admitted that the defendants showed signs of physical injury when they arrived at the police station. The defendants testified that they lay down and submitted to arrest when the officers fired upon them; that they were kicked and struck by the officers while being handcuffed and while being taken to the station. They further testified that they were subjected to violence while at the West Los Angeles police station. The officers testified that the only violence used was at the time of arrest, when the defendants refused to disclose the whereabouts of their automobile and one of the defendants tried to escape. In part, according to the prosecution, their physical condition while in the station and at the county jail was due to the fact that they flung themselves to the pavement to escape the officers' bullets. It may be conceded that both defendants had a "rough time" and were "roughed up" in the process of apprehension at the Westwood Boulevard store.

But whether the confessions were elicited by threats, brutality or other form of coercion presented a question of fact upon which the evidence was in sharp conflict. Appellants contend that despite such conflict they are entitled to a reversal, citing Lisenba v. People of State of California, 314 U.S. 219, 62 S.Ct. 280, 290, 86 L.Ed. 166, 180, and Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192, to the effect that when it is claimed that a prisoner's admission or confession has been wrongfully obtained an appellate court is "bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both." The cited cases, as well as other cases relied upon by appellants, present situations in which the appellate tribunals held that the *uncontradicted* evidence disclosed circumstances indicating that the confession was obtained by means not sanctioned by the law. This was the situation not only in the cases above cited but as well in People v. Jones, 24 Cal.2d 601, 150 P.2d 801; Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; People v. Rogers, 22 Cal.2d 787, 805, 141 P.2d 722; People v. Loper, 159 Cal. 6, 112 P. 720, Ann.Cas. 1912B, 1193. But no such situation is presented in the case at bar.

[4, 5] It may be conceded that in any case where the claim is made that a confession has been unlawfully elicited an appellate court should scrutinize the record to determine whether the trial court, to whom the question is first addressed, properly held that there was sufficient evidence that the confession was free and voluntary to warrant its admission in evidence. On the other hand, if the mere claim or testimony of a defendant that the confessions were coerced is sufficient to require that evidence thereof be excluded, then any defendant would have the power to prevent the production of such evidence. As was said in People v. Bateman, 80 Cal.App. 151, 156, 251 P. 335, 337:

"* * * If this were the law, it would lie within the power of the defendant to clear from the case all confessions by his own evidence or such evidence as he might produce, and this regardless of the truth of such testimony. Where it is sought to introduce a confession of a defendant in evidence, the court is called upon primarily to pass upon the question of fact as to whether the confession was freely and voluntarily made, and it is for the jury to determine ultimately whether it was so made and therefore entitled to consideration. * * *."

[6, 7] See also People v. Elliott, 104 Cal. App. 107, 285 P. 401 and 4 Cal.Jur. Ten Year Supp., p. 669. To quote from the last-cited authority, "Nor is the court required to strike out the confession because the defendant testifies that it was made involuntarily, his credibility being a matter for the jury's determination." Equally pertinent is the language from Lisenba v. People of State of California, supra, 314 U.S. at page 238, 62 S.Ct. at page 291, 86 L.Ed. 181: "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by *court and jury* which involves an answer to the due process question. In such *a case we accept the determination of the triers of fact,* unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process." (Emphasis added.) In Ashcraft v. State of Tennessee, supra, 322 U.S. at page 153, 64 S.Ct. at page 926, 88 L.Ed. 1199, the United States Supreme Court said: "Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion *from facts which are not in dispute at all.*"

Conceding that it was the duty of the trial court to determine in the first instance whether the confessions should be admitted, we have here a situation in which no objection was raised to their admission for lack of foundation as being free and voluntary, the defendants choosing to rely upon their own evidence presented as part of their defense that the confessions were wrongfully obtained. In such circumstances, as heretofore indicated, the question was one of fact for the triers of fact. The instructions are not part of the record on appeal nor have appellants complained thereof in any way. It must be presumed that the jury found either that the confessions were free and voluntary or that the evidence was sufficient in the absence of the confessions. In either event, the verdicts are amply supported.

It is urged that a new trial should have been granted for insufficiency of the evidence and error in admitting the confessions. No appeal was taken from the order denying a new trial. The errors complained of have, however, been discussed under the appeal from the judgment.

[8] The assignment of alleged "errors at the trial" is without merit. Such errors would not justify a reversal even in the absence of section 4½ of article VI of the California Constitution. Furthermore, if evidence as to offenses not charged against the defendants was received, it must be assumed that the jury was given proper instructions as to the limited purpose for which such evidence was received, inasmuch as no contention is made that the jury was not fully, fairly and correctly instructed. For that reason, the instructions have not been brought here on this appeal.

[9-12] There remains to be noticed the final contention of appellants, that because of certain statements made by the trial judge at the time he pronounced sentence upon them, it was the court's duty to order a new trial on the ground that the aforesaid confessions were inadmissible. In this regard the record reflects that after the jury had rendered the guilty verdicts herein and had been discharged, and when granting appellants' requests for permission to file applications for probation, the court said:

"Before the matter is concluded there is something the Court would like to state.

"There was strong evidence in this case that the police exercised force and brutalities on these defendants. The Court isn't at all convinced that didn't happen, and from a preponderance of the evidence, the indication is that certain members of the Los Angeles Police Department did use force and threats on these defendants.

"I have no criticism of the verdict. We know the effect of such. They, the jury, rightly perhaps, disregarded the confessions and even admissions and still arrived at the result."

When, however, at a later date, appellants appeared for hearing upon their applications for probation, the court denied a motion for new trial, denied probation, and sentenced appellants to the penitentiary.

There can be no doubt that where a trial court is of the opinion that a party prosecuted for a crime has been convicted upon insufficient evidence or has been denied that fair and impartial trial guaranteed to every person accused of crime, it is the duty of the court to set the verdict aside by granting a new trial. But in the instant case the foregoing remarks of the trial judge show conclusively that he had no doubt but that the verdicts were justified. We have a right to presume, from the fact that the motions for new trial were denied, that the court entertained no doubt that the verdicts were justifiable and fully supported by substantial evidence, and that the defendants had been fairly tried and justly convicted. We must assume, in other words, that had the trial judge entertained any reasonable doubt as to whether guilty verdicts should have been returned, he would have granted a new trial. In this regard it must be borne in mind that notwithstanding his remarks concerning the testimony relative to claimed brutality and threats on the part of the police officers, the trial judge stated unequivocally, "I have no criticism of the verdict." Furthermore, as aptly stated by the court, "They, the jury, rightly perhaps, disregarded the confessions and even admissions and still arrived at the result." The instructions not being before us and no claim being urged that they were not full, complete and correct, we too must assume that the jury was correctly instructed upon its duty not to consider the confessions of appellants if they believed such confessions were obtained by force, violence or threats, and were, therefore, not freely and voluntarily made.

We have now specially considered the more important points urged for a reversal, and, as must be apparent, have been able to discover no sound legal reason for disturbing the result.

The judgments are and each of them is therefore affirmed.

YORK, P. J., and DORAN, J., concur.

SACKS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 16095.

District Court of Appeal, Second District, Division 1, California.

Sept. 2, 1947.

Rehearing Denied Sept. 25, 1947.

1. Process 🔑1

Issuance of process is not a judicial, but an administerial, act or duty.

2. Officers 🔑103

A purely ministerial act is void, unless officer performing it conforms strictly to provisions of statute measuring his authority.

3. Insane persons 🔑13

The absence of statutory provision for issuance of alias citation in incompetency proceeding does not deprive superior court of authority to order issuance of such citation, as courts vested by Constitution with jurisdiction of such proceedings may frame suitable writs and direct reasonable mode of service thereof. Probate Code, § 1461.

4. Process 🔑45

A court has inherent power, outside of any statute, to issue such further process as will bring parties before it in action over which it has jurisdiction. Code Civ.Proc. § 187.

5. Prohibition 🔑26

In prohibition proceeding to restrain superior court from proceeding on alias citation issued by clerk thereof in incompetency proceeding, allegation in court's answer that it had no sufficient information or belief, whereby it might answer allegation of petition that no court order directing clerk to issue such citation was made, was insufficient denial of such fact as amounting to no more than statement that court had no information or belief concerning its own records. Probate Code, § 1461.

6. Insane persons 🔑13

The statute prescribing procedure for declaration of person's incompetency and appointment of guardian does not authorize superior court clerk to issue alias citation to alleged incompetent without express court order, but ministerial power, given clerk by such statute, to issue citation, is exhausted by issuance of original citation. Probate Code, § 1461.

7. Insane persons 🔑13

In proceeding for declaration of person's incompetency and appointment of guardian, neither such person, nor his attorney, is legally entitled to waive sufficiency of process against him. Probate Code, § 1461.

8. Insane persons 🔑13

Probate Code, § 1207, prescribing manner of issuance of original citation, required by section 1206 when Code prescribes no mode of giving required personal notice, is inapplicable to incompetency proceedings, in which kind of notice, character of service thereof, and mode of giving it are prescribed in section 1461, and hence does not authorize superior court clerk to issue alias citation to alleged incompetent without court order. Probate Code, §§ 1206, 1207, 1461.

9. Trial 🔑14

The superior court clerk has no authority to restore to court calendar, of his own volition, a cause previously marked "off calendar" by court, but such restoration must be accomplished by court's direction or order.

10. Prohibition 🔑10(2)

Prohibition lies to restrain superior court from proceeding on alias citation issued by court clerk in incompetency proceeding without court order required by statute, compliance with which is jurisdictional. Probate Code, § 1461.

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* Subsequent opinion 190 P.2d 602.

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Original proceeding by Allie Walters Sacks for a writ of prohibition requiring the Superior Court of Los Angeles County and Newcomb Condee, a judge thereof, to refrain from proceeding on an alias citation, issued by the clerk of such court without a court order in a proceeding to declare petitioner an incompetent person and appoint a guardian for her.

Peremptory writ granted.

See also 180 P.2d 922.

Bodkin, Breslin & Luddy and S. V. O. Prichard, all of Los Angeles, for petitioner.

Harold W. Kennedy, Co. Counsel, William E. Lamoreaux, Deputy Co. Counsel, Wilbert C. Hamilton, and R. R. Sleeper, all of Los Angeles, for respondents.

WHITE, Justice.

This is an original application to this court brought by Allie Walters Sacks, directed to the Superior Court of the County of Los Angeles, praying for a writ of prohibition requiring said superior court to desist and refrain from all further proceedings in an incompetency matter instituted against petitioner, and in which proceeding it is alleged respondent court will proceed upon an alias citation issued by the clerk of said court allegedly "without any order of said respondent court and acting solely upon his own motion and of his own free will."

So far as pertinent to a disposition of the present controversy, petitioner asserts in her petition that on July 16, 1946 there was filed in respondent court a petition for the appointment of a guardian of her person and estate. Thereupon, pursuant to the provisions of section 1461 of the Probate Code, the clerk of respondent court set August 12, 1946, at 9:30 a.m., in department 25 of respondent court, as the time and place for the hearing of said petition, and as further required by the aforesaid Probate Code section, issued a citation. Thereafter, on July 30, 1946, upon representation being made that the original citation had been lost, an order was made by a judge of respondent court directing the clerk to issue an alias citation, returnable at the same time and place as that set forth in the original citation.

When the matter came on for hearing on August 12, 1946, petitioner, the citee named in said citation and alias citation not having been served with process, was not in court, and the matter was continued to August 19, 1946 on which date, although petitioner, the citee named in said citation and said alias citation, had not yet been served with said process and was not present in court (although she was physically able to have attended such court), respondent court proceeded to conduct a hearing based upon the foregoing original citation and alias citation, and then and there made its order adjudging that this petitioner was an incompetent person and appointed a guardian of her estate. That at such hearing the court directed that insofar as the petition sought the appointment of a guardian of the person of this petitioner, that matter should be continued to September 16, 1946, and directed that an alias citation be issued by the clerk returnable on the last-mentioned date, requiring petitioner herein to appear and then and there show cause why an order should not be made appointing a guardian of her person. Petitioner herein further alleges that when the matter was called for hearing on September 16, 1946 no showing was made that the alias citation had been served upon her and that the court then made its order that the petition, insofar as it sought the appointment of a guardian for the person of petitioner herein, should be marked "off calendar."

Petitioner further alleges that subsequent to September 16, 1946, no order of respondent court has ever been made directing that the foregoing petition, insofar as it related to the appointment of a guardian of the person of petitioner herein, should be restored to the calendar of respondent court, and that no order has at any time been made directing that the clerk should issue any alias citation "or any other appropriate process to be served upon this petitioner in connection with said matter and proceeding except as hereinbefore recited."

Petitioner then alleges that on March 31, 1947, she instituted in this court an original proceeding in prohibition to restrain the respondent superior court and the Honorable Newcomb Condee, as a judge thereof, from proceeding further with respect to the petition for appointment of a guardian, based upon the foregoing order of August 19, 1946, adjudging this petitioner to be an incompetent person and appointing a guardian of her estate. It is then alleged by petitioner that while said prohibition proceeding was pending in this court and undetermined therein, the clerk of respondent superior court, on or about May 1, 1947, "without any order of said respondent court, and acting solely upon his own motion and of his own free will, issued a new citation with reference to said petition * * *, directing and requiring this petitioner to appear before respondent court on May 15, 1947 * * *, then and there to show cause why this petitioner should not be adjudged an incompetent person" and why a guardian should not be appointed both of her person and of her estate in accordance with the original petition on file. It is then alleged that on May 15, 1947, when said citation was returnable, petitioner appeared in respondent court in person and by her attorneys and objected to respondent court taking any steps or proceeding with respect to said citation by reason of the pendency of the prohibition proceeding in this court and because of the alternative writ of prohibition issued by us. Thereupon, respondent superior court made its order that all proceedings with respect to said citation should be continued to June 5, 1947.

It is then alleged by petitioner that on May 21, 1947, this court rendered its decision wherein it was held that the order of August 19, 1946, purporting to adjudicate that petitioner herein was an incompetent person and appointing a guardian of her estate, was without authority, in excess of the jurisdiction of respondent court and void, and that said respondent court should be restrained from further actions and proceedings based upon said order, Sacks v. Superior Court, 79 Cal.App.2d 806, 180 P.2d 922, petition for hearing in the Supreme Court denied July 17, 1947.

It is further alleged in the petition herein that when the petition based upon the citation issued by the clerk of respondent court "of his own free will and without any order of the court for the issuance of said citation" came on for hearing on June 5, 1947, petitioner and her attorneys appeared before respondent court, objected to any proceedings based upon said purported citation upon the ground that said citation was a nullity and void because the clerk had neither statutory authority nor authority by order of court for the issuance of said citation. Thereupon, the matter was continued for further hearing until July 11, 1946, upon which date respondent court overruled the objection of petitioner with respect to said citation and ordered that the matter be continued to July 18, 1947, at which time it is alleged that the Honorable Newcomb Condee, as judge of respondent court "stated that said matter would be sent to the presiding judge for immediate assignment for trial based upon said purported citation."

Upon the filing of the foregoing petition herein, this court made its order directing the issuance of an alternative writ of prohibition directing respondent court to refrain from taking any further proceedings based upon the citation allegedly issued as aforesaid by the clerk of respondent court on May 1, 1947, or to show cause why a peremptory writ should not issue.

Pursuant to the aforesaid alternative writ of prohibition respondent court filed its return and answer thereto wherein no denial is made of the material allegations contained in the foregoing petition filed herein except insofar as petitioner alleges that no order of respondent court has ever been made directing that the petition for an appointment of a guardian insofar as it related to the appointment of a guardian of the person of petitioner is concerned, should be restored to the calendar of said court, and that no order has been made directing that the clerk should issue an alias citation. Respondent court in answer thereto alleges "that neither petitioner Allie Walters Sacks, nor her counsel have or conceivably could have sufficient information to support" such allegations, and "this respondent has no sufficient information or belief in the matter whereby it may answer" such allegations, "and therefore, on that ground denies" the same.

The first ground upon which petitioner asks for a peremptory writ of prohibition is that there is no authority for the issuance by the clerk of an alias or new citation in a proceeding to adjudge one an incompetent person without an order of court where an original citation has been issued and the issues thereon tried.

Section 1461 of the Probate Code provides the procedure whereby any relative or friend may seek the appointment of a guardian for an alleged insane or incompetent person. After setting forth such procedure the section then goes on to provide that "thereupon the clerk shall set the same for hearing by the court and issue a citation directed to said alleged insane or incompetent person setting forth the time and place of hearing so fixed by him." The manner in which the citation shall be served and in which the hearing shall be conducted are then provided. We are satisfied that section 1461 of the Probate Code gives no authority to the clerk to issue an alias citation or to do other than, upon the filing of a petition for an appointment of a guardian to "thereupon" set the cause for hearing and issue a citation. The record herein discloses that immediately after the filing of the petition in July, 1946, the clerk of respondent court exercised the foregoing authority vested in him by section 1461 of the Probate Code, issued a citation, which was heard and determined in part and marked "off calendar" as to the residue.

We are therefore confronted with the question of whether by his issuance of the original citation the clerk exhausted completely all statutory authority vested in him for the issuance of any citation.

[1, 2] The issuance of process is not a judicial but is rather a ministerial act or duty. 50 C.J. 449. A multitude of cases sustain the statement that a purely ministerial act is void unless the officer performing it conforms strictly to the provisions of the statute which is the measure of his authority. Farrar v. Steenbergh, 173 Cal. 94, 159 P. 707; Landwehr v. Gillette, 174 Cal. 654, 163 P. 1018; Baird v. Smith, 216 Cal. 408, 14 P.2d 749; Da Aranje v. Rodriques, 50 Cal.App.2d 425, 431, 123 P.2d 154; Spaulding & Co. v. Chapin, 37 Cal.App. 573, 174 P. 334; Kelly v. Van Austin, 17 Cal. 564; Old Settlers Inv. Co. v. White, 158 Cal. 236, 110 P. 922.

[3-6] We do not wish to be understood as holding that under the circumstances here present the court itself was without authority to make an order for the issuance of the alias citation here under attack simply because section 1461 of the Probate Code or no other section of that code makes provision for the issuance of such process, because the courts, being vested by the Constitution with jurisdiction of actions such as the one before us, could frame suitable writs and direct a reasonable mode of service. In other words, the power is inherent in the courts outside of any statute to issue such further process as will bring the parties before it in an action over which it has jurisdiction. Section 187 of the Code of Civil Procedure expressly confers this power when necessary to the exercise of the court's jurisdiction. McKendrick v. Western Zinc Mining Co., 165 Cal. 24, 29, 30, 130 P. 865; United States Blowpipe Co. v. Spencer, 46 W. Va. 590, 33 S.E. 342, 344. While in the instant proceeding the court recognised this right and exercised it in the issuance of other alias citations herein, yet no such order was made prior to the issuance of the alias citation upon which the court now seeks to proceed. Such is the emphatic allegation in the petition herein and the same is denied by respondent court only because of "no sufficient information or belief." This denial we consider as totally insufficient because it amounts to no more than respondent court saying it has no information or belief concerning its own records. Insofar as section 1461 of the Probate Code is concerned, we are satisfied that the issuance of the alias citation, about which we are here concerned, was a nullity. That in the absence of some express order of the court, the clerk was without authority to issue more than the original citation authorized by the foregoing code section.

When he issued that citation his ministerial power to issue was exhausted. Peck v. La Roche, 86 Ga. 314, 12 S.E. 638.

The cases cited by respondent court are not helpful in solving the question now before us because they simply support the proposition that a new citation may be issued pursuant to a judicial order directing its issuance. In the case at bar, as we have pointed out, there was no such order.

[7] While it is true that deficiency in process may be waived in the ordinary case, this is not such a case. It is a proceeding wherein the citee was alleged by the petition to be an incompetent person. In such proceedings neither the alleged incompetent nor his attorney is legally entitled to waive the sufficiency of the process against him. Snyder v. Superior Court, 206 Cal. 346, 349, 274 P. 337, and cases therein cited.

[8] Respondents, however, cite and place firm reliance upon section 1207 of the Probate Code, asserting that this section furnishes authority for the clerk to issue the alias citation without an order of court. We fail to perceive the force of respondents' argument. In the first place, section 1207 relates to an original citation and has no reference to an alias citation. Secondly, section 1207 is directly connected with and has reference to section 1206 of the Probate Code. The last-named section provides that "when personal notice is required, and *no mode of giving it is prescribed by this code*" (emphasis added), it must be given by citation. Section 1207 then provides that "the" citation may be issued in a certain manner, manifestly referring to "the" citation prescribed in section 1206. The section just named comes into operation only when personal service is required, and when "no mode of giving it is prescribed by this code." Section 1461, which has to do with incompetency proceedings, is definite and unequivocal as to two things. The first requires that personal service be made, and then particularly prescribes "the mode" of giving it. Therefore, it seems to us that while section 1207 is contained in a series of sections relating to the character of notice required to be given in probate proceedings, it bears no reference to incompetency proceedings because section 1461 of the Probate Code provides fully for the kind of notice, the character of service, and the "mode" of giving it, and is a part of chapter IV of the Probate Code, which sets up a complete plan and method for use in declaring a person incompetent.

[9] We are cited by respondents to the case of In re Guardianship of Lyle, 77 Cal. App.2d 153, 174 P.2d 906, in support of their claim that notwithstanding the fact that the court marked the proceeding "off calender" it still retained jurisdiction. But nowhere in the cited case do we find any authority for the clerk of the court, of his own volition, to restore a cause, so marked, to the calender. In fact, the holding in the Lyle case is that once a case is marked "off calendar" the court retains jurisdiction to restore the cause to the calender "on motion of one or more of the litigants or on the court's own motion." The restoration of the cause to the calendar must, therefore, be accomplished by direction or order of the court.

Furthermore, in the matter now before us the court acquired no jurisdiction of this petitioner through the first and original citation issued. In the decision rendered by this court in Sacks v. Superior Court, supra, it was held that the steps taken by respondent court in August and September, 1946, were totally void. In such a situation, In re Guardianship of Lyle, supra, is not helpful.

[10] Finally, respondents assert that prohibition is not the proper remedy. The cases of Snyder v. Superior Court, supra, and Sacks v. Superior Court, supra, hold that compliance with section 1461 of the Probate Code is jurisdictional. Where, as here, there has been no compliance therewith, prohibition will lie.

Let the peremptory writ issue as prayed for.

YORK, P. J., and DORAN, J., concur.

80 Cal.App.2d 888

DOCHERTY v. KEY SYSTEM et al.

Civ. 13381.

District Court of Appeal, First District,
Division 1, California.

July 21, 1947.

As Modified on Denial of Rehearing
Aug. 20, 1947.

Hearing Denied Sept. 18, 1947.

1. Judgment 🔑**199(3)**

The trial court's right to set aside verdict and enter a contrary judgment is the same as its right to grant a nonsuit.

2. Judgment 🔑**199(3)**

Judgment notwithstanding verdict for plaintiff should be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, there is no evidence of sufficient substantiality to support verdict for plaintiff.

3. Railroads 🔑**350(30)**

In action for death of motorist whose automobile was struck by electric train at street intersection in area in which train was operating on a private right of way, whether motorist was contributorily negligent in not getting automobile off car tracks or whether he had been unavoidably delayed by truck running through stop sign was a question for jury.

4. Railroads 🔑**324(1)**

Where parties to action for death of motorist whose automobile was struck by electric train agreed that because train at that point was operating on private right of way with ties exposed, rules relative to railroad intersections should apply, motorist upon observing presence of open tracks in the private right of way was under a special duty of care.

5. Railroads 🔑**320**

Motorman operating electric train on private right of way was entitled to assume that any person approaching crossing at street intersection would use due care for his own protection.

6. Railroads 🔑**350(7)**

In action for death of motorist whose automobile was struck by electric train operating on private right of way on either side of street intersection, whether it was negligence for train to approach crossing at increasing speed reaching 30 miles an hour without giving warning until 50 to 75 feet away was question for jury under evidence that motorist was in a line of traffic crossing tracks and was delayed by truck driven through stop sign on intersecting street.

7. Railroads 🔑**333(3)**

A motorist whose automobile was struck by electric train at crossing when his automobile was delayed in crossing track by truck which was driven through stop sign on intersecting street, in approaching crossing was entitled to assume that truck driver would stop at stop sign.

8. Railroads 🔑**333(2)**

The stop, look and listen rule does not require driver of vehicle to wait for train to pass unless it is in such proximity to crossing as to constitute an apparent hazard.

9. Railroads 🔑**350(30)**

In action for death of motorist whose automobile was struck by electric train at crossing, where plaintiff's eyewitness testified to impression that motorist was delayed by truck so as to be unable to cross track in front of train, whether alleged discrepancies in testimony based upon witness' estimate of time, speed and distance overcame weight of his main story was for jury to determine.

10. Judgment 🔑**199(3)**

In action for death of motorist whose automobile was struck by electric train at crossing, where, upon indulging in every legitimate inference which could be drawn from plaintiff's testimony it could not be said that there was no evidence of sufficient substantiality to support a verdict in favor of plaintiff, it was improper to enter judgment in favor of defendants notwithstanding verdict for plaintiff.

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Mabel V. Docherty against the Key System and another to recover for the death of the plaintiff's husband in a collision between an automobile driven by the deceased and the defendant's train. From a judgment in favor of the defendants notwithstanding a verdict for the plaintiff, the plaintiff appeals.

Judgment reversed with directions.

Nichols & Richard, Milo E. Ayer and Stanley C. Smallwood, all of Oakland, for appellant.

Donahue, Richards & Hamlin, Arthur E. Sugden and Bryant M. Bennett, all of Oakland, for respondents.

BRAY, Justice.

Action by plaintiff for the death of her husband in a collision at Ashby Avenue and Adeline Street in Berkeley between an automobile driven by the deceased and a train of the defendant. The jury brought in a verdict for plaintiff, but the court entered a judgment in favor of defendants notwithstanding the verdict, upon the grounds that "* * * the decedent was, at the time of and prior to the happening of the collision in question, guilty of contributory negligence as a matter of law [and] * * * That the motion for a directed verdict heretofore made by the Defendants herein should have been granted by the Court." In addition to the denial of the motion for directed verdict, the court also denied a motion for nonsuit.

[1, 2] Before considering the evidence, it may be well to consider the rule of law applicable to this appeal.

"The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right to grant a nonsuit. [Citing cases.] The court should therefore grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. [Citing cases.]" Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191.

As said in Shannon v. Thomas, 57 Cal. App.2d 187, at page 193, 134 P.2d 522, 525:

"* * * it is only when reasonable minds can draw but one inference, and that inference points inevitably to the negligence of plaintiff, contributing directly or proximately to his injuries, that the law will step in and forbid a recovery under the verdict. Preservation of the inviolable right of a litigant to a trial by jury is guaranteed by both the federal and state Constitutions, * * * which accounts for the rule that it is only when it can be said as a matter of law that no reasonable conclusion is legally deducible from the evidence other than would sustain a verdict for the defendant, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, that a court is justified in taking the case from the jury and rendering the decision itself. [Citing cases.]

"Upon this appeal, therefore, there is but one question to be determined by us and that is whether the appellants or either of them were as a matter of law guilty of contributory negligence which proximately contributed to their injuries. If this question requires an affirmative answer, then recovery is barred."

In view of the above rule only the facts must favorable to plaintiff will be set out. Contradictory evidence will be omitted.

The accident occurred on a Saturday evening at approximately 8 o'clock. At the scene of the accident, Adeline Street runs approximately north and south, and is approximately 147 feet 7 inches wide. There are two sets of tracks on Adeline Street, only the more easterly of which is used by the Key System; although some distance on either side of the intersection in question, the Key System operates on double tracks. For five or six blocks north of the intersection in question and for three or four blocks south, the tracks used by the Key System are on a private right of way with the ties exposed, although at the point where Ashby crosses Adeline, the right of way is paved. There is a jog in Ashby at Adeline, the point where Ashby enters from the east being some distance north of the point of entry from the west. From the north curb of Ashby where it enters on the east side of Adeline to Emerson Street, which enters Adeline also on the east side, just south of the point where Ashby enters Adeline from the west, the distance is over 300 feet. At the point where Ashby enters Adeline from the east side, it is divided in the center by a double white line with two traffic lanes on each side thereof, and Ashby is similarly lined with the same number of traffic lanes where it enters Adeline Street from the west. There are stop signs stopping all traffic entering the intersection from either street.

John Mitts is the only eyewitness produced by plaintiff. He testified that he was in the antique business in a store on Adeline Street which he located on a map or plat (plaintiff's exhibit 1). His car was parked in front of or to the north of his store. He placed the car on the map at a point on the east side of Adeline Street and about 40 feet from the point M-2 hereafter mentioned. As he was walking to his car he first saw the electric train coming to a stop just before it hit the easterly jog of Ashby Avenue (over 150 feet away from the point of impact). At that time he saw Docherty's car among several cars coming east on Ashby towards Adeline. He paid no particular attention to them. Docherty's car was about 100 feet from the tracks with one car ahead of it and quite a number behind it. At that time there was traffic going down Adeline to which he did not pay much attention. Mitts had entered and started his car when a big van-type truck passed him to his left going north on Adeline traveling as close to the curb on the left side of the street as it could get. (On Adeline there is a curb paralleling, and less than 10 feet to the east of, the railroad tracks. Its northerly end is in front of Mitts' store.) Mitts then placed on the map the location of the truck (at M-3). He drew the front end of the truck as just opposite the rear end of his car and about 20 feet to 25 feet beyond the stop mark on the pavement of Adeline Street. The truck was going about 20 miles an hour. At that time Docherty's car was about a hundred feet from the truck. Mitts then placed Docherty's car on the map at a point marked M-2 which shows the car on the westerly of the two sets of tracks, its front touching the easterly rail of the westerly tracks (actually no more than 20 feet from the truck as marked). Mitts then stated that at the time the truck was passing him Docherty's car was 75 feet from the point where it was hit, but again located Docherty's car at M-2. Apparently Mitts' judgment as to distance was not very accurate as he estimated the tracks as being 25 feet apart (apparently meaning the distance between sets of tracks). Actually, the distance from the most westerly rail of the westerly tracks to the most easterly rail of the easterly tracks is only 18.2 feet. At this point there was a car in front of and 10 feet from Docherty's car. This car passed in front of the truck; the truck almost hit it, and Mitts' vision of Docherty's car was obstructed by the passing truck. At that time the train had started out from Ashby station. When the truck passed Mitts, Docherty's car was at M-4. The diagram placed by Mitts on the map shows the car diagonally across the easterly set of tracks, its front touching the most easterly rail. It was barely moving and the train was about 100 feet away increasing its speed. The train struck Docherty's car and pushed the car in front of it down to the next street corner. (According to measurements made by a police officer the train went 154 feet after striking the car.) Mitts estimated the speed of the train when it hit the car as 30 miles an hour. When the train was 50 to 75 feet from the car the bell was sounded on the train. On cross-examination Mitts said that when he last saw the truck it was almost going out of sight north on Adeline across Ashby Avenue, going between 20 and 25 miles an hour, and at that time Mitts placed the location of the train as M-6, which is approximately 30 feet from M-4, the location of Docherty's car and the point of the accident. Mitts saw Docherty's car travel from M-2 to M-4. (On direct examination he said that he saw the car at M-2, the truck obstructed his view, and he next saw the car at M-4.)

A reasonable inference from Mitts' testimony as a whole is that Docherty was approaching the crossing second in a line of cars; that the train was far enough away to have enabled him to cross the tracks in safety; that the truck ran through the stop sign, blocked the path of the car ahead of him, causing Docherty to either stop on the tracks or to almost stop, long enough for the on-coming train, which in spite of the fact that it was approaching a heavily traveled intersection and a line of cars approaching and crossing it, kept increasing its speed, and without giving any warning until it was 50 to 75 feet from the crossing, collided with Docherty's car; that Docherty would have safely crossed had it not been for the action of the truck in violating the law in not stopping at the stop sign and thereby creating an unexpected hazard, which together with the negligence of the train caused the accident.

[3] It is true that Mitts' testimony is somewhat contradictory and that the inference above stated is not the only one which can be drawn from his testimony. Moreover, it is a possible and reasonable inference from Mitts' testimony (and this inference is supported by the evidence introduced by defendants) that the accident was solely due to the fault of Docherty, or that Docherty at least was guilty of contributory negligence. But taking Mitts' testimony and the legitimate inferences therefrom, as we must, there was evidence of sufficient substantiality to require that the jury pass upon the case.

In drawing the inference that the truck ran through the stop sign, we are disregarding the conclusion of the witness Mitts in that regard, as it was objected to and was clearly not admissible. However, the fact that a truck of the size testified to by Mitts was going 20 miles an hour at a point not over 25 feet from the stop line raises a legitimate inference that it did not stop, as it is exceedingly doubtful that such a truck could reach that speed from a standstill in 25 feet.

Also a reasonable inference can be drawn that the deceased as he approached the crossing would have seen the truck considerably to the south of the stop line, would have assumed that it would stop as required by law; and then seeing the train a safe distance away, was justified in proceeding to follow the car ahead of him, keeping his eyes on the train to his left, as the point from which danger might be expected, and then due to the failure of the truck to obey the law, deceased found himself delayed just long enough to be unable to get out of the way of the approaching train. There was not room enough between the truck and the tracks for Docherty to have cleared the tracks.

[4-6] It is agreed by both parties that under the situation as it existed at the point of the accident, the rules relative to railroad intersections should apply rather than the rules applying to street car tracks. Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 153 P.2d 705; Dolton v. Green, 72 Cal.App.2d 427, 164 P.2d 795. Thus, Docherty, upon observing the presence of the open tracks in the private right of way, was under a special duty of care. Heintz v. Southern Pacific Co., 63 Cal.App.2d 699, 147 P.2d 621. The motorman of the train was entitled to assume that any person approaching the track would use due care for his own protection. While the motorman ordinarily would be under no duty to stop, slow down or otherwise change the operation of his train in approaching the crossing, still, in view of the line of traffic crossing the tracks, the on-coming truck blocking the line of traffic and the peculiar circumstances here, it was for the jury to determine whether or not it was negligence for the train to approach the crossing at an ever-increasing speed reaching 30 miles an hour, without giving any warning until 50 to 75 feet away.

While, as pointed out by respondents, there is no direct evidence in the record that deceased stopped before approaching the tracks, that fact is not controlling. The evidence showed that deceased was familiar with the crossing. Without resorting to the due care presumption, the jury had the right to infer from all the circumstances of the case that had deceased looked as he approached the crossing he would have seen the train far enough away to permit him to continue on and clear the tracks in ample time, had not the sudden emergency created by the truck blocked his passage.

Respondents rely upon the case of Dolton v. Green, supra, 72 Cal.App.2d 427, 164 P.2d 795. In that case Dolton at a crossing quite similar to the one here, on making a left-hand turn 58 feet from the tracks, entered a line of moving traffic behind a sedan which was following another vehicle. At this point he saw the on-coming train, but made no estimate of its speed, and did not look at it again. While he was crossing the tracks, the two cars ahead of him suddenly stopped to permit the passing of traffic ahead of them going at right angles to their approach. Dolton could not go forward or backward because of the cars ahead of and behind him, and was struck by the train. He was held guilty of contributory negligence as a matter of law because he did not stop before he went upon the tracks. The court said, 72 Cal.App.2d at page 443, 164 P.2d at page 803: "While it is true that respondent could not go backward because of the presence of another vehicle 'about five feet behind me,' he could nevertheless have stopped his truck at any time before he went upon the tracks. He was travelling at a rate of speed of from ten to twelve miles per hour and, according to his own testimony, could have stopped his vehicle within 10 or 12 feet. The situation here presented is not one where without negligence on his part a vehicle driver finds himself in a position where the circumstances suddenly confronting him may excuse his failure to follow the law and wherein what a reasonable person might do under similar circumstances is not so clear but that reasonable minds might differ on the question. In the case with which we are here concerned the physical facts shown by the undisputed evidence raise the inevitable inference that respondent admittedly not only could see but did see the electric car approaching when he was in a position of safety 58 feet from the tracks; that he failed to again look in the direction of the approaching danger or pay any attention thereto before he reached a hazardous position on the track; that at any time before he drove on to the tracks he could have stopped his truck within a distance of 10 or 12 feet; that he was also aware of the traffic proceeding east and west on the south side of Venice Boulevard and that such westbound traffic might, as it did, cause the vehicles in front of him to stop. The evidence shows that although respondent had an unobstructed view of the tracks and the car approaching thereon for the last 58 feet, he still continued to drive up to and upon the tracks in face of the approaching car, and that during the time just mentioned he neither judged the speed of the car nor looked toward it to see what effect its approach to the intersection might have upon his safety."

The distinction between the Dolton case and ours is that there Dolton while 58 feet from the tracks saw the approaching train 200 feet away, paid no more attention to it, nor estimated its speed, continued to the tracks at a speed of about 12 miles an hour, entered upon the tracks with the knowledge of the boulevard traffic going at right angles just across the tracks, and the probability of the cars ahead of him being blocked by that traffic. In our case, as pointed out, the jury could infer that at the time Docherty entered upon the tracks the train was far enough away not to constitute an immediate hazard, that had he noticed the truck before it reached the stop sign, he would not necessarily be negligent in no longer watching the truck and in assuming that it would stop, which would have enabled him and the car ahead to clear the tracks, and that while keeping watch of the on-coming train he was blocked while on the tracks by the truck continuing to come ahead without stopping at the stop sign.

[7] Under the testimony of Mitts, there was no time when it could be said as a matter of law that Docherty was guilty of contributory negligence. It is not clear from the testimony whether Mitts first saw Docherty's car in the line of cars approaching the tracks before it arrived at the westerly set of tracks (M-2). But at that point a reasonable inference may be drawn that the train was far enough away so that Docherty was in no peril from its approach, had the truck stopped at the stop sign.

Again when Mitts next saw Docherty (at M-4) on the easterly tracks (the ones upon which the train was approaching), it is a reasonable inference that he would have been able to have cleared the tracks except for the action of the truck. This case really resolves itself into the one question, as a matter of law was Docherty negligent in assuming that the truck would stop at the stop sign and in not watching it? To ask the question is to answer it. He had a right to assume that the driver of the truck would obey the law.

The truck was a hazard to Docherty, not because of its proximity, but because it failed to stop as required by law. The rule is well stated in Dickinson v. Pacific Greyhound Lines, 55 Cal.App.2d 824, at page 827, 131 P.2d 401, 402, "In other words, defendant's bus was a hazard to plaintiff's car not because of the proximity of the bus but because of its unlawful speed. At its distance danger could be anticipated from it only by anticipating that its driver would violate the law. The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person. (Harris v. Johnson, 1916, 174 Cal. 55, 58, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560; Medlin v. Spazier, 1913, 23 Cal.App. 242, 245, 137 P. 1078, quoting from 29 Cyc. 516.) Whether reasonable care is used under the circumstances in any particular case in relying upon the presumption is a question for the jury. (White v. Davis, 1930, 103 Cal.App. 531, 545, 284 P. 1086.)"

In Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 161 P.2d 673, 164 A.L.R. 1, the plaintiff left the curb when the traffic signal turned in her favor. She was hit by a street car which disregarded the traffic signal. The court said, 26 Cal.2d at page 838, 161 P.2d at page 675, 164 A.L.R. 1: "Whether or not she should have observed that the street car had started forward at that time, and if it had, she was aware of the danger, *were for the jury to decide.*" (Emphasis added.) In Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682, the plaintiff was driving her automobile over an oblique crossing of five sets of railroad tracks. She claimed she looked to the right and saw no train. She did not look in that direction again. She then looked to the left and saw a freight train on the first track for which she waited. She then started across the tracks and saw a locomotive to her left on track two. Keeping her eye on this locomotive she continued on and was struck on track four by a train coming from her right. The court said 8 Cal.2d at page 651, 67 P.2d at page 684: "* * * her conduct in failing to look again to her right, in the presence of what she considered to be a definite hazard on her left" was a question for the jury.

[8] Cases like Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 59 P.2d 617, are distinguishable from this case, in that here the evidence sustains the conclusion that when deceased was first upon the tracks he had ample time to clear them had it not been for an unexpected violation of the law by the truck. In the Rasmussen case and those mentioned in it, the situations were ones where the plaintiffs took a chance on beating the on-coming trains across the crossing. The stop, look and listen rule does not require the driver of a vehicle to wait for a train to pass unless it is in such proximity to the crossing as to constitute an apparent hazard.

[9] One of the difficulties in this case is one inherent in all trials of this kind. An effort is made to pin a witness down to estimates of time, speed and distance, and then attempt to show the contradiction between computations made upon such estimates and the other statements of the witness. For example, it is possible to figure out from Mitts' estimate under cross-examination of the position of the truck, the train and the car, just before the collision, that the truck did not cause a blocking of the path of Docherty's car long enough to cause the accident. Still taking Mitts' testimony as a whole (and disregarding the discrepancies in it) it is apparent that as Mitts sat in his car he had a definite impression of Docherty's car being held, either stationary or barely moving, on the

tracks by the action of the truck just long enough for the accident to happen, and it was for the jury to determine whether the discrepancies overcame in weight his main story. The court cannot usurp the functions of the jury and say that they did. In Nelson v. Southern Pacific Co., supra (8 Cal.2d 648, at page 651, 67 P.2d 682, at page 684), concerning the effect of similar calculations, the court said: "It is obvious that even a slight error in the estimation of speed and distances would produce a totally different result. Such estimates and calculations do not therefore appear to us to be a sound basis upon which to declare inherently improbable the plaintiff's positive statement that no train was visible for a quarter of a mile on a stretch of straight track."

The testimony of Mitts, unaided by the presumption of due care, raises an inference of due care on the part of the deceased. Therefore, we have not considered appellant's contention that the presumption of due care applies, nor respondents' contention that it does not apply because contradicted by appellant's own evidence. Also it is unnecessary to consider appellant's contention that the doctrine of last clear chance applies. It should be noted that these questions were not raised at the trial nor were any instructions offered thereon.

[10] In this opinion we are not holding that the inference that Docherty was free from neglect is the only reasonable, nor necessarily the most reasonable one, to be drawn from the evidence, nor that a motion for a new trial would not be justified. We are merely holding that "disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence" we cannot say "there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Quotations are from Card v. Boms, supra, 210 Cal. 200, 202, 291 P. 190, 191.

As said in Anthony v. Hobbie, 25 Cal. 2d 814, at page 818, 155 P.2d 826, 829: "But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. [Citing cases]."

The judgment entered notwithstanding the verdict is reversed and the trial court directed to enter judgment in accordance with the verdict of the jury.

PETERS, P. J., and WARD, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

30 Cal.2d 541

ISLAND v. FIREMAN'S FUND INDEMNITY CO. et al.

S. F. 17393.

Supreme Court of California, in Bank.
Sept. 8, 1947.

1. Trial 🔑54(1)

The trial court is not bound by counsel's declarations that evidence is offered for limited purpose, so as to preclude other deductions therefrom than those suggested by terms of offer, unless injustice to opposite party would follow permission of such inferences or counsel and court have express understanding that evidence is to be limited to particular matter.

2. Appeal and error 🔑882(12)

Where defendant's attorney stated that he was going to impeach defendant's witness by his affidavit and, when plaintiff's counsel and trial court expressly limited evidentiary purpose of such witness' affidavits to impeachment of witness, defendant's counsel failed to take contrary position, defendant could not complain on plaintiff's appeal, that instruction to jury that evidence of witness's statements inconsistent wtih his testimony was admitted solely for impeachment purposes was erroneous.

3. Domicile 🔑4(2)

A person's domicile or legal residence is not affected by his enlistment in armed forces in absence of contrary intent.

4. Insurance 🔑146(3)

An insurance policy provision, susceptible of two constructions, should be construed most strongly in insured's favor.

5. Insurance 🔑435

Insured's son, living at insured's home before entering armed forces, in which he was serving when his automobile, driven by insured, caused injuries to another, was not member of insured's "household" at time of accident within condition of automobile liability policy that it should not apply to any other automobile owned by or furnished for regular use to insured or member of his "household."

See Words and Phrases, Permanent Edition, for all other definitions of "Household".

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Isaac Island against the Fireman's Fund Indemnity Company and others to recover, under an automobile liability insurance policy, the amount of a judgment against insured for personal injuries to plaintiff. From an order granting defendants a new trial after a judgment for plaintiff, he appeals, and from the judgment, defendants cross-appeal.

Order reversed and judgment affirmed.

Prior opinion, App., 172 P.2d 520.

James G. Quinn, Jr., of Emeryville, and John J. Healy, Jr., of San Francisco, for appellant Island.

Bronson, Bronson & McKinnon, and E. H. Chapman, all of San Francisco, for respondents.

EDMONDS, Justice.

Isaac Island sued Fireman's Fund Indemnity Company as a judgment creditor of J. C. Cave, Sr., its insured. The principal defense to the action is that the automobile which caused the injuries for which damages were awarded was not covered by the policy. Following a judgment in favor of Island, a new trial was granted. He has appealed from that order and the insurer is prosecuting a cross appeal from the judgment.

The insurer issued its standard form of automobile policy to Cave, Sr., and the accident occurred during the policy period. It appears without question that in an action brought by Island against J. C. Cave, Sr., he recovered a judgment for personal injuries. The judgment became final and is wholly unsatisfied.

The answer to the complaint stating these facts pleaded the provisions of the policy which insured Cave, Sr., against liability because of the operation by him of a certain Ford automobile. The contract extended the coverage to any other automobile operated by him, but upon the specific condition that the additional insurance should not apply "(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than such chauffeur or servant. * * *"

Adopting the language of the policy, the answer alleged that Island was injured by reason of the operation of an automobile driven by Cave, Sr., and furnished for regular use to him by J. C. Cave, Jr., his son and a member of his household. At the time of the accident, the insurer continued, the automobile owned by the son was, and had been, in regular use by the insured.

It is conceded that the accident in which Island was injured occurred while J. C. Cave, Sr., was driving the automobile owned by his son. At that time the son was in the armed forces. When he entered upon his military duties, about four months before the date of the accident, the son and his wife were living at the home of his father.

J. C. Cave, Sr., called as a witness by the insurer, told the jury that at the time the son went into the Army "he left the car there, with me; we had a double garage; and he asked me if I would drive it once in a while and keep the battery up,—charged." In reply to a question as to his compliance with his son's request, the witness said, "I drove his car a few times; I don't recall how often; * * * I used the car 15 or 20 times while he was away. * * * He was away about eight months." Asked as to whether he used the son's car with about the same frequency as his own, Cave, Sr., replied, "No; I didn't use it that often." He also declared that he used his car "to drive to and from work" and his son's car "about the same."

Counsel for the insurer asserted that he was surprised by this testimony and he produced an affidavit which the witness identified as one signed and sworn to by him in June, 1944, about fifteen months after the accident occurred. Asked as to how much of the statement was being relied upon to impeach the witness, the insurer's attorney replied, "The entire document." Obviously for the purpose of having a clear understanding as to the use to be made of the statement, Island's attorney then asked: "Before you start in, * * * do I understand * * * that you are attempting to impeach Mr. Cave—is that right?" The answer to this statement was: "I am going to do it. It is no attempt." An objection to "any attempt to impeach this witness" was overruled by the trial judge who stated: "I will permit counsel to impeach his own witness by the statement contained in the document on the ground of surprise."

The affidavit was then received in evidence and read to the jury. After the statement by the insured that, at the time of the accident, he and his wife resided in Oakland, the affidavit continued as follows: "My son and his wife lived with us off and on since we have been at the address. His name is John C. Cave, Jr. He joined the army on Dec. 16, 1942. He owned a 1935 Ford * * * sedan which he left with me when he went into the services. He and his wife lived with us for about a year just before he went in to the services. He left the car with me to drive it once in a while to keep the battery up and see that the car was in condition. I drove the car about 15 days per month to work or just about as much as I drove my own car."

Other evidence tending to prove statements by Cave, Sr., inconsistent with his testimony was given by James M. Hamlin, claims manager of the insurer. According to Hamlin, he called on Cave, Sr., two or three months after the accident occurred and took a written statement from him. During the examination of Hamlin, counsel for Island objected to the testimony identifying the document upon the ground that it constituted "an attempt * * * to impeach a witness that they brought here." Following some argument by counsel, the trial judge remarked: "It seems to me * * * that before you can introduce this statement by way of impeachment, you would have to lay a foundation for it, calling it to the witness's attention."

The insured, recalled as a witness for the insurer, admitted that he had signed the statement identified by Hamlin. It was then offered in evidence. Counsel for Island objected to the statement as "a further attempt upon the part of the defendant to impeach the witness produced by the defendant." The ruling upon the objection was that the portion of the statement relating to the extent of the use by the insured of his son's automobile would be admitted in evidence. Island's attorney then asked whether that portion of the statement was received "solely for the purpose of impeachment?" The trial judge replied: "That is true." A further question was asked by counsel: "And the same is true as to your Honor's ruling on the first document?" The judge answered: "I take it that was the purpose of the offer." The attorney for the insurer took no part in this colloquy and as soon as it was concluded read to the jury from the insured's statement the following: "He left the car with me to drive it once in a while to keep the battery up and see that the car was in condition. I drove the car about 15 days per month to work or just about as much as I drove my own car."

At the request of Island, the court instructed the jury: "In this case, evidence was received tending to show that the witness Cave had made statements, with reference to his use of the automobile involved in the accident, inconsistent with his testimony upon the witness stand. Such testimony was admitted solely for the purpose of impeachment, in order to assist you in determining what credibility should be given to his present testimony. It should not be considered by you as evidence affirmatively establishing the existence or truth of the facts stated in such prior statements."

Following the verdict of the jury in favor of Island and the entry of judgment thereon, the insurer made a motion for a new trial. In granting this motion, insufficiency of the evidence to support the judgment was not specified as a ground for the decision, and it is conceded that the only question to be considered upon the appeal from the order is whether this instruction should have been given.

Island takes the position that the motion should not have been granted because the affidavits of Cave, Sr., were, by stipulation between counsel and the court, offered and admitted solely for the purpose of impeachment after the insurer stated it had been surprised by his testimony. Furthermore, says Island, even if there had not been this understanding, the instruction was proper as the affidavits were hearsay and were inadmissible against him except for the purpose of impeachment.

The insurer contends that the evidence of Cave's prior declarations was not offered solely for impeachment and for no other purpose. Furthermore, it asserts, counsel have no power to limit the effect of evidence, and the evidence is admissible as a declaration against interest without regard to the purpose for which it is offered. The company insists that Island stands in exactly the same position as the insured; his rights are no greater nor less than those of Cave, Sr., and in his cause of action he is bound by the terms and limitations of the policy.

The judgment is subject to attack because of the insufficiency of the evidence, says the company in support of its appeal, although the order granting a new trial was not made upon that ground. Pointing to the allegations of the complaint, the insurer contends that the defense, reserved in the exclusionary clause of the policy, was properly presented to the trial court. There was a conflict in the evidence as to the issuance of regular use, the insurer admits, but it asserts that there is adequate testimony to prove ownership of the automobile involved in the collision by a member of the insured's household. Island takes the position that the insurer did not properly present the defense of ownership of the automobile involved in the accident by a member of the household, and in any event, the son did not come within that category while serving in the armed forces.

[1] The court is not bound by the declarations of counsel that evidence is admitted for a limited purpose so as to preclude the drawing of deductions from it other than those suggested by the terms of the offer, unless injustice would follow to the opposite party by permitting such inferences. Meridian, Ltd., v. City and County of San Francisco, 13 Cal.2d 424, 490, 90 P.2d 537, 91 P.2d 105; Isenberg v. Sherman, 214 Cal. 722, 732, 7 P.2d 1006; Sears v. Starbird, 78 Cal. 225, 230, 20 P. 547; Sill v. Reese, 47 Cal. 294, 340; People v. Westcott, 86 Cal.App. 298, 313, 260 P. 901; see 10 Cal.Jur. 816, et seq. However, in Sears v. Starbird, supra, 78 Cal. at page 230, 20 P. 547, and People v. Westcott, supra, 86 Cal.App. at page 313, 260 P. 901, at page 908, the court stated that this rule would not be applied when there was an "express understanding between counsel and the court that evidence is to be limited to a particular matter, * * *." See, 10 Cal.Jur. 816; 23 Cal.Jur., Stipulations, sec. 7, pp. 816, et seq.

[2] The present record shows such an understanding. During the course of the trial, answering the inquiry of Island's counsel as to whether the insurer was attempting to impeach Cave, Sr., by his affidavit, the attorney replied: "I am going to do it. It is no attempt." And when the other affidavit was introduced in evidence, counsel for Island and the court each expressly limited the evidentiary purpose of the documents. Counsel for the insurer, by his failure to then take a contrary position, agreed that the affidavits were offered solely for the purpose of impeaching the prior testimony of Cave, Sr. Under these circumstances, the insurer is in no position to complain that the instruction limiting the effect of the evidence was erroneous.

Turning to the cross-appeal of the insurer from the judgment, the contention of Island that the special defense as to the son's status as a member of the insured's household was not pleaded nor relied upon by the insurer in the trial court is not supported by the record. The insurer's answer quoted the exclusionary clause in full and alleged that the automobile involved in the accident was "furnished for regular use to J. C. Cave, Sr., by a member of his household, to wit, his son. * * *" and that said accident did not come "within the purview of the coverage afforded by said policy of insurance." Furthermore, one of the grounds included in the insurer's motion for a directed verdict was "that the ownership of the car that he was operating was by a member of his [Cave, Sr.'s] household."

[3] As contended by the insurer, the domicile or legal residence of a person is in no way affected by his enlistment in the armed forces in the absence of a contrary intent. Percy v. Percy, 188 Cal. 765, 768, 207 P. 369; Estate of Gordon, 142 Cal. 125, 75 P. 672; Stewart v. Kyser, 105 Cal. 459, 39 P. 19; Johnston v. Benton, 73 Cal.App. 565, 569, 239 P. 60; Kinsel v. Pickens, D.C. 25 F.Supp. 455; 148 A.L.R. 1414. But these decisions are not decisive upon the question as to whether military service excludes the enlistee from being a "member of the household" within the meaning of that term as used in an insurance policy.

One of the definitions of the word "household" given in Webster's New International Dictionary is, "Those who dwell under the same roof and compose a family; a domestic establishment." The courts have noted that the term may have different meanings under different circumstances. Moore Shipbuilding Corporation v. Industrial Acc. Comm., 185 Cal. 200, 207, 196 P. 257, 13 A.L.R. 676; Collins v. Northwest Casualty Co., 180 Wash. 347, 352, 39 P.2d 986, 97 A.L.R. 1235; Lumbermen's Mutual Casualty Co. v. Pulsifer, D. C., 41 F.Supp. 249. In one of these cases it was said that the word "is variously used to designate people, generally, who live together in the same house, including the family, servants, and boarders; or it may be used as including only members of the family relation. It is probable that the two terms are coupled together in this statute to indicate that they are used synonymously, the 'family' to include only those of the household who are thus intimately associated, the 'household' to exclude those of the family not living in the home." Moore Shipbuilding Corporation v. Industrial Acc. Comm., supra, 185 Cal. at page 207, 196 P. at page 259, 13 A.L.R. 676. A federal court declared: "* * * Whether the term 'household' or 'family' is used, the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof; a 'collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness.'" In that case, it was held that when two families came together temporarily, "Each family retained its own organization under its own head and did not merge to make one family or one household in any such way as the word is used in the policy." Lumbermen's Mutual Casualty Co. v. Pulsifer, supra, D.C., 41 F.Supp. at pages 251, 252.

[4, 5] A cardinal rule of interpretation is that, where a provision of an insurance policy is susceptible of two constructions, it should be construed most strongly in favor of the policyholder. Culley v. New York Life Ins. Co., 27 Cal.2d 187, 194, 163 P.2d 698; Baine v. Continental Assur. Co., 21 Cal.2d 1, 5, 129 P.2d 396, 142 A.L.R. 1253; Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal.2d 731, 747, 117 P.2d 661. This rule requires the conclusion that Cave, Jr., was not a member of his father's household at the time of the happening of the accident to Island. If the insurer intended to restrict its coverage to the extent of its defense in the present case, it should have used language clearly stating that purpose.

The order granting the insurer's motion for a new trial is reversed and the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, TRAYNOR, and SPENCE, JJ., concur.

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81 Cal.App.2d 432

HANRAHAN v. SUPERIOR COURT IN AND FOR MERCED COUNTY.

Civ. 7429.

District Court of Appeal, Third District, California.

Sept. 6, 1947.

1. Prohibition ⚷17

An appellate court will not issue a writ of prohibition to lower court until objection to such court's action or anticipated action has been made to and overruled by it, unless its lack of jurisdiction is apparent on face of record, it has persisted in course of action in manner indicating that objection would be useless, or there was no opportunity to interpose objection.

2. Prohibition ⚷27

On original petition to appellate court for writ of prohibition to lower court, presumption is that any valid objection, properly brought to lower court's attention, to its action or anticipated action, will prevail, thereby obviating necessity for writ.

3. Prohibition ⚷3(1)

A defendant, taking no steps in county court, wherein action was brought, to secure relief from prosecution of second action, brought therein by same plaintiff after transfer of first action, on defendant's motion for change of venue, to another county, court of which acquired jurisdiction of cause before filing of second action, was not entitled to writ of prohibition restraining county court from proceeding with second action, as defendant had plain, speedy, and adequate remedy in such court by plea in abatement of second action on ground of another action pending or by motion to dismiss second action. Code Civ. Proc. §§ 430, 433, 597.

4. Abatement and revival ⚷8(1)

The pendency of prior action, based on same cause as second action, contested by same parties, and considered in same jurisdiction, is ground for abatement of second action. Code Civ.Proc. §§ 430, 433.

◆

Original proceeding by Marshall S. Hanrahan for a writ of prohibition to prohibit the Superior Court in and for the County of Merced from proceeding with an action by River Rock, Incorporated, against petitioner for goods sold and delivered and rentals of equipment.

Alternative writ discharged, and peremptory writ denied without prejudice.

Stanley Pedder and Kenneth Ferguson, both of San Francisco, for petitioner.

C. Ray Robinson and W. E. Craven, both of Merced, for respondent.

ADAMS, Presiding Justice.

On or about February 21, 1947, River Rock, Inc., filed an action in Merced County against petitioner, Marshall S. Hanrahan, seeking a judgment for goods sold and delivered and for rentals of equipment. Defendant sought and, on April 21st, was granted a change of venue to Santa Clara County, the place of his residence.

On April 22, 1947, plaintiff filed in the Merced court a dismissal of said action without prejudice, and on April 23rd filed a new action based upon the same grounds as the former one, but alleging, as the first had not, that the oral contract upon which the action was based was entered into in Merced County, and was to be performed there, and that the obligation to pay the sums sought was incurred there. Summons in said action was served upon defendant.

On May 18th petitioner Hanrahan filed in this court a petition for an alternative writ of prohibition, seeking to prohibit the trial court from proceeding with the second action; and said writ was issued returnable before this court on June 23rd. River Rock, Inc., made return to the writ alleging that a *copy* of the dismissal of the first action filed in Merced County was forwarded to the Santa Clara court; also that the second action filed in Merced County differed from the first in the respects above stated. It alleged that petitioner had a plain, speedy and adequate remedy at law and that the proper course for him to pursue was to present his objections to the Merced County court by way of motion to dismiss or motion for change of venue; that the Merced County court had jurisdiction of the subject matter and the parties. It also filed notice of motion to quash the alternative writ of prohibition.

Upon the hearing on the return day, petitioner filed a certificate of the County Clerk of Santa Clara County, dated June 17th, which certified that plaintiff's original action was regularly transferred to Santa Clara County, that the record was transmitted by the clerk of the Merced County court to the County Clerk of Santa Clara County, at the instance of plaintiff, and that it was received, filed and docketed by the clerk of Santa Clara County on June 4th. He also certified that no dismissal of said action had ever been addressed to and filed with him as clerk of said court, though a purported dismissal of same filed in Merced County was among the records transmitted by the clerk of the Merced County court; also that defendant Hanrahan had, on June 5th, filed in the Santa Clara court his answer to plaintiff's complaint, and a cross-complaint againt River Rock, Inc. It is conceded by counsel for River Rock, Inc., that the action transferred to Santa Clara County is still pending there.

The immediate question which presents itself for our consideration is whether a writ of prohibition should issue under the facts of the case. We are statisfied that it should not, and that petitioner should have sought relief in the trial court.

[1, 2] It is well settled as a rule of practice, adopted by our courts and long followed, that an appellate court will not issue a writ of prohibition until objection to the action or anticipated action of a lower court has been made to and overruled by that court. There are exceptions to the rule, as, for instances, where lack of jurisdiction of the lower court is apparent upon the face of the record, or where that court has persisted in a course of action in such manner as to indicate that it would be useless to object, or where there was no opportunity to interpose an objection. The reason for this rule is stated to be the respect and consideration due to the lower courts, and the expediency of preventing unnecessary litigation. See Havemeyer v. Superior Court, 84 Cal. 327, 406, 24 P.121, 10 L.R.A. 627, 18 Am.St.Rep. 192; Macfarland v. Superior Court, 3 Cal. App.2d 173, 176, 38 P.2d 800; Baughman

v. Superior Court, 72 Cal. 572, 576, 14 P. 207; Pacific Broadcasting Co. v. Superior Court, 100 Cal.App. 649, 650, 280 P. 991; Grinbaum v. Superior Court, 189 Cal. 741, 742, 209 P. 1005; McAneny v. Superior Court, 150 Cal. 6, 10, 11, 87 P. 1020; Baird v. Superior Court, 204 Cal. 408, 415, 268 P. 640; Drew v. Superior Court, 43 Cal. App. 651, 654, 655, 185 P. 680; Yolo Water, etc., Co. v. Superior Court, 43 Cal.App. 332, 338, 185 P. 195; Burge v. Justice's Court, 11 Cal.App. 213, 215, 104 P. 581. As was said in Pacific Broadcasting Company v. Superior Court, supra, quoting from Havemeyer v. Superior Court, supra, it is only fair to the trial court that the objections of petitioner be first made to that court and it be given an opportunity to pass upon the question. And it is presumed that any valid objection properly brought to the attention of that court will prevail, and all necessity for a writ of prohibition be obviated. Macfarland v. Superior Court, supra.

[3] In the case before us petitioner admittedly has taken no steps to secure relief in the Merced County court, and there is nothing before us to suggest that if petitioner seeks relief there it will not be granted. He is not without a plain, speedy and adequate remedy in that court, for, as is now admitted, the action transferred to Santa Clara County is still pending there, and as that court acquired judisdiction of the cause of action before the second action was filed in Merced County, petitioner is in a position to ask for an abatement of the second action on the ground of another action pending.

Also, respondent itself suggests that a motion to dismiss the second action will lie, citing Ylo Water, etc., Co. v. Superior Court, supra.

[4] It is well settled in California that the pendency of a prior action based upon the same cause, contested by the same parties and considered in the same jurisdiction, is ground for abatement of the second action. 1 Cal.Jur. 23, sec. 4; Code Civ.Proc., secs. 430, 433; Fresno Planing Mill Co. v. Manning, 20 Cal.App. 766, 769, 130 P. 196; Mears v. Jeffry, 80 Cal.App.2d 610, 182 P.2d 294. Petitioner, in support of his petition filed in this court, cites and relies upon Rilcoff v. Superior Court, 50 Cal.App. 2d 503, 123 P.2d 540, as authority for his contention that prohibition is his proper remedy. There the court, citing many authorities, states at page 506 of 50 Cal.App. 2d at page 542 of 123 P.2d, that "When the superior court of one county has once acquired jurisdiction of a cause of action, so long as it is there pending, a plea in abatement will lie in another court where an action between the same parties and the same subject matter is also pending." While in that case the writ issued, it differs from the case before us in that the court in which the second action was filed, had proceeded therein, in the face of an affidavit made by defendant setting up the pendency of the action in another county, had declined to order a transfer of the second action, had found defendant in contempt for failure to obey an order made in the second action, and had issued an order to show cause in re contempt. Under those circumstances the propriety of the issuance of a writ of prohibition was obvious; but no such circumstances appear here.

Petitioner also cites other cases as supporting the propriety of the issuance of writ in similar cases. But in all of those cases it appeared that the court or tribunal against which the writ was sought was, over the opposition of petitioner, asserting jurisdiction, and actually performing acts in regard to the subject matter of the action or proceeding. In short, they were cases properly within the exception to the rule of practice hereinbefore stated.

Such is not the case here, for, from all that is alleged, petitioner has sought no relief in the Merced County Court, and that court has done nothing in the action, nor has it threatened to do anything; and we cannot assume that, on proper application to it and a showing of the fact that the original action is pending in Santa Clara County, it will refuse to abate the second action pending before it. Under section 433 of the Code of Civil Procedure, petitioner can raise the issue of another action pending by answer to plaintiff's complaint, and under the provisions of section 597 of that code may have that issue first tried. He is not, therefore, without a plain, speedy and adequate remedy in that court. Had he so proceeded instead of filing his petition herein, it seems probable the matter would long since have been decided.

While not deciding as to the power of this court, in its discretion, to issue the writ of prohibition in this case, we deem it to be one in which the rule that application for relief should first be made in the trial court is particularly applicable. Respect and consideration for that court impels the conclusion that plaintiff's objections should first be presented there and denied, before a writ of prohibition should issue from this court.

The alternative writ is discharged and a peremptory writ is denied, without prejudice.

PEEK and THOMPSON, JJ., concur.

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81 Cal.App.2d 371

LAUREL HILL CEMETERY ASS'N v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13404.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1947.

Rehearing Denied Oct. 3, 1947.

Hearing Denied Oct. 27, 1947.

1. Taxation 🔑245

The constitutional exemption from taxation of cemetery property not used or held for profit is confined to lands and structures affording actual sepulchre to human bodies. Const. art. 13, § 1b.

2. Conversion 🔑11

The legal fiction of equitable conversion cannot be invoked in aid of exemption from taxation of unused former cemetery land, which cemetery association has contracted to sell, by treating land as money, on ground that proceeds of sales should be exempt from taxation as destined by statute for ultimate tax exempt use in acquisition of other lands and improvements for cemetery purposes, disinterment, removal, and re-interment of bodies, and perpetual care of new graves, markers, etc. Health and Safety Code, §§ 7925, 7926; Const. art. 13, § 1b.

3. Taxation 🔑204(2)

Tax exemptions must be strictly construed against taxpayer.

4. Taxation 🔑245

Land directly and primarily used for subdivision into residential lots after removal of dead bodies buried therein and entry of superior court decree declaring land no longer dedicated as cemetery was not exempt from taxation because proceeds of cemetery association's sale of land were destined by statute for tax exempt uses in acquiring other lands for cemetery purposes, disinterring, removing, and re-interring bodies, and caring for graves, markers, etc. Health and Safety Code, §§ 7925, 7926; Const. art. 13, § 1b.

5. Taxation 🔑543(7)

In cemetery association's action to recover amount of taxes paid by it on land no longer used for cemetery purposes, finding that all such land was used and held for profit was not erroneous as in conflict with admitted fact that plaintiff was non-profit corporation, in view of statutory provision that carrying on of business at profit shall not be deemed forbidden to non-profit corporations. Civil Code, § 593; Const. art. 13, § 1b.

6. Taxation 🔑543(8)

In cemetery association's action to recover amount of taxes paid by it on land no longer used for cemetery purposes, finding that particular proceeds of association's sale of such land were not necessary for acquisition of other lands for mausoleum, construction thereof, and establishment of perpetual care fund, but that plaintiff would be without funds with which to house bodies removed from land, unless part of such proceeds were used for such purpose and balance invested to obtain funds for maintenance of mausoleum, was not self-contradictory, when read as a whole. Health and Safety Code, §§ 7925, 7926; Const. art. 13, § 1b.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by the Laurel Hill Cemetery Association against the City and County of San Francisco to recover the amount of certain taxes paid by plaintiff under protest. Judgment for defendant, and plaintiff appeals.

Affirmed.

Myrick & Deering and Scott, James Walter Scott, Jr., and Royal E. Handlos, all of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondent.

GOODELL, Justice.

The appellant sued to recover $8,948.98 in taxes paid under protest.

On the first Monday in March, 1944, legal title to 55.3 acres of land situated in San Francisco was vested in the appellant. The tract was assessed at a valuation of $189,510, for the land and $1,300 for improvements. The grounds of protest were of course the same as those presented to the trial court and on this appeal.

During the period from 1854 to 1941 this tract was dedicated and used as a cemetery, and upwards of 38,000 bodies had been buried therein. Burials in San Francisco after August 1, 1901, were prohibited by law, but it was not until 1937 that the supervisors ordered the removal of all bodies from the cemetery. By early 1941, 35,987 bodies had been removed by the association and placed in a temporary mausoleum at Lawndale, in San Mateo County, where they are now, awaiting the construction of a permanent memorial mausoleum. On February 7, 1941, notice of the removal of all bodies was recorded and on March 10, 1941, the Superior Court by its decree declared that the 55-acre tract, theretofore dedicated as a cemetery, was no longer so dedicated. This brought to a close the first phase of the Laurel Hill operation.

The second or intermediate phase opened with the entry of said decree, for thereafter the tract, freed from the dedication, was simply so much vacant, unused real property. On December 16, 1940, and on January 6, 1941, the association, anticipating the decree terminating the cemetery status, entered into contracts with Heyman Brothers, Inc., for the sale to them of the whole tract. The transfer of title was delayed for several reasons. The association was obligated to file a suit to quiet title, which developed into a contest and resulted in an appeal. Laurel Hill Cemetery Association v. All Persons, 69 Cal.App.2d 190, 158 P.2d 759. That litigation took several years and the judgment quieting appellant's title did not become final until July 12, 1945. Moreover, the construction of the permanent mausoleum was delayed by the war. The war interfered also with the financing by the vendees of their real estate project and with the physical improvements thereon. It is conceded by both sides that the delay—affecting vendor and vendee alike—was unavoidable. It was during this interval that the tax was levied.

The third and final phase will open with the completion of the memorial mausoleum at Lawndale and the transfer thereto, as their final resting place, of the 35,987 bodies formerly buried at Laurel Hill.

Section 1b of article XIII of the state constitution reads: "All property used or held exclusively for the burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead, except as used or held for profit shall be free from taxation and local assessment." From the time of the adoption of that section in 1926 until March, 1941, Laurel Hill cemetery was exempt from taxation. It seems clear (although that question is not before us) that the memorial mausoleum which will contain the 35,987 bodies will be likewise exempt, for it will be used for the "permanent deposit of the human dead" and will not be "used or held for profit."

The question presented for decision is whether, during the fiscal year 1944–45 (within the second phase of the operation and intermediate the two periods of tax exemption) the 55-acre tract was subject to taxation.

The contracts of sale, entered into several years before this tax was assessed, were in effect at the time of the assessment. The appellant urges with considerable force that this case calls for the application of the doctrine of equitable conversion, the argument being that after the decree of the Superior Court establishing the reasonableness of the selling price "the vendees were the equitable owners of the land * * * legal title being retained by the * * * Association as security for the price and the Cemetery Association was the equitable owner of the moneys, personal property, held and earmarked by the terms of the Morris Act * * * to be used exclusively for the purposes enumerated in sections 7925 and 7926, Health and Safety Code * * *." Accordingly they conclude that, as the doctrine of equitable conversion treats land as money and money as land, the 55-acre tract represents and is, in legal contemplation, the money derived from the sale, and that such money should be exempt from taxation because it is destined by section 7925 for an ultimate use which will be tax exempt. That section reads:

"Exemption of proceeds of land sales: Authorized uses. Money payable or to become payable as the purchase price or on account of the purchase price of unused lands, or lands from which all remains have been removed is not subject to garnishment, attachment or execution, but shall be used exclusively for any or all of the following purposes:

"(a) Acquisition of lands and improvements for cemetery purposes.

"(b) Disinterment, removal, and reinterment of bodies, pursuant to this chapter.

"(c) Perpetual care of graves, markers, and cemetery embellishments.

"(d) The payment of expenses incidental to the disinterment, removal, and reinterment.

"(e) Any other purpose consistent with the objects for which the cemetery authority owning the cemetery is created or organized."

It must be conceded, of course, that if the tax of $8,948.98 stands, it depletes the proceeds of the sale by just that much.

The appellant cites no authority in this state where the doctrine of equitable conversion has been applied in the field of taxation and apparently none is to be found. There is a division of authority on the subject in the United States, Connecticut College for Women v. Town of Groton, 123 Conn. 196, 193 A. 873, 112 A.L.R. 23-27; 19 Am.Jur. 18; 51 Am.Jur. 540.

[1] In 51 Am.Jur. 612 this is found: "In general, cemeteries are exempted from taxation by express statutory or constitutional provision. * * * Such an exemption is favored upon grounds of public policy. One reason for their exemption is the difficulty of collecting a tax thereon and the obvious impropriety of selling the graves of the dead in order to pay the expenses of carrying on the government of the living." That this is a reason for the exemption found in our constitution appears from the opinion in Cypress Lawn Cemetery Association v. City and County of San Francisco, 211 Cal. 387, 391, 295 P. 813, 814, where the court says: "It is in accordance with the common wish of mankind that the places where the dead are buried should be protected and preserved against interference of possible sales for unpaid taxes, and be kept free from molestation or desecration. Exemptions of cemetery property from taxation are but the expression of that wish. That this is true as regards section 1b of article 13, supra, appears from the argument made in favor of the proposed constitutional amendment and sent to all of the voters prior to the election at which it was adopted. The proponents of the measure urged that it 'should have been adopted long ago in order to protect the last resting place of the departed. * * * The county assessors know that they cannot under the law seize and sell a burial lot containing a body and yet under the present law, they are compelled to levy an assessment against such a plot, * * *. "Finally, only the cemetery property not held for profit and owned by those exclusively for burial purposes is exempted. It will not relieve from taxation property of cemetery associations and others which is to be sold for profit, but only property to be used exclusively for the burial of the dead, and this sacred property should be kept tax free. * * *"'"

Thus it appears that the exemption is confined to lands and structures (and reasonable surroundings and embellishments) which at the time afforded actual sepulchre to human bodies, and the reason underlying the exemption is the protection of such bodies and the land wherein they are buried "against interference of possible sales for unpaid taxes." The 55-acre tract at the time of the assessment contained no bodies. It was simply so much unused land, subject to sale for real estate development.

[2, 3] If the court applied the doctrine of equitable conversion in this case by treating the land as money it would have to go out of its way to invoke a legal fiction in aid of an exemption from taxation. This would run counter to the rule that exemptions must be strictly construed against the taxpayer which rule is settled by many authorities including: Cypress Lawn case, supra, 211 Cal. 387, 390, 295 P. 813; Bay Cities Transportation Co. v. Johnson, 8 Cal. 2d 706, 712, 68 P.2d 710; Miller v. McColgan, 17 Cal.2d 432, 442, 110 P.2d 419, 134 A.L.R. 1424; Pacific Greyhound Lines v. Johnson, 54 Cal.App.2d 297, 303, 129 P.2d 32; 21 Cal. Law Rev., 193, at pages 213, 215.

[4] We are satisfied that this case falls within the reasoning of the Cypress Lawn case, supra, 211 Cal. 387, 295 P. 813. There it was contended that a San Francisco hotel owned by the Cemetery Association, a nonprofit corporation, was exempt from taxation because the income from the hotel was used toward the care, maintenance and upkeep of the cemetery and the care of the dead buried therein. The court held otherwise, stating that the direct and primary use of the hotel was the housing of guests. Here the claim is made that this 55-acre tract, the direct and primary use of which is the subdivision thereof into residential lots, is exempt. We think the reason for denying the exemption is substantially the same in both cases. What is said in the Cypress Lawn case, 211 Cal. at page 392, 295 P. at page 814, seems apposite: "We cannot perceive how the wish to protect and preserve the resting place of the dead would be made effectual by exempting property, such as is herein involved, and which may be disposed of at any time and for any purpose."

Independently of equitable conversion appellant argues "that under the circumstances here disclosed the whole or all of the * * * Association's property is being used or held exclusively for the permanent deposit of the human dead, or for the care, maintenance or upkeep of * * * such dead within the intendment of California Constitution, Article XIII, Section 1-b." This does not differ essentially from the argument made and rejected in the Cypress Lawn case.

The basis for this contention is that, although all bodies had been exhumed and the dedication removed, the land remained exempt to the same extent that it had been while bodies were buried therein, for the reason that section 7925 Health & Safety Code required the proceeds of its sale to be ultimately devoted exclusively to purposes of sepulchre.

In support of this theory appellants called one of its trustees who testified that the plan was to devote the proceeds of the sale ($670,000 or thereabouts) to the acquisition of a site for the memorial mausoleum, and to its construction. Even at that he doubted whether the money "would be entirely adequate." He concluded, "No money that is received can be distributed to any other source than to the care and final keep of the bodies now down at Cypress Lawn." Counsel for respondent then said: "I know what is going to happen with respect to the money, and I will stipulate to it. They are going to take the money and erect a building in San Mateo County to house the human dead they took from Laurel Hill Cemetery, and then use the rest of the money for the purpose of investment to keep it up * * * Perpetual care."

The trial court did not adopt the appellant's theory for it made the following finding: "That at no time since the removal of the said human remains * * * have said cemetery lands * * * been nor are they now held by plaintiff solely and exclusively for the care and maintenance of the human dead; and neither the whole nor any part of said property is held and used exclusively for the care of such dead and the whole of said property is now used and held for profit." Appellant attacks this finding as contrary to the trustee's uncontradicted testimony and the stipulation quoted above. If the finding (saving the last 13 words) be treated as a finding of fact addressed to the physical situation of the land after the bodies were removed, it is certainly an accurate statement. If treated as a conclusion of law negativing the appellant's theory despite the removal of the bodies the real estate asset in the hands of the association enjoys continued and uninterrupted exemption from taxation, it accords with the holding in the Cypress Lawn case.

[5] Appellant complains that the last 13 words of the same finding, "and the whole of said property is now used and held for profit," conflict with the admitted fact that appellant is a non-profit corporation. There is no such conflict for "The carrying on of business at a profit," says section 593 of the Civil Code, "shall not be deemed forbidden to non-profit corporations." See, also, San Gabriel Cemetery Ass'n v. County of Los Angeles, 49 Cal.App.2d 624, 122 P.2d 330. It might well be that the idea of profit ("Accession of good; valuable results; useful consequences; avail; gain * * *." Webster's New Int'l. Dict. 2nd Ed.) was lodged with the court by the testimony of the trustee that the 55-acre tract was carried on the association's books at a valuation of $129,000, while it was being sold for $670,000 or thereabouts. This finding is not necessary to support the judgment, however, for under the reasoning of the Cypress Lawn case, once it is found that the bodies were removed the conclusion follows that the land no longer a cemetery is no longer exempt, profit or no profit.

The finding that "said cemetery was abandoned as such" is likewise attacked. The court doubtless used "abandoned" as synonymous with "discontinued." In any event there is good precedent for speaking of an *abandoned cemetery* for the legislature itself used that expression in the Morris Act (Stats.1923, p. 646, sections 5, 10, 15), and in sections 9201, 9202 and 9220, Health and Safety Code. Moreover, when the last body was exhumed the cemetery certainly was discontinued or "abandoned" *as such.* The finding is not material for reasons already given, that non-exemption follows from the removal of bodies.

The same reason renders immaterial the findings that since March, 1941, "said real property has been used for purposes other than a cemetery." If the land was no longer a cemetery, the use to which it was put after March, 1941, is immaterial.

[6] Finally, appellant attacks the following finding in the light of the trustee's uncontradicted testimony and the stipulation as to the use of the proceeds of sale: "That the particular proceeds of said sale are not necessary for the acquisition of lands for said mausoleum, for the construction of said mausoleum, and for the establishment of a perpetual care fund to maintain the same. *But plaintiff is, and will be, without funds or assets with which to house the bodies removed from Laurel Hill Cemetery and to maintain the same, unless a part of the proceeds of said sale are used for such purpose, and the balance* is invested for the purpose of obtaining *funds to maintain the mausoleum* to be erected for the purpose of housing said bodies, or unless plaintiff obtains funds or assets from some other source." (Emphasis ours.)

The language which we have emphasized makes it clear, in spite of the first sentence of the finding, that the court had in mind that the building of the mausoleum might not exhaust the $670,000 fund, and that the overplus would be invested (as in the Cypress Lawn case) to provide an income for upkeep. There was no satisfactory evidence as to the cost of the mausoleum or as to the size of the fund required for its maintenance. About all the court could do was to find, as it did, that part of the fund would be needed for construction and part for maintenance. We are satisfied that the emphasized part of this finding is the dominant and controlling part and that, when read as a whole, the finding is not self-contradictory. The duty of the association with respect to the proceeds of the sale is clearly defined by section 7925, and nothing in this finding can control or interfere with the performance of such duty, for the court in this litigation is not called on to adjudicate such question.

We are satisfied that the court correctly held the property to be taxable.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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81 Cal.App.2d 419

In re JORDAN'S ESTATE.

JENKINS et al. v. MULDROW.

Civ. 15982.

District Court of Appeal, Second District, Division 3, California.
Sept. 4, 1947.

1. Wills 🔑111(2), 123(3)

Due execution of will requires that testator's and subscribing witnesses' signatures be affixed at "end of will", which means at the end of testamentary provisions. Probate Code, § 50.

See Words and Phrases, Permanent Edition, for all other definitions of "End of Will".

2. Wills 🔑467

A provision in postscript, after testatrix' and subscribing witnesses' signatures to will, that "I want" executor "to send my" two brothers and niece stated sums, was not merely precatory and could not be disregarded in determining what constituted will, where all directions and bequests therein started with same words.

3. Wills 🔑108

The rule that testator's expressed intentions are controlling in interpreting will cannot be extended to length of allowing such intentions to take place of required acts in execution of will. Probate Code, § 50.

4. Wills 🔑111(2), 123(3)

A will containing postscript, directing executor to pay specified sums to testatrix' two brothers and niece, after testatrix' and subscribing witnesses' signatures, was invalid and not entitled to probate, though testatrix intended to include such beneficiaries in original writing. Probate Code, § 50.

5. Wills 🔑111(2), 123(3)

A portion of will in testatrix' handwriting above her signature should be admitted to probate as her will, though signatures of testatrix and subscribing witnesses precede clause bequeathing specified sums to named relatives. Probate Code, § 50.

6. Wills 🔑133

A testamentary provision, written by testatrix before affixing her signature to portion of olographic will above such provision, is part of will, as olographic will need not be signed at end of testamentary provisions, but, in case of contest over inclusion of final provision in will, court must determine, from circumstances under which will was written and signed, whether such provision was part thereof or only an attempted codicil invalid for want of subscription and date.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by Clifton Muldrow for probate of the will of Wretha Jordan, deceased, opposed by Ina Jenkins and others. From a judgment admitting the will to probate, opponents appeal.

Reversed for further proceedings.

Thomas L. Griffith, Jr., of Los Angeles, for appellants.

Gordon, Ragland & Porter, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Appeal from a judgment admitting a will to probate. The typewritten will reads as follows:

"Will

"This is the last will of Wretha Jordan
"Los Angeles, California
"September 29, 1945.

"Knowing we all must depart from this life some day, I want all my debts paid. I want all of my insurance put on my funeral

"The home I am buying at 2125 West 29th Street, Los Angeles, I want Clifton Muldrow to have. If I have not finished paying for it, I want him to finish paying it out. I want Clifton Muldrow to have part of the household goods and Wayman Moore part of the household goods.

"Clifton Muldrow must pay all of my doctor bills, if there be any, and all of my other debts.

"Signed Wretha Jordan
"Wretha Jordan.

"Witnesses:
"Mrs. Bobbie Rodgers Rhodes.
"Mrs. Bobbie Rodgers Rhodes
"Alphonse E. Cain.
"Alphonse E. Cain.

"P.S. I want Clifton Muldrow to send my brother, Wash Fatheree $20.00, my brother, Hice Fatheree, $20.00 and my niece, Ina Jenkins, $20.00, if they are alive. Clifton Muldrow is to be executor of my estate without bond. Anyone contesting this will, will be paid one dollar and one cent ($1.01).

"Subscribed and sworn to before me, a Notary Public, in and for the County of Los Angeles, State of California, this 11th day of November, 1945.

[SEAL] Hazel A. Macbeth
"Hazel A. Macbeth

"My Commission Expires Feb. 21, 1946."

It was offered for probate by Clifton Muldrow and probate was opposed by appellants, Ina Jenkins and Wash Fatheree, respectively niece and brother of decedent, and by a creditor who does not appeal.

It was established by the evidence that testatrix and the witnesses signed the will in the presence of each other, and that testatrix declared it to be her will.

The question of validity arises from the fact that a portion of the writing follows the signatures of testatrix and the subscribing witnesses. According to the witness Cain, testatrix, in November 1945, handed him what purported to be her will and asked him to have it typed for her. Her expressed reason was that her handwriting might be misinterpreted. This document was placed in evidence by the proponent, with an envelope inscribed "The Last Will of Wretha Jordan." It bears date September 29, 1945, is handwritten and bears the purported signature of Wretha Jordan, below which are the signatures of two others. The portion above the signatures (except in minor detail) is identical with the corresponding portion of the typed will. Below the signatures it reads as follows: "P.S. I want Clifton Muldrow to send my brother Wash Fatheree $20 dollars my Brother Hice Fatheree $20 dollars if they are alive. This without Bond."

The typist, Hazel A. Macbeth, who was also a notary, testified that she typed only the portion which preceded the signatures at her office and took her typewriter to the home of testatrix where she added the portion commencing "P.S.," which differs somewhat from the corresponding portion of the handwritten document. There was testimony that the addition was made before the signatures of testatrix and the witnesses were affixed.

[1, 2] The court made the following finding: "IV. That, although the name of the testatrix and of the witnesses to the Will do not appear after and at the end of the last clause, thereof, said clause was written thereon and was a part of said instrument before the names of the testatrix and witnesses were affixed thereto, and that it was the manifest intention that the last clause thereof should be included in and be a part of the said Last Will and Testament of Wretha Jordan." This finding, if given effect, would inevitably defeat the will. It makes of the writing an entire document. Due execution requires that the signatures of the testator and the subscribing witnesses be affixed at the end of the will. Probate Code, sec. 50. This is held to mean, at the end of the testamentary provisions. Estate of Morey, 75 Cal.App.2d 628, 171 P.2d 131; Estate of Moro, 183 Cal. 29, 190 P. 168, 10 A.L.R. 422; Estate of Seaman, 146 Cal. 455, 80 P. 700, 106 Am.St.Rep. 53, 2 Ann.Cas. 726. It is argued that the direction to Clifton Muldrow to send $20 to each of three named relatives was precatory only, and that it may be disregarded in determining what constituted the will. Neither argument is sound. The directions and bequests throughout the will all start with the same words as were used in the direction with respect to the three bequests. Five times in

the main body of the will directions commence with the words, "I want," and it would not seem that they were intended to have less significance in one connection, or in one place, than in the others. It is true that these bequests were small in amount but they were of sufficient importance to testatrix to be included in the scheme of her will and that is enough to give them equal dignity with the more generous provisions.

[3, 4] The facts that she intended to include them and failed to incorporate them in the writing she signed defeat the entire will. No matter what her intentions may have been with reference to the inclusion of the added portion in her will, the courts are powerless to give effect to that intention in disregard of the indispensable requirements of due execution. The rule that the expressed intentions of the testator are controlling in the interpretation of wills cannot be extended to the length of allowing intentions to take the place of required acts in the matter of execution. The strict requirement of the statute may not be ignored nor may it be relaxed as proponent would have done here, so as to make a will of a part only of what testatrix composed as her will. Under the finding that the entire writing was prepared before it was signed and constituted the intended will, none of it is good unless it is all good. Since the signatures were not affixed at the end of all the testamentary provisions the will is invalid. The judgment admitting the document to probate must be reversed.

[5, 6] We have caused to be transmitted to this court the exhibits at the trial. One of these is the writing above referred to which was copied on the typewriter. The portion above the signature of the testatrix is in the form of a complete olographic will. Two persons signed as witnesses below the signature of the testatrix, but all three signatures preceded the final clause. Further proceedings should be had to determine whether this document is the will of Wretha Jordan. If it is established by proof that the signature and the writing which precedes it are in her handwriting, that portion should be admitted as her will. If it should be proved that the final clause was written by testatrix before she affixed her signature, it would be a part of the will, since it is not necessary that an olographic will be signed at the end of the testamentary provisions. Estate of Morgan, 200 Cal. 400, 253 P. 702. If there should be a contest over the inclusion of the final clause as a part of the will, even though it contains but two bequests of $20 each, it will be necessary for the court to determine from the circumstances under which the will was written and signed whether the final clause was a part of it, or only an attempted codicil, invalid for want of subscription and date.

The judgment is reversed for further proceedings in accordance with the views herein stated.

WOOD, J., concurs.

81 Cal.App.2d 408

PEOPLE v. AGNEW.

Cr. 4159.

District Court of Appeal, Second District, Division 1, California.

Sept. 4, 1947.

Rehearing Denied Sept. 15, 1947.

Hearing Denied Oct. 2, 1947.

1. Criminal law 🔑1023(12)

An order granting probation to one convicted of crime, without imposition of judgment and sentence, or order modifying or changing order granting probation, is not an appealable order. Pen.Code, § 1203.3.

2. Criminal law 🔑1023(13)

An order denying defendant's motion to vacate order denying his motion for new trial after appellate court affirmed judgment of conviction and order denying new trial was not an appealable order.

3. Criminal law 🔑1023(13)

A party exercising right to appeal from order denying his motion for new trial after his conviction cannot move to set aside such order and then appeal from adverse ruling on such motion.

4. Criminal law ⚷997

Defendant's contention that his conviction of perjury was secured by fraud and perjured testimony were reviewable on his motion for new trial and appeal from order denying such motion, and hence could not be made ground of application for writ of error coram nobis.

5. Criminal law ⚷997

The function of writ of error coram nobis is to correct errors of fact, not errors of law.

6. Criminal law ⚷1023(12)

The statute providing for appeal from order after judgment affecting party's substantial rights does not authorize appeal from order denying defendant's petition for writ of error corm nobis, alleging that his conviction was secured by fraud and perjured testimony, after appellate court affirmed judgment of conviction and order denying defendant's motion for new trial, as order made after judgment is not appealable, where motion merely asks court to repeat or overrule former ruling on same facts. Pen.Code, § 1237, subd. 3.

◆

Appeal from Superior Court, Ventura County; Ernest D. Wagner, Judge.

R. W. Agnew was convicted of perjury and granted probation, and from orders denying his motion to vacate an order extending the period of probation and modifying the terms thereof, denying a motion to set aside and vacate an order denying his motion for a new trial, and granting the People's motion to dismiss defendant's petition for a writ of error coram nobis, he appeals. On the People's motion to dismiss the appeal.

Appeal dismissed.

R. W. Agnew, in pro. per.

Fred N. Howser, Atty. Gen., and M. Arthur Waite, Dist. Atty., of Ventura, for respondent.

WHITE, Justice.

This is a motion by respondent to dismiss an appeal taken by appellant from (1) an order of the Superior Court of Ventura County denying appellant's motion to vacate orders extending the period of his probation and modifying the terms thereof; (2) an order denying the motion of appellant to "set aside, vacate and nullify" an order denying a motion for a new trial; and (3) an order granting respondent's motion to dismiss appellant's petition for a writ of coram nobis.

Concerning the facts surrounding the aforesaid orders, it appears that on January 31, 1946, appellant was convicted by a jury of the crime of perjury; that he thereupon made a motion for a new trial which was denied. Subsequently appellant made application for probation, and on February 23, 1946, the same was granted for a period of thirteen months upon the condition that for the first twelve months thereof appellant be confined in the Ventura County jail. From the judgment and the order denying his motion for a new trial appellant appealed, and on March 22, 1946, he was released on bond pending such appeal. On January 22, 1947, Division Two of this court rendered its decision affirming the foregoing judgment and order denying appellant's motion for a new trial. People v. Agnew, 77 Cal.App.2d 748, 176 P.2d 724. Upon the going down of the remittitur, which was lodged in the trial court on the 25th day of February, 1947, appellant refused to surrender to the sheriff, contending that the jail term imposed upon him as a term of probation had expired. Thereupon, on March 5, 1947, the District Attorney of Ventura County filed his motion for an order modifying the terms of probation. A hearing was had upon said motion on March 10, 1947, following which the court modified the terms of the foregoing probation as follows:

"That the defendant, R. W. Agnew be confined in the County Jail of Ventura County for a period of eleven (11) months, the Court taking into consideration the fact that the defendant has heretofore been confined in said County jail for a period of one (1) month of the period of twelve (12) months heretofore ordered in the Original Order Admitting to Probation;

"That the period of probation be, and hereby is extended to a period of five (5) years from the date of the Original Order

Admitting to Probation, namely from the 23rd day of February, 1946; * * *."

As to the second order, the record reflects that on April 3, 1947, appellant made a motion to "set aside, vacate and nullify order denying motion for a new trial." Said motion was made upon the ground "that the denial of said motion for new trial was secured by the prosecutor herein by deliberate, false and fraudulent representations," and upon the further ground of "newly discovered evidence to be produced at the hearing hereof."

As to the third order, it appears that on March 10, 1947, appellant filed in the superior court his petition for a writ of error coram nobis, basing said petition upon the claim that his conviction aforesaid was secured by intrinsic and extrinsic fraud and "by the use of perjured testimony entered in said cause, which testimony appears in the attached exhibits and which are made a part hereof." In his petition appellant further alleged: "That by reason and in the premises of the deceit and frauds committed by the prosecution and witnesses in said cause upon petitioner, upon said court and upon said jury in said cause, petitioner was deprived of a trial upon the merits in said cause, and was by intrinsic and extrinsic causes and acts in said cause deprived of his legal rights secured by the 1st, 4th, 5th, 6th, 8th, and 14th amendments to the Constitution of the United States."

Insofar as the first order appealed from is concerned, it appears that the court, after denying appellant's motion for a new trial, ordered the suspension of proceedings and placed him on probation as aforesaid. Section 1203.3 of the Penal Code provides in part that the court "shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence."

[1] It is the established law of this state that an order granting probation without the imposition of judgment and sentence is not an appealable order. People v. Smith, 36 Cal.App.2d 361, 362, 97 P.2d 867; People v. Crow, 48 Cal.App.2d 666, 672, 120 P.2d 686; People v. Kauffman, 48 Cal.App.2d 393, 396, 119 P.2d 998; Balestreiri v. Arques, 49 Cal.App.2d 664, 669, 122 P.2d 277; People v. Von Eckartsberg, 133 Cal.App. 1, 3, 23 P.2d 819; People v. Neel, 133 Cal.App. 332, 333, 24 P.2d 230; People v. Johnston, 37 Cal.App.2d 606, 608, 100 P.2d 307; People v. Patello, 125 Cal. App. 480, 487, 13 P.2d 1068; In re Phillips, 17 Cal.2d 55, 58, 109 P.2d 344, 132 A.L.R. 644; People v. Noone, 132 Cal.App. 89, 92, 22 P.2d 284. Therefore, it necessarily follows that an order modifying or changing an order granting probation is also not an appealable order.

[2, 3] The second order appealed from, denying appellant's motion to set aside and vacate an order denying his motion for a new trial, made after appeal and decision by the appellate court, is also a nonappealable order. Appellant had theretofore appealed from the original order denying his motion for a new trial, and such appeal was heard and determined by Division Two of this court. People v. Agnew, supra. The general rule, subject to certain exceptions not pertinent to the instant case, is that when a party has exercised his right to appeal from an order denying his motion for a new trial he is not allowed to move to set it aside and then appeal from an adverse ruling upon such motion. People v. Balt, 78 Cal.App.2d 171, 177 P.2d 362. To hold otherwise would be equivalent to allowing two appeals from the order, something not intended by the legislature nor authorized by law.

[4, 5] In his petition for a writ of error coram nobis, appellant urges that his conviction was secured "by the prosecution by intrinsic and extrinsic fraud and by the use of perjured testimony entered in said cause." He then sets forth certain testimony given at his trial and presents his own affidavit wherein he charges that such testimony was perjurious. All of the allegations contained in the appellant's petition for a writ of error coram nobis were reviewable on motion for a new trial and on appeal, and, therefore, cannot be made the ground of an application for the writ of error coram nobis. There is absolutely no showing herein of extrinsic fraud which in effect deprived appellant of a trial upon the merits. The function of a writ of error

coram nobis is to correct an error of fact. It was never intended to issue for the purpose of correcting an error of law. For a historical review and discussion of the function of a writ of error coram nobis, see People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435.

[6] Appellant contends that his appeal from the order denying his petition for a writ of error coram nobis is authorized by subdivision 3 of section 1237 of the Penal Code, providing for an appeal from an order after judgment affecting the substantial rights of a party. But, as was said in People v. Vivian, 46 Cal.App.2d 163, 166, 115 P.2d 559, 560, "* * * but the rule is well established that an order made after judgment is not appealable where the motion merely asks the court to repeat or overrule the former ruling on the same facts." Such is the exact situation prevailing in the case now engaging our attention.

From the foregoing it follows that the appeal herein should be dismissed. It is so ordered.

YORK, P. J., and DORAN, J., concur.

81 Cal.App.2d 492

In re THORNTON'S ESTATE.
THORNTON v. THORNTON.

Civ. 15897.

District Court of Appeal, Second District, Division 1, California.

Sept. 11, 1947.

Rehearing Denied Sept. 30, 1947.

1. Executors and administrators 🔑194(7)

Where evidence sustained order denying widow's petition to have estate of deceased husband set aside to her, on ground that she did not have another estate of $5,000, for failure to sustain burden of proving that her own estate was less than $5,000, the order was conclusive on appeal. Probate Code, §§ 640–645.

2. Executors and administrators 🔑194(5)

Evidence sustained order denying widow's petition to have deceased husband's estate set aside to her for failure to sustain burden on her of proving that other estate owned by her was less than $5,000. Probate Code, §§ 640–645.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Proceeding in the matter of the estate of Virgil O. Thornton, deceased, wherein Alicia R. Thornton, widow of the deceased, filed a petition against Verna Thornton, as administratrix of the deceased's estate, to have the estate set aside to the widow. From an order denying the petition, the widow appeals.

Order affirmed

Blâse A. Bonpane, of Los Angeles, for appellant.

Elsie M. Farris, of Long Beach, for respondent.

DORAN, Justice.

This is an appeal from the order in a probate proceeding denying a petition to have the estate set aside to the widow under section 640 of the Probate Code "and particularly from that portion of the order," reading as follows:

"The court finds that the widow of deceased, Alicia R. Thornton, has failed to sustain the burden of proving her ownership of an estate of less than $5000.00, and is not entitled to have said estate set aside to her on her petition under Probate Code Section 640, et seq., and that said petition is denied."

Appellant submits that, "there is only one issue involved in this appeal, namely, whether, under the state of the record, the widow, Alicia R. Thornton, is entitled to have the entire estate of her husband, after payment of funeral expenses, expenses of last illness and of administration, set aside to her under the provisions of sections 640–645 inclusive of the Probate Code. There is no dispute as to the law because it is conceded that under the above sections of the Probate Code when a decedent leaves a surviving spouse and the net value of his estate over and above all liens and encumbrances of record at the date of death does not exceed the sum of two thousand five hundred dollars, the estate will be set aside to the surviving spouse provided she does not have other estate of $5000."

It is contended that "the court's finding that the widow failed to sustain the burden of proving her ownership of an estate of less than $5000 is contrary to the evidence and the law."

The only evidence offered was the testimony of the widow.

The briefs consist of somewhat extensive quotations from the testimony accompanied by an analysis of its effect. For example appellant argues, "After being divested of the usual repetitious verbiage which is apt to result from direct, cross and redirect examination, interspersed by questions from the court, the widow's testimony shows" etc. Then follows a list of the items and a calculation tending to support appellant's contention that the value is less than $5000. Respondent on the other hand argues that, "All of the testimony of the widow is indefinite and vacillating in the extreme. It was with the utmost difficulty that she was made to answer a direct question." Excerpts from the testitmony follow in connection with which respondent contends, in part, "It is respectfully submitted that the widow in this case, under her own testimony, was unable to establish the amount of money she had on hand at the time of the death of decedent, or what the value of the property was in her possession" and concluded with the observation that "The lower court was well able to judge the manner of this witness in testifying and her indefinite, inconsistent and unconvincing testimony."

Appellant replies that, "It would appear that appellant's counsel is trying to patch together disconnecting parts of appellant's testimony as to the amounts in appellant's possession at the time of her husband's death and omits intermediate parts that are elucidating," and also that "In spite of the repetitious questioning of the widow, in an apparent effort to create an illusion that the amounts involved were greater than they actually were, the fact does remain that in all of her positive testimony, the widow time and time again testified only to certain stated items as being in her possession at the time of her husband's death, the sum total of which was $4115.50."

[1, 2] The trial court settled the dispute in favor of respondent and it is well settled that the judgment in such circumstances is conclusive on appeal.

Order is affirmed.

YORK, P. J., and WHITE, J., concur.

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81 Cal.App.2d 423

CUTTS v. TINNING et al.

Civ. 7344.

District Court of Appeal, Third District, California.

Sept. 6, 1947.

Rehearing Denied Oct. 6, 1947.

1. Officers 🔑11

Prier to 1943 amendment to State Civil Service Act, authorizing promotion of those employees in state civil service inducted into military service whose names appeared on promontional list to extent that appointing power may, during absence on military duty, make appointments to take effect upon return of appointee to state service, no authority existed for promotion of civil service employees during absence while on active duty with armed forces. Gen.Laws, Act 1404, § 96.6; Military and Veterans Code, §§ 395, 395.5.

2. Officers 🔑11

The 1941 amendment to State Civil Service Act, providing that names of persons, holding a state civil service position with permanent status, entering armed forces, should be retained on promotional lists, did not authorize actual promotions and appointments during absence on military service. Gen.Laws, Act 1404, § 96.5.

3. Officers ⚿11

Appointment in 1941 of state civil service employee holding permanent civil service position of physician and surgeon to position of assistant medical director, during his absence in military service, was properly canceled in 1942, as being ineffective in that he was ineligible for promotion notwithstanding employee's name was put on promotional, eligible list prior to his entry into service and he accepted promotional appointment in 1941 by performing new duties while on a short leave from military service for such purpose. Military and Veterans Code, §§ 395, 395.5; Gen. Laws, Act 1404, §§ 96.5, 96.6.

4. Appeal and error ⚿712

Appellate court cannot consider matters asserted and outside the record.

5. Officers ⚿69

Where civil service employee's original appointment was ineffective and its cancellation proper, his seniority rights dated from his subsequent entry upon duties under a valid appointment.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Petition for writ of mandate by Francis William Cutts, M.D., against Archibald B. Tinning and others, as members of the California State Personnel Board, and others, to have cancellation of petitioner's appointment of Assistant Medical Director declared void and for reinstatement to such position and for other relief. From an adverse judgment, petitioner appeals.

Affirmed.

James H. Phillips, of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

ADAMS, Presiding Justice.

Appellant herein, on or about April 26, 1946, filed in the Superior Court in the County of Sacramento, a petition for a writ of mandate to be directed to the members of the California State Personnel Board, the Director of the Department of Mental Hygiene, the State Controller, the State Treasurer, and the Director of Finance. Attached to the petition and made a part thereof was an "Agreed Statement of Facts" which had been filed with the Personnel Board on March 29, 1946, and which statement contained a recitation of facts upon which petitioner based his petition and his right to the relief prayed.

The recited facts are as follows: Petitioner, on February 3, 1941, held the permanent civil service position of physician and surgeon at Camarillo State Hospital. He was also in the Medical Corps Reserve of the United states Army, holding the rank of captain. On or about that date he was ordered to active duty, whereupon he took leave of absence from the Camarillo State Hospital and entered upon active duty with the United States military forces. Prior to that time, and on December 12, 1940, he had taken and qualified under a promotional examination for Assistant Medical Director, Department of Institutions, and had been placed first on the promotional eligible list. On Septmeber 17, 1941, he was certified for appointment as Assistant Medical Director at Stockton State Hospital. On October 4, 1941, he obtained a leave of absence from the army, "for the purpose of accepting appointment to said position," but was not otherwise relieved from military duty. While on such leave he performed the duties of Assistant Medical Director at the Stockton Hospital until October 13, 1941, when his leave terminated. Report of his appointment was made to the Personnel Board, and entered upon the official roster. On October 7th, he requested of the Department of Institutions a leave of absence from his position, effective October 13th, on the ground that he was "ordered to military duty." The leave was approved by the Department of Institutions on October 10th and filed with the Personnel Board, which approved it on October 21st. After his return to military service he performed no services for the state. On or about October 8, 1945, his military service terminated and he returned to and was reinstated in his position at Camarillo.

In the meantime, and on November 16, 1942, the Personnel Board had cancelled his appointment of October 4, 1941, as Assistant Medical Director at the Stockton State Hospital, on the ground that as an officer on active duty with the United States Army he was ineligible for same; but on July 19, 1943, he had been again certified from the same promotional list for Assistant Medical Director at the Stockton Hospital, and on August 2, 1943, had been appointed to fill the position, "such appointment to take effect upon his return to State service in accordance with Section 96.6 of the State Civil Service Act [Gen. Laws, Act 1404] as added by Chapter 395, of the Statutes of 1943."

Immediately after petitioner's reinstatement at the Camarillo Hospital, his appointment at the Stockton Hospital was made effective and he began his duties at the latter place, performing them until February 28, 1946, at which time he and three other employees of the Department of Mental Hygiene (formerly the Department of Institutions) were laid off, such layoffs being necessary because of the reinstatement of employees after discharge from military service, as provided for in section 19390 of the Government Code. The statement of facts recited that petitioner was included among those laid off for the reason that he was "the person having the lowest combined score for efficiency and seniority among other employees in said class"; and that "in lieu of being laid off from State service the appellant exercised the option of being demoted to a position in his former class of physician and surgeon, which position he now holds."

In his petition for writ of mandate, based upon the foregoing facts, appellant alleges as a first cause of action that inasmuch as he had been appointed to and accepted the position at the Stockton Hospital on October 4, 1941, and had actually served in the position for "a period of time," the subsequent cancellation of his appointment was invalid; and that he was entitled to return to and be reinstated to such position and not subject to the layoff procedure; that he had filed an appeal with the Personnel Board in accordance with section 19541 of the Government Code, protesting his layoff, which appeal, and also a petition for rehearing, had been denied. He prayed that the cancellation of his appointment by the Board be declared void, that he be reinstated to his position, and that respondents certify, approve and pay his claim for the difference in salary between what he had received since his layoff and what he would have received as Assistant Medical Director had he not been laid off. In a second cause of action he alleged that he was the first person appointed to fill the vacancy and was not subject to layoff procedure under sections 19530–19535 of the Government Code.

An alternative writ issued, whereupon respondents answered by way of a general demurrer to the petition. The cause was submitted on the record, the trial court rendered an opinion and entered judgment for respondents denying a peremptory writ of mandate. This appeal followed.

Determination of the cause rests primarily upon the effectiveness of petitioner's appointment on October 4, 1941, and the validity of the order of November 16, 1942, canceling same. The record shows that the cancellation was based upon an opinion of the Attorney General (NS4427) rendered in July, 1942, which stated:

"It is the view of this office that under the existing statutory provisions a permanent civil service employee, absent from duties on military leave of absence and on active duty with the United States Armed forces, cannot be appointed to some other civil service position for which he may have qualified either before or after he obtained military leave and entered into active service with the armed forces.

"Appointment to a civil service position necessarily implies and requires an actual acceptance of such appointment by the entering into the state service and performance of the duties. Since it is physically impossible for a person in the armed forces to actually accept an appointment to a position and enter into a performance of the duties thereof, such person cannot be appointed to such civil service position.

"There is still another reason that compels this conclusion. The rights of one on a leave of absence are purely statutory, and hence the statutory provisions are the measure of the right. In examining the statutes quoted above we find only two of the sections dealing with the right to promotion. Section 395 of the Military and Veterans Code provides in substance, among other things, that no state employee shall be preduduced by reason of such absence (to perform military duty) with refence to promotion. Section 96.5 of the Civil Service Act provides that any person who holds a civil service position with permanent status and whose name appears on a promotional list and who enters the armed forces of the United States before such list is abolished shall retain his place on such list until the expiration of three years from the termination of his services with the armed forces, provided that he has been certified to the position during such service. It is further provided that if the list is abolished and a new one prepared such person shall be placed on the list in the order in which he appeared on the former list and at the same place. Section 395 of the Military & Veterans Code is general, whereas Section 96.5 of the Civil Service Act is specific, and, therefore, the latter must prevail. The extent of the employee's right is measured by the terms of Section 96.5, which grants only the right of retention of his name on a promotional list, and, therefore, the employee in question cannot be appointed to another position while on leave of absence to perform military duty."

A similar conclusion was expressed in subsequent opinions of that official.

Sections 395 and 395.5 of the Military and Veterans Code, which were in effect in 1941, provide:

"§ 395. Absence of public officers and employees on military or naval duty.

"[Right of state, county, city or district officer or employee to absent himself from duties or service.] Every officer and employee of the State * * * who is a member of the National Guard or Naval Militia, or a member of the reserve corps or force in the Federal military, naval, or marine service, shall be entitled to absent himself from his duties or service while engaged in the performance of ordered military or naval duty and while going to and returning from such duty.

"[Absentee not to lose vacation or holiday privilege, or be prejudiced as to promotion, etc.] If he has been in the service of the State or of any one of the political subdivisions enumerated in this section for a period of not less than one year prior to the date upon which his absence begins, no such officer or employee shall be subjected by any person directly or indirectly by reason of such absence to any loss or diminution of vacation or holiday privilege or be prejudiced by reason of such absence with reference to promotion or continuance in office, employment, reappointment to office, or reemployment.

"[Salary or compensation during the absence.] During the absence of any such officer or employee, while engaged in the performance of ordered military or naval duty as a member of the National Guard, Naval Militia, or reserve corps or force in the Federal military, naval, or marine service, he shall receive his salary or compensation as such officer or employee, if the period of such absence in any calendar year does not exceed thirty days and if he has been in the service of the State or of any one of the political subdivisions enumerated in this section for a period of not less than one year prior to the date upon which his absence begins."

"§ 395.5. Retention of civil service rights by state officer or employee ordered on active duty in wartime: Reinstatement. Any officer or employee of the State having civil service status who is ordered on active duty in time of war shall retain all civil service rights to his position and shall be reinstated to such position upon application at any time within ninety days after the termination of such duty."

Section 96.5 of the State Civil Service Act, Stats. 1941, ch. 400, p. 1685, reads:

"Any person who holds a position with permanent status and whose name appears on a departmental reemployment, general reemployment or promotional list and who enters the armed forces of the United States before such list upon which his name appears is abolished shall retain his place on such list until the expiration of three years from the termination of his service with the armed forces; provided, however, this section does not apply to any person who refuses to accept appointment to a position after certification thereto subsequent to his discharge from the armed forces, or who has not been certified during his service with the armed forces of the United States, or who is not discharged from the armed forces of the United States within two years after the effective date of this section.

"No promotional lists upon which the names of such persons appear may be abolished, except that they may be replaced by more recently prepared list if the names of such persons are placed in the order in which they appeared on the former list and at the same place as they appeared on said list."

In 1943 the legislature enacted section 96.6 of the Civil Service Act, Stats. 1943, ch. 395, pp. 1912, 1913, as follows:

"Any person away from State service under the provisions of Section 152.5, whose name appears on a promotional list and which name is retained on such list subject to the provisions of Section 96.5, shall have his name certified to fill any vacancy which may occur during the period his name is retained on said list under said Section 96.5, and if it is the desire of an appointing power to appoint such person, he shall be so appointed to fill the position to take effect upon his return to State service within the time provided in Section 152.5."

The trial court, in denying the petition for writ of mandate, rendered an opinion to the effect that since petitioner was on active duty with the army when his appointment as Assistant Medical Director at the Stockton Hospital was made, petitioner was not in a position to accept same, and that his acceptance was merely a "token acceptance," and was ineffective; but that the subsequent appointment to take effect upon his return from military service was valid, and that since, after the termination of his military service and his return to the position of physican and surgeon at Camarillo he was subsequently promoted to the position of Assistant Medical Director under the provisions of section 96.6, supra, his seniority rights should be considered as of that date.

[1, 2] Until the enactment of section 96.6 in 1943 there was no statutory provision for promotion of civil service employees during their absence while on active duty with the armed forces. Section 395, supra, merely provided that employees of state, etc., should be entitled to leaves for the purpose of performing military duty, and that they should not be prejudiced by reason of such absence with reference to promotion or continuance in office, etc. And section 395.5 provided that any such employee ordered to active duty in time of war should retain all civil service rights to his position and should be reinstated to such position upon application at any time within ninety days after termination of such duty, and section 96.5, supra, merely provided for the retention of names upon promotional lists during absences on military duty. Plainly, these enactments concern only the retention of rights already acquired and do not provide for the acquisition of new ones during absences and military duty. It was only after 1943, when the legislature enacted section 96.6, that new rights might be acquired during such absences; and by that section rights to promotion of those whose names appeared on promotional lists were granted to the extent that the appointing power might, during such absences, make appointments to take effect upon the return of the appointee to state service. Prior to this enactment no statutory provision had been made for appointments during absences on military service; and the provision of the 1941 enactment to the effect that names should be retained on promotional lists is not compatable with the motion that actual promotions and appointments might be made during such absences. If the making of such appointments during such absences was provided for under existing legislation, no need for the addition of section 96.6 would have arisen, unless it can be said that its purpose was to limit rights already existing, which it obviously was not.

In enacting section 96.5 the legislature declared that it was an emergency measure to take effect immediately for the purpose of *retaining* to employees on active military duty rights already acquired. Also, the act of 1943 which included section 96.6, supra, was declared an emergency measure, it being recited as reason therefor that "conditions should be maintained as uniformly as possible for those who leave the State service and enter the military forces which is not true in the case of the possibilities of promotion and can only be made so by permitting as provided in this act the 'token' certification of persons on promotional lists who have entered the armed forces. This uniformity should be established as soon as possible and therefore this act should go into effect immediately." St.1943, p. 1913, § 4.

[3] From the foregoing we conclude that the appointment of petitioner in 1941 during the time that he was on active duty with the United States military forces was ineffective and that the cancellation of same in 1942 was proper; and that it is of no significance that petitioner "accepted" the appointment, as he says he did, and performed the services of Assistant Medical Director at the Stockton Hospital for nine days. Obviously when he did so it was with full knowledge that he was at the time, and would be indefinitely, on military duty, and that he could perform the duties at the hospital only during his limited military leave. And it was only because he happened to be on military duty near Stockton and that he was able to secure the short leave, that he was enabled to perform services as Assistant Medical Director at all. Had he been on foreign duty such performance would have been impossible. The enactment of section 96.6 apparently evidences a recognition of this fact. For if appointments made during military service could be made effective by service when on leave, a person fortunate enough to be stationed near the place to which he was appointed could obtain an advantage over others who might be on foreign duty—an advantage which it cannot be presumed the legislature intended should be enjoyed. Seniority rights should not be thus acquired.

[4] The record seems to indicate that petitioner recognized the foregoing conclusion, and acted accordingly. For, as the statement of facts recites, on his return from military duty he was reinstated to his former position as physician and surgeon at Camarillo, "and immediately thereafter his appointment as Assistant Medical Director, made on August 2, 1943, as aforesaid, was made effective, and he entered upon the performance of the duties thereof. * * * " Only when layoffs was necessitated and he found himself perforce laid off because of lack of seniority did he choose to claim such rights under the former appointment which had been cancelled. Furtheremore, the agreed statement recites that "in lieu of being laid off from State service appellant exercised the option of being demoted to a position in his former class as physician and surgeon, which position he now holds." While in his brief appellant states that he did not in fact exercise that option we cannot on this appeal consider matters so asserted and outside the record.

[5] Since we have concluded that appellant's original appointment in 1941 was ineffective and its cancellation proper, appellant's seniority rights must be held to date from his subsequent entry upon duty in October, 1945. The agreed statement of facts recites that on the day that he was laid off he "was the person having the lowest combined score for efficiency and seniority among other employees in said class." We assume that by this statement appellant concedes that he was properly laid off unless he had seniority rights dating from October, 1941.

The judgment appealed from is affirmed.

PEEK and THOMPSON, JJ., concur.

81 Cal.App.2d 460

SMITH v. McLAUGHLIN et al.

Civ. 7376.

District Court of Appeal, Third District, California.

Sept. 8, 1947.

1. Pleading 🔑406(8)

Defendant, by not demurring to the complaint on ground that two causes of action were pleaded without being separately stated, waived the defect. Code Civ. Proc. §§ 427, 434.

2. Automobiles 🔑240(1)

Where evidence admittedly established that defendant's automobile involved in collision with plaintiff's automobile was driven by his minor son having no driver's license and was driving with the father's consent, and evidence established that the collision was caused by the son's negligence, a prima facie case for plaintiff was established, and the failure to prove allegation that the son was acting as his father's agent would not preclude recovery, since allegation was surplusage. Vehicle Code, § 402.

3. Pleading 🔑52(2)

Common-law and statutory negligence need not be pleaded in separate counts.

4. Pleading 🔑193(6)

A complaint which states facts of case in ordinary and concise language is not demurrable on ground that such statement shows that plaintiff is entitled to recover on two different legal grounds. Code Civ. Proc. § 426.

5. Judgment 🔑18(2)

If complaint contains two causes of action, proof of either will sustain a judgment for plaintiff.

6. Appeal and error 🔑1170(3)

The failure to prove an unnecessary allegation in complaint was at most harmless error, where there was no showing that defendant was misled to his prejudice. Const. art. 6, § 4½; Code Civ.Proc. §§ 469, 475.

Appeal from Superior Court, Madera County; R. R. Sischo, Judge.

Action by Olan E. Smith against R. E. McLaughlin and another to recover damages resulting from an automobile collision. From an adverse judgment, named defendant appeals.

Affirmed.

J. D. Boyle, of Madera, for appellant.

Ray W. Hays, of Fresno, for respondent.

ADAMS, Presiding Justice.

The complaint filed in this action alleged that plaintiff sustained damage to his automobile by reason of the negligent operation of an Oldsmobile coupe by defendant John Doe (for whom the name William McLaughlin was later substituted) which caused said automobile to collide with plaintiff's automobile. The complaint further alleged, paragraph III:

"That at said time and place the defendant R. E. McLaughlin was the owner of an Oldsmobile Coupe automobile, which said automobile was being driven by the defendant John Doe; that the plaintiff is informed and believes, and therefore alleges, that at said time and place the defendant John Doe was the agent, servant and employee of the defendant R. E. McLaughlin, and was driving said automobile with the permission and consent of the said R. E. McLaughlin."

Defendants demurred to the complaint as failing to state a cause of action, for uncertainty, ambiguity and unintelligibility in that it could not be ascertained therefrom how or in what manner defendant John Doe was the agent, servant and employee of defendant R. E. McLaughlin, or whether or not said John Doe was acting within the scope of his alleged employment. No other grounds of demurrer were asserted. The demurrer was overruled.

Defendants filed an answer in which they admitted that defendant R. E. McLaughlin was the owner of the Oldsmobile Coupe, but denied the other allegations of paragraph III of the complaint. They also denied the allegations regarding the negligent operation of said Oldsmobile Coupe.

The action was tried by the court sitting without a jury, and resulted in a judgment for plaintiff. Defendants moved for a new trial on the ground that no evidence was introduced to establish that William McLaughlin was the agent, servant or employee of defendant R. E. McLaughlin, and that no evidence was offered, nor was it set forth in the pleadings, that any agent was acting within the scope of his authority; and that the decision was against law for the same reasons. The motion was denied.

The trial court found that defendant R. E. McLaughlin was owner of the Oldsmobile Coupe, that it was being driven by William McLaughlin with the consent of R. E. McLaughlin, and that the defendant William McLaughlin was guilty of negligence which caused the collision and resulting damage.

R. E. McLaughlin has appealed, the grounds for reversal being the same as those urged on motion for a new trial. More particularly he asserts first that plaintiff's complaint states two causes of action, one based upon the theory of agency and the other on the theory that appellant is liable because of his ownership of the Oldsmobile and that it was being driven by William (his son) with his consent; and that said causes of action are not separately stated, thus violating section 427 of the Code of Civil Procedure. Secondly, he argues that plaintiff pleaded on the theory of respondeat superior, but failed to prove agency, and that he should not be permitted to recover on the theory that defendant William McLaughlin was driving the car owned by his father with the latter's consent, thus rendering appellant liable under section 402 of the Vehicle Code, without having amended his pleading with the consent of the court.

[1] Appellant did not demur to plaintiff's complaint on the ground that two causes of action were pleaded without being separately stated. So, even if it can be said that the complaint is defective in this respect, which need not be decided, appellant waived the defect. Code Civ. Proc., sec. 434; King v. Schumacher, 32 Cal.App.2d 172, 179, 89 P.2d 466; Camozzi v. Colusa Sandstone Co., 26 Cal.App. 74, 77, 78, 147 P. 107, 112. Also, the record shows that at the close of plaintiff's case this appellant, in asking for judgment for defendant, stated, in support of that request, that the complaint set up but one cause of action—one based upon the theory of respondeat superior; that plaintiff had failed to prove agency and therefore could not recover. The motion was denied, the court pointing out that the complaint not only pleaded agency but alleged that the boy was driving the car with the consent of the owner; and that though agency was not proven, the evidence did show a violation of section 402 of the Vehicle Code.

In support of his second point appellant asserts that a party cannot set up one cause of action and prove another; that there was a fatal failure of proof when agency was not proven; that a cause of action based upon respondeat superior is an entirely different and foreign cause of action from that based upon section 402 of the Vehicle Code; and that, though the complaint alleged that William McLaughlin was driving the car with the permission and consent of defendant R. E. McLaughlin, it should be construed only as an allegation that it was so driven by the son as the agent of his father.

[2] We find no merit in appellant's contentions. It is not contended on this appeal that the evidence fails to show that the son, a boy aged about 14 years and having no driver's license, was driving his father's car with the latter's consent. It is not contended that the court's finding that the collision was caused by the boy's negligence is not supported by the evidence. Proof of those facts made a case for plaintiff within the allegations of the complaint, and a failure to prove, in addition, that the boy was acting as his father's agent is immaterial. Appellant does not contend that had the allegation regarding agency been omitted from the complaint, it would have been insufficient; therefore such allegation may be regarded as surplusage. It is not essential to the statement of a cause of action.

[3] Coleman v. City of Oakland, 110 Cal.App. 715, 295 P. 59, is applicable. There plaintiff sought to recover for injuries alleged to have been caused by a motor truck owned and operated by defendant City. Paragraph IV of the com-

plaint contained an allegation that the collision was caused by a dangerous and defective condition of the motor-truck, and that defendant had knowledge of such defective and dangerous condition but had neglected to remedy it. A demurrer to the complaint was sustained on the ground that two causes of action were pleaded and not separately stated—one based upon the Statute of 1923, p. 675, § 2, and the other upon common law liability. The appellate court reversed the judgment of the trial court, saying, 110 Cal.App. at page 721, 295 P. at page 61: "In drawing his complaint the pleader has followed the requirement of Code of Civil Procedure, section 426, subdivision 2, and set out 'a statement of the facts constituting the cause of action, in ordinary and concise language.' The accident was single, and the recovery sought is single. If the facts may entitle plaintiff to recover on two theories that does not render his pleading duplicitous. Mills v. Barney, 22 Cal. 240. It has been too often held to be open to doubt that in this jurisdiction common-law and statutory negligence need not be pleaded in separate counts. Opitz v. Schenck, 178 Cal. 636, 174 P. 40; Martin v. Shea, 182 Cal. 130, 187 P. 23; Scharpf v. Union Oil Co., 19 Cal.App. 100, 124 P. 864."

[4] In Mills v. Barney, 22 Cal. 240, 247, 248, above cited, the court also said that a complaint which states the facts of the case in ordinary and concise language is not demurrable because such statement shows that the plaintiff is entitled to recover on two different legal grounds. Also see King v. Schumacher, supra, 32 Cal.App.2d at pages 179, 180, 89 P.2d 466.

[5] If, as appellant contends, plaintiff pleaded two causes of action, the principle that proof of either will sustain the judgment is applicable. 21 Cal.Jur. p. 256, sec. 179; Moore v. San Vicente Lumber Co., 175 Cal. 212, 215, 165 P. 687. Furthermore, under the provisions of Article VI, section 4½, of the Constitution, no judgment shall be set aside for any matter of pleading, unless, after an examination of the entire cause, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

[6] Section 475 of the Code of Civil Procedure also provides that a court must, at every stage of an action, disregard any defect in a pleading which, in the opinion of the court does not affect the substantial rights of the parties; and that there is no presumption that error is prejudicial, or that there was injury if error was shown. And section 469 of the Code of Civil Procedure provides that no variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. We are unable to see that defendant was prejudiced by the manner in which plaintiff pleaded his case, or by his failure to prove agency. If plaintiff proved enough to entitle him to recover, defendant was not injured by plaintiff's failure to prove more. Therefore, in view of the foregoing constitutional and statutory mandates the judgment must be, and it is hereby affirmed.

PEEK and THOMPSON, JJ., concur.

81 Cal.App.2d 454

GRIFFITH v. BUCKNAM.

Civ. 15724.

District Court of Appeal, Second District,
Division 1, California.
Sept. 8, 1947.

1. Contracts 🔑31

A contract may be partly oral and partly written.

2. Evidence 🔑420(3)

Where a proposal in writing is made and accepted, it is permissible to show that it was accepted with conditions or qualifications, or that accompanying the acceptance, and in reality forming a part of it, terms in addition to those set forth in the proposal were exacted by the acceptor.

3. Evidence ⚷420(3)

Where exchange of correspondence between plaintiff and defendant with respect to leasing of plaintiff's stallion for stud purposes on defendant's premises did not create a contract until defendant's letter proposing that plaintiff accept all outside stud fees was accepted by plaintiff by telephone, testimony that plaintiff did not unqualifiedly accept defendant's offer by telephone, but instead made a counter offer requiring defendant's promise to use a hobble harness on mares bred to the stallion, was not inadmissible as contradicting a written contract by parol.

4. Joint adventures ⚷1

A contract for leasing of plaintiff's stallion to defendant for stud purposes did not create a "joint adventure" so as to require sharing of the loss when the stallion was killed while standing at stud, where there was no joint participation in the conduct of the business, no agreement to share profits or losses, nor any joint proprietary interest in right of mutual control over the stallion.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

5. Animals ⚷18

Where, by terms of contract relative to leasing of plaintiff's stallion to defendant for stud purposes, defendant could at any time up to specified date relieve himself from obligation to pay stud fees collected by exercising option to purchase stallion at price fixed by plaintiff, plaintiff was only entitled to recover price fixed for stallion where stallion died prior to the date set for the exercise of option as result of breach of contract by defendant, and plaintiff was not entitled to recover amount for loss of stud fees on theory that defendant would not have exercised the option.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Mrs. F. A. Griffith against George M. Bucknam for loss of plaintiff's stallion, which died as a result of injuries received while at stud on the farm of defendant. From an adverse judgment, defendant appeals.

Judgment affirmed as modified.

Edward Payson Hart, of Los Angeles, Horace Heffernan, of Pasadena, Wallace Trau, of Los Angeles, and Davies & Abbey and James B. Abbey, all of San Diego, for appellant.

Neil S. McCarthy, Charles R. Thompson, and Neil Dillon McCarthy, all of Los Angeles, for respondent.

WHITE, Justice.

Defendant has appealed from a judgment awarding plaintiff $10,000 damages for the loss of her stallion, "Sarada," which died as the result of injuries received while at stud on the farm of defendant. Plaintiff's complaint contained two causes of action, the first of which was based upon an alleged oral agreement whereby plaintiff leased the stallion to defendant to be bred to thoroughbred mares, with the express provision "that defendant would affix to each of the mares so bred to said stallion Sarada, an effective hobble-harness before and during the process of breeding her in order that she would be unable to kick said stallion." In her second cause of action, predicated upon negligence, plaintiff alleged that it was the accepted practice in the breeding of thoroughbreds to affix an effective hobble-harness to the mare to prevent her from kicking the stallion. In each cause of action plaintiff further charged that defendant failed to use such hobble-harness in breeding a mare to said stallion; that as a result the mare was able to and did kick the stallion, breaking his leg and causing his death.

After trial without a jury, the court found that the allegations of plaintiff's first cause of action were true, and as to the second cause of action found that while some breeders used the hobble-harness as a regular practice, others did not, leaving it to the judgment of the particular person handling the breeding at the time, and that more breeders used the harness than did not; but that irrespective of any custom or practice, "under the facts and circumstances existing at the time of the breeding or attempt to breed the said mare to the said stallion Sarada it was negligence on defendant's part not to use hobble harness on said mare."

The defendant owned and operated a breeding farm in San Diego County. On December 16, 1944, the plaintiff, Mrs. Griffith, wrote to defendant from Hot Springs, Arkansas, "I am thinking of returning my Stallion 'Sarada' by Sir Galahad III to Cal. to the stud, and I am wondering if you would be interested in standing him for me—or perhaps you might like to buy him. * * * If you are not interested and know of someone else who may be, I would certainly appreciate hearing from you * * *." In response, the defendant wrote to Mrs. Griffith: "I might be interested in standing the horse for you this coming season with an option to purchase him. If this arrangement is made, could you ship him to the farm in plenty of time for the 1945 season?" The plaintiff replied on or about January 4, 1945, as follows:

"* * * I am asking $7,500.00 for him and I believe that if conditions were normal that I could get twice as much for him. I would lease him for $2,500.00 per year (with the privilege of 30 mares). I should think that many owners would be interested in breeding mares and fillies which they had intended to run.

"I believe that Sarada should get plenty of mares at a fee of $250.00.

"I would appreciate hearing from you. * * *."

Under date of January 9, 1945, Mr. Bucknam wrote Mrs. Griffith as follows:

"Your letter of January 4th received.

"I will stand the horse 'Sarada' in California if you will accept as compensation, all outside stud fees up to $2500.00 for the season. I to have the option of paying instead the $7500.00 you ask for him. Payment to be made by September 1st, 1945. Also, I shall have the privilege to breed a few of my mares at no fee. * * * If you are interested in the above arrangement please write me confirmation at once so I can arrange a full page ad announcing the return of the horse in the January issue of The California Breeders Magazine. * * *."

Upon receipt of this letter plaintiff did not wire defendant, but talked with him by long distance telephone on January 14, 1945. The pertinent portions of plaintiff's testimony regarding this conversation are as follows:

"I said, 'Mr. Bucknam, I read your letter regarding Sarada and although you asked me to wire you I am calling because even though your terms which you mention as to payment of Sarada are satisfactory, there are some other things which I would have to discuss, and some further agreements which have to be made before I can tell you that I will ship Sarada to you.'

"He said, 'All right, Mrs. Griffith, what are they?' I said, 'First, do you live at your ranch?'

"He said, 'Yes, I do.'

"I said, 'Then you would see Sarada every day?'

"He said, 'Oh, yes.'

* * * * * *

"And I said, 'Do you have breeding hobbles?'

"He said, 'Yes, I have.'

"And I said, 'In the event I ship Sarada, do you agree to hobble all mares which you breed to Sarada?'

"He said, 'Yes, Mrs. Griffith, I do.' * *."

Mrs. Griffith shipped her horse to defendant on January 18, 1945. On February 6, 1945, while employees of defendant were attempting to breed the mare "Show Card" to the stallion, the mare kicked the stallion, breaking his leg, with the result that he died on February 18, 1945. No contention is made by appellant that the trial court was not justified in finding, in accordance with Mrs. Griffith's testimony, as well as some corroborative testimony, that the defendant orally agreed to use hobbles on the mares bred to Sarada and that no hobbles were being used at the time of the kicking incident.

[1-3] Appellant's first ground for reversal is that the judgment "either ignores or tortures the parol evidence rule, which is a rule of substantive law and not merely a rule of evidence." This contention will be considered together with appellant's third point, that the contract was written and could not be varied by parol evidence. Neither of these contentions can be sustained.

The exchange of correspondence between the parties did not alone bring a contract into existence, for there was no meeting of the minds. It is apparent from a reading of the letters above quoted that there could be no contract until the offer contained in defendant's letter of January 9 was accepted by the plaintiff. According to plaintiff's testimony, she did not unqualifiedly accept the offer of January 9 when she telephoned defendant, but instead made a counter-offer containing an additional condition or promise—that Mr. Bucknam should use a hobble-harness on the mares bred to Sarada. The situation, therefore, was one in which a written offer was followed by an oral counter-offer and an oral acceptance of the counter-offer; or, to put it another way, plaintiff's oral acceptance of defendant's offer was conditional, and defendant in turn acceded to the condition proposed by the plaintiff. A contract may be partly oral and partly written. 17 C.J.S., Contracts, § 59, p. 409. "Where a proposal in writing is made and accepted, it is permissible to show that it was accepted with conditions or qualifications, or that accompanying the acceptance and in reality forming a part of it, terms in addition to those set forth in the proposal were exacted by the acceptor." Scott Co., Inc., v. Rolkin, 133 Cal.App. 209, 212, 23 P.2d 1065. The language employed in Lawrence v. Premier Indem. Assur. Co., 180 Cal. 688, 698, 182 P. 431, 435, is pertinent here: "Because of the fact that the writing is a proposal merely, something more must be shown before it can be considered that there is a contract. That something is an acceptance, and the acceptance is just as much a part of the contract as the proposal, and anything which is a part of the acceptance may be shown, even though the proposal be in writing and the acceptance be not. So far as the 'parol evidence' rule goes, the essential distinction between a writing which purports to be a proposal merely and one which purports to be the contract of the parties is that the first does not purport to be the written memorial of both parties as to their understanding, and the second does, with the necessary result that in the latter case, but not in the former, the writing and nothing else is to be taken as expressing the contract. It follows that in the present case it was permitted to the defendants to show that their acceptance of the plaintiff's written proposal was conditional * * *."

It is argued by appellant that all of the elements of a contract appear from the letters of January 4 and January 9. To the contrary, Mrs. Griffith's letter of January 4, contained an offer to lease the stallion for $2500 per year and suggested a stud fee of $250. Defendant's letter of January 9 proposed that Mrs. Griffith accept "all outside stud fees up to $2500.00 for the season." Nor did defendant agree to purchase Sarada for $7500. Instead he asked for an option to purchase, good until September 1, 1945, and further, that should he exercise the option he should retain all stud fees.

The conclusion at which we have arrived upon this phase of the appeal renders it unnecessary to consider appellant's contention that the finding of negligence upon the second cause of action is unsupported by the evidence, particularly in view of the court's finding that no general custom existed with respect to the use of a hobble-harness.

[4] It is next asserted that the parties were engaged in a joint venture, and for that reason they should share equally the losses as well as the profits from the transaction. The authorities cited by appellant do not support the view that the parties were joint venturers. The elements of a joint enterprise are not here present. There was no joint participation in the conduct of the business, no agreement to share profits or losses with respect thereto, nor any "joint proprietary interest and right of mutual control over the subject matter of the enterprise or over the property engaged therein." Parker v. Trefry, 58 Cal.App.2d 69, 136 P.2d 55, 58. See also, Freedman v. Industrial Acc. Comm, 67 Cal.App.2d 629, 154 P.2d 922.

[5] There remains to be determined the question of whether or not the trial court properly allowed to the plaintiff as damages the sum of $2500 for loss of stud fees, in addition to the sum of $7500 representing the value of her stallion. In this we think the trial court erred. The sum of $7500

represents the value placed upon her property by the plaintiff herself in her contract with the defendant, and reasonable value at the time of loss is the measure of damages for the loss or destruction of such personal property. By the terms of the contract the defendant could, at any time up to September 1, 1945, relieve himself from the obligation to pay over the first $2500 of stud fees collected by exercising his right to acquire the stallion at the price fixed by plaintiff, $7500. To award plaintiff these anticipated earnings, on the theory that the defendant would not have exercised his option, would be to allow damages for loss of profits the realization of which was wholly contingent upon a decision by defendant as to whether he wished to acquire the horse. Plaintiff, as well as defendant, is bound by the terms of the contract, and under the contract she cannot complain if she receives what she agreed to accept—that is, the value of the stallion.

The judgment is modified by reducing the principal amount thereof from $10,000 to $7500, and as so modified the judgment is affirmed, neither party to recover costs of appeal.

YORK, P. J., and DORAN, J., concur.

81 Cal.App.2d 437

SCOTT'S VALLEY FRUIT EXCHANGE v. GROWERS REFRIGERATION CO., Inc.

GROWERS REFRIGERATION CO., Inc., v. SCOTT'S VALLEY FRUIT EXCHANGE et al.

No. 13377.

District Court of Appeal, First District, Division 1, California.

Sept. 8, 1947.

1. Bailment 🔑25

An action will lie against a bailee for negligent destruction of or injury to deposited goods.

2. Appeal and error 🔑882(3)

Where action for conversion of pears, stored by plaintiff in defendant's refrigeration warehouse, was tried and briefed on theory that defendant's negligence, resulting in destruction of or injury to pears, was involved, parties were barred from changing such theory on appeal from judgment for plaintiff.

3. Warehousemen 🔑24(1)

A warehouseman is not an insurer of goods stored, but is liable only for failure to exercise ordinary care in storage thereof.

4. Warehousemen 🔑24(2)

A warehouseman, undertaking to store fruit, is bound to maintain storage rooms at temperature proper for preserving such fruit.

5. Warehousemen 🔑34(7)

In action for conversion of pears stored in defendant's refrigeration warehouse, evidence supported finding that defendant was guilty of negligence proximately causing 75 per cent. destruction of pears and over 75 per cent. decay of each lug, thereof.

6. Contracts 🔑166

Parties to contract may incorporate therein by reference the terms of some other document.

7. Contracts 🔑166

To incorporate into contract by reference, the terms of another document, reference thereto by one party must be clear and unequivocal, called to other party's attention, and consented to by him, and terms of incorporated document must be known or easily available to contracting parties.

8. Warehousemen 🔑14

A co-operative association, which received from owner of warehouse, in which association stored pears, only hand receipts, reciting merely dates of delivery, lot numbers, and numbers of lugs delivered, and was not furnished with copy of, or informed of terms of, standard warehouse receipt, referred to in printed statements on hand receipts that customers accepting such receipts agreed to rules of standard receipt and were bound thereby, was not bound by terms of such receipt.

9. Warehousemen ⚿2

In co-operative association's action for conversion of pears, destroyed or injured while stored in defendant corporation's refrigeration warehouse, judgment for plaintiff was not erroneous as granting it a preference over other depositors, in violation of Public Utilities Act because of plaintiff's noncompliance with provisions of standard warehouse receipt, where there was no evidence that plaintiff was granted preferential rate and trial court was justified in finding that terms of such receipt were not part of bailment contract. Gen. Laws, Act 6386, § 19.

10. Trover and conversion ⚿9(3)

A demand for return of goods is normally condition precedent to action for conversion thereof, but is not always indispensable.

11. Warehousemen ⚿34(1)

Where action for conversion of pears, stored by plaintiff in defendant's refrigeration warehouse, was tried on theory of defendant's negligent destruction of pears and evidence supported findings that pears were 75 per cent. destroyed and that each lug thereof was more than 10 per cent. defective, demand by plaintiff for return of pears was unnecessary to entitle plaintiff to recover, as removal of pears, without resorting and repacking, would have been unlawful under Agricultural Code. Agricultural Code, §§ 784, 804, 831.

12. Damages ⚿62(3)

A co-operative association's duty to mimimize its damages from destruction of and injury to pears, stored by it in refrigeration warehouse, by removing them when notified by warehouseman of damage thereto and selling some of them, did not extend to expenditure of amount exceeding amount recoverable to salvage some of pears by resorting and repacking them.

13. Damages ⚿62(1)

The extent of duty to minimize damages is to use ordinary care to prevent enhancement of damages, and injured party need not go to extraordinary lengths to minimize damages.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by the Scott's Valley Fruit Exchange, a nonprofit co-operative association, against the Growers Refrigeration Company, Inc., for conversion of pears stored in a refrigeration warehouse owned by defendant, which filed a cross-complaint against plaintiff and J. F. Hunt for the amount spent by defendant in sorting and selling a portion of the pears. From a judgment for plaintiff and a judgment for cross-defendants on the cross-complaint, defendant appeals.

Affirmed.

Clarence E. Todd, Henry C. Todd, and Gordon W. Mallatratt, all of San Francisco, for appellant.

Dreher, McCarthy & Erickson, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff is a nonprofit cooperative, its membership being engaged in raising pears in Lake County. Defendant is a corporation operating in San Francisco a public warehouse for the storage of food and food products, including fruit. This action was brought by plaintiff to recover damages for the alleged conversion by defendant of 1816 lugs of pears stored by plaintiff in defendant's refrigeration warehouse. Judgment for plaintiff was given in the amount of $6,560.30, the damages being calculated on the basis of $4.25 per lug, less the normal 15 per cent sales commission. Defendant, in addition to its answer, in which it denied the conversion, and, as affirmative defenses, pleaded noncompliance by plaintiff with various provisions of a form of warehouse receipt on occasion used by the warehouse, also filed a cross-complaint against plaintiff and one J. F. Hunt, a commission merchant who had negotiated the contract of bailment for plaintiff, in which defendant prayed for $2,500 damages, the amount allegedly spent by defendant in sorting and selling a portion of the pears. The cross-complaint alleges that the salvaged pears were sold for $419.71. Judgment went for the cross-defendants on the cross-complaint.

Defendant appeals from both portions of the judgment.

On this appeal the main contentions of defendant are that the "entire" contract of bailment, including the warehouse receipt, negates its liability for the loss, or practical loss of the pears; that the effect of the judgment is to place upon it an excessive standard of care; that plaintiff failed to pursue its duty to minimize damages; that the effect of the judgment is to extend preferential rates to the plaintiff contrary to the public utilities law; and that the findings relating to demand and refusal are not supported.

[1, 2] Although none of the pleadings raises negligence as an issue, an examination of the record demonstrates that the case was tried, decided, and briefed on the theory, subject to the defenses mentioned, that if the pears had been substantially destroyed by defendant's negligence and were not practically salvageable, the defendant was liable. This is mentioned, although not raised by either party, because of the conflict of authority in this state as to whether negligence alone will support a conversion action. There is authority to the effect that negligent injury or destruction of property does not constitute a conversion. Poggi v. Scott, 167 Cal. 372, 139 P. 815, 51 L.R.A., N.S., 925; Emmert v. United Bank etc. Co., 14 Cal.App.2d 1, 57 P.2d 963; Rogers v. Huie, 2 Cal. 571, 56 Am.Dec. 363; Cass v. Ocean Park Bath Co., 45 Cal.App. 656, 188 P. 616; Woods Leasing Co. v. Funcheon, 134 Cal.App. 111, 25 P.2d 47; see, also, Zaslow v. Kroenert, 29 Cal.2d 541, 176 P.2d 1; Restatement of Torts, sec. 224. There is also substantial authority, however, in which destruction of property resulting from negligence was held to constitute a conversion. Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Atwood v. Southern California Ice Co., 63 Cal.App. 343, 218 P. 283; Vagim v. Haslett Warehouse Co., 131 Cal. App. 197, 20 P.2d 992; Wolfe v. Willard H. George, Inc., 110 Cal.App. 532, 294 P. 436; Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 258 P. 596; First Nat. Bank of Long Beach v. Crown Transfer & Storage Co., 89 Cal.App. 243, 264 P. 534. All of the cases recognize that an action will lie against a bailee for negligent destruction of or injury to deposited goods, but many of the cases holding that negligence does not constitute a conversion point out that the measure of damages for conversion and negligence is frequently different, and that for negligence the plaintiff should be limited to the damages customarily allowed in such actions, and not permitted to recover the greater damages sometimes allowed in conversion actions. That problem is not here involved, because the court measured the damages by the market value of the pears on the date of the destruction, the normal negligence measure of damages. In view of the facts that throughout the trial the plaintiff attempted to show, without objection, that defendant was negligent, and that defendant devoted the major part of his defense to attempting to negate such negligence, that the trial court decided the case on the theory of negligence, that defendant does not raise the point under discussion in its briefs, and that the measure of damages allowed was that customarily allowed in negligence actions, it is quite apparent that the cause has been tried and briefed on the theory that negligence was involved, and that the parties are barred from now changing that theory. The point is mentioned only for the purpose of calling attention to the apparently conflicting cases in this state, and to indicate, in any later proceedings on this appeal, that the point was not inadvertently overlooked by this court.

The theory upon which the case was decided, and the basic finding of the trial court, is disclosed by finding XIII which reads as follows: "That the defendant from and after the date of deposit of the said pears in storage by the plaintiff and cross-defendant had so negligently and carelessly operated and maintained the storage rooms of its said warehouse in which the said pears were stored as to cause or permit the said pears on or before September 13, 1943, to become destroyed to the extent of seventy-five per cent (75%) and each lug thereof to become decayed by reason of wet breakdown following scald in excess of ten per cent (10%), and that under the terms and provisions of Sections 784, 804 and 831 of the

Agricultural Code of the State of California, the plaintiff and cross-defendant could not legally thereafter accept delivery of the said pears or any part thereof or transport or sell the same before they had been sorted and repacked on the premises of the said warehouse pursuant to proper licenses therefor obtained from the State Department of Agriculture and that the cost and expense of such sorting and repacking would be and was greatly in excess of the reasonable market value of the repacked pears legally saleable after such sorting and repacking."

Sections 784 and 831 of the Agricultural Code referred to in the finding make it a criminal offense to transport or to sell any fruit unless the fruit and the containers conform to the provisions of the Code. Section 804, also referred to in the finding, reads in part as follows: "Fresh pears shall be mature but not overripe, free from codlin moth larvae, mold, decay, black end, unsealed cuts, and skin breaks; and free from serious damage * * *. Not more than 10 per cent, by count, of the pears in any one container or bulk lot may be below these requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause."

An examination of the record demonstrates that the above finding is amply supported by substantial evidence, in fact, defendant in its reply brief frankly concedes that it "does not now contest the right of the trial Court to find from the evidence that defendant was guilty of *some* negligence which negligence resulted in *some* damage to the pears." (Reply br. p. 2.) In view of this concession that the finding of negligent damage is supported (defendant does challenge the finding as to the extent of the damage), but brief reference need be made to the supporting evidence. The record shows that in June, 1943, plaintiff requested Hunt, a San Francisco commission merchant with whom plaintiff had dealt for many years, to find some refrigeration space in San Francisco for plaintiff's pears. Hunt communicated with defendant and defendant promised to hold storage space in August for about 5,000 lugs. Although there is a conflict in the evidence, the court found, and the finding is supported, that defendant knew Hunt was acting as agent for plaintiff, and defendant knew, although when the pears were delivered it issued its receipts in the name of Hunt, that plaintiff was in fact the owner. Between August 6, 1943, and September 8, 1943, plaintiff shipped to defendant for storage 5,300 lugs of pears. All of these pears were "the cream of the crop." Some 4,500 lugs were U. S. grade No. 1, and the balance a combination of U. S. grades No. 1 and No. 2. They were the first harvested fruit, and such fruit holds up best for storage. It was the common practice, well-known to the trade, to keep such pears in storage for 90 to 120 days for the purpose of selling them to the winter trade. Under proper storage conditions pears of this type would keep perfectly for such a period of time. Each lug had been inspected prior to shipment and each box contained on the outside a marking clearly indicating the grade as determined by a Federal-State Department of Agriculture inspector.

Defendant received these pears and stored them in two separate rooms, designated as the "small" and "large" rooms. The 1816 lugs involved in this action were stored in the "small" room. Although there is some conflict, there is substantial evidence that the proper temperature for the storage of pears is 32 degrees, or less. There is substantial evidence that on certain days the temperature in the small room was actually 37 degrees or more, and there is expert evidence that such a temperature is too high. Defendant's manager admitted a temperature of between 33 and 35 degrees, and also admitted that on two occasions prior to September 13th his refrigeration machinery broke down and that during the repairs thereto the temperature may have risen as much as 4 degrees. Admittedly, defendant kept no log of temperatures, although that is the common and usual practice in most fruit refrigeration storage plants.

There is ample and substantial evidence to show that pears in storage should be so piled as to permit a free circulation of cool air around the lugs, and that the pears in the "small" room were improperly piled. The evidence most favorable to plaintiff is to the effect that the lugs were "cross-piled" without "stripping," and piled solid, end to end, so that air could not possibly circulate.

There is evidence that the manager and president of defendant stated to several witnesses that prior to September 13th the machinery had broken down and was out of order for three days. While the manager denied these conversations, he did admit that in August one of his two compressors was being repaired and was out of commission for ten hours, and that the other was being repaired and was out of commission for a shorter period, early in September. Both compressors were necessary to maintain the proper temperatures. Defendant had no "stand-by" equipment in case of emergency, although it was the custom and practice of public refrigeration plants to have sufficient machinery to maintain a 25% safety factor in excess of everyday needs. Although the repair company that repaired defendant's machinery maintained a monthly inspection service, defendant did not avail itself of this protection, calling the repair company only when its machinery was out of repair.

The pears in the "large" room were properly piled and did not spoil, but the pears in the "small" room began to ripen as early as Friday, September 10th. The manager of defendant testified that he observed the pears on that Friday and "found that they were turning very fast and that we had to move them." They were riper on September 11th. He testified that he tried to get in touch with Hunt late Friday afternoon and again on Saturday, but that he was informed Hunt was out of town and would not return until Monday, September 13th. He made no attempt to notify plaintiff of the condition then existing. Early Monday morning, September 13th, he notified Hunt of the condition of the pears, and Hunt notified the manager of the plaintiff. The manager of plaintiff, and several of plaintiff's officers, immediately left Lakeport for San Francisco, and, upon arrival, together with Hunt, they visited defendant's plant and inspected the pears. The trial court has found that on that date the pears in the "small" room were 75% spoiled. That finding is amply supported. The manager of plaintiff testified that his inspection disclosed that "about 1500 boxes were completely spoiled, cooked," that "some boxes were fully decayed; most boxes were 75 per cent decayed. The others were so ripe they could not be handled—they should not have handled them at all." In his opinion not more than 15 per cent of the pears could have been salvaged if resorted at once.

The federal-state fruit inspector testified that he examined the fruit in the "small" room on September 13th and 14th. In addition to testifying as to the improper piling of the boxes, and that the manager of the defendant was then attempting to sort out the good pears, he testified that the pears "were in bad shape and I found them unusable for human consumption * * *. Unfit for human consumption * * *. They were practically all scalded * * * a disease in the storage of fruit caused by fruit being chilled and then the temperature rising." His official report shows that the "scald ranges from 10 per cent to 100 per cent, averaging approximately 75 per cent for entire lot * * * averaging approximately 55 per cent wet breakdown following scald." He testified that none of the pears could be sold as edible without resorting, and that, if immediately resorted, not more than 25 per cent could have been salvaged. He subsequently inspected other pears of plaintiff in other San Francisco storage houses and found such pears in excellent condition.

Hunt testified that he inspected the pears in the "small" room on September 13th; that "we started to inspect the pears, started raising covers where we could—all we could see were chocolate colored pears, juice running out of the boxes"; that on the top rows they were 100 per cent bad, that "to me it appeared as a hopeless mess * * * that from my observation on that day I don't think there would be any salvage"; that the cost of salvage would not be commercially feasible.

There was other evidence that on September 13th the pears were "hog feed, a lot of slop * * * they might be sold to a hog outfit. That is all they were good for." Another witness testified that the fruit was rotten and that juice was running out of the bottom of many boxes and that the pears were at least 75 per cent bad, and the balance not very good.

The plaintiff's witnesses testified that on the 13th and thereafter no instructions were given by them as to the disposal of the pears, and that defendant made no demand or request that the pears be removed. On September 16th plaintiff's manager told defendant's manager that "I don't care what you do with them * * * They are your pears." Defendant did attempt to salvage some of the pears. Its verified cross-complaint alleges that it salvaged some of the pears at a cost of $2,500 and received for such salvaged pears $419.71. There was some evidence that defendant actually received a little less than $1,000 in salvage. There was no detailed evidence of the actual cost of salvage, although the evidence demonstrates that such cost was material and probably in excess of what could be or was received for the salvaged pears. Most of the pears in the "small" room were sold for hog feed. All of the salvaged pears were sold by defendant through commission merchants upon the order and for the account of defendant.

[3-5] It is, of course, the law that a warehouseman is not an insurer, but is liable only for a failure to exercise ordinary care. England v. Lyon Fireproof Storage Co., 94 Cal.App. 562, 271 P. 532; Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 195 P. 398, 16 A.L.R. 275; see cases collected 25 Cal.Jur., p. 957, sec. 15. Where a warehouseman undertakes to store fruit he is bound to maintain his storage rooms at such a temperature as is proper for preserving such fruit. Crystal Ice etc. Co. v. Renschler Produce Co., 99 Cal.App. 417, 278 P. 874. Tested by these standards it is quite obvious that negligence was clearly shown. From this brief resume of the evidence it is quite apparent that the finding that defendant was negligent and that such negligence proximately injured the pears in the amount set forth in the finding is amply supported.

One of the major contentions of defendant is that the "entire" contract between it and plaintiff negated its liability for the spoilage of the pears. This contention is based on the following facts: With every deposit of a load of pears defendant delivered to Hunt a so-called "hand receipt," and Hunt passed it on to plaintiff. This receipt merely recited the date of delivery, the lot number, and the number of the lugs delivered. Printed on this receipt was the following: "Customer in accepting this receipt agrees to rules of our standard warehouse receipt and is bound thereby." Plaintiff's manager knew this provision was on the receipts received by him, but he had no knowledge of the terms of the warehouse receipt. Defendant's manager testified that his firm had a "standard" form of warehouse receipt that was delivered to customers upon request. Admittedly, however, defendant did not deliver a copy of this warehouse receipt to Hunt or to plaintiff, and both testified they had no knowledge of the terms of such warehouse receipt. The evidence shows that but very few of these warehouse receipts were issued to depositors. From December, 1943, to May, 1946 (the time of trial) defendant issued but six of its formal warehouse receipts, one of which was void, and since the defendant started in business it has issued but 407 such receipts.

The so-called "standard" warehouse receipt was introduced into evidence. It provides, inter alia, that defendant was not liable for any injury to the goods in excess of $25 unless the true value of the property was stated in the receipt, and that no liability should attach unless a claim in writing was presented within 30 days of the termination of the bailment. It was further provided that in case of accident to the plant or machinery of defendant, or for any other reason, the defendant could terminate the bailment upon 48 hours' notice. Another provision was to the effect that the defendant was not liable for the preservation of any goods in closed packages unless it examined the goods when taken in storage at the request and expense of the bailee.

The trial court found that Hunt had not been given a copy of the warehouse receipt; that neither Hunt nor plaintiff had been told that the rates for the storage were on any basis other than the full value of the pears deposited; that it was the general custom of the defendant to issue only the "hand receipt" to its customers, and that it was not its custom to issue a formal warehouse receipt; that the "formal warehouse receipt was not during the said periods usually or customarily issued by defendant"; that the formal receipt introduced into evidence was not the "standard" receipt of defendant and was not similar to that employed by other public warehousemen in San Francisco; that defendant knew that neither Hunt nor plaintiff had ever seen a copy of the warehouse receipt; that defendant knew that both Hunt and plaintiff believed that the rate charged for the storage was based on the full value of the pears; that defendant never notified Hunt or plaintiff to remove the pears, and that the first notice plaintiff had of the destruction of the pears was on September 13, 1943.

These findings are substantially supported. Both Hunt and the manager of plaintiff testified that defendant had never notified them to remove the pears, or otherwise attempt to terminate the bailment. While it is true that the pears were stored in closed lugs, the top cover was easily removable, and each lug, on the outside, contained the official inspection stamp designating the type and quality of the pears. The manager of defendant had been in the fruit business for many years, was familiar with the nature of fruit, and generally knew the market value of the pears at the time they were stored. He was also familiar with what the various grades of pears designated by the inspector's stamp indicated. Defendant makes no contention that the storage charges assessed by it and paid by Hunt were anything less than it would have charged had the "true value" of the pears been expressly declared. The "true value" of the pears was in fact declared by the inspector's stamp designating the grade just as clearly as if the parties had then designated the market value of the pears on the date of delivery.

[6, 7] It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. Forest Lawn Memorial Park Ass'n. v. DeJarnette, 79 Cal.App. 601, 250 P. 581; see cases collected 12 Am.Jur. p. 781, sec. 246. But each case must turn on its facts. William A. Davis Co. v. Bertrand Seed Co., 94 Cal.App. 281, 271 P. 123. For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.

In Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193, the bank's passbook delivered to the depositor contained certain printed matter purporting to limit materially the bank's liability that would otherwise exist for paying out the depositor's money on forged endorsements. In holding that this printed provision appearing in the very document evidencing the contract was not binding on the depositor the Supreme Court stated (180 Cal. at page 613, 182 P. at page 298):

"This statement is not signed by the plaintiff, nor is there any showing that it was called to the plaintiff's attention or wittingly agreed to by it. It is just the character of thing that the average man would not trouble to read, or reading would fail to appreciate the significance of the inclusion in it of 'indorsements,' and the fact that it very materially changed the usual obligation of a bank to its depositors. There is no reason, so far as we know, why a depositor may not make such an agreement if he deliberately chooses to do so, unreasonable as it is. But it is evident that the statement comes in the category of 'traps for the unwary,' and before such statement can be given effect as a contract binding upon the depositor and changing in a substantial particular the relation which presumably he thought he was entering into, it must appear affirmatively that he consented and agreed to it either by being required to sign it or by having his attention particularly called to it. It is not sufficient merely that it appear in the front of the passbook * * *

"In order for the bank to avail itself of the statement as a contract made by the plaintiff, it was necessary for the bank to prove that the statement had been called to the attention of some responsible officer of the company. Without this it cannot be fairly said that it was accepted or consented to by the company, and nothing of this sort appears.

"We are not unaware of the numerous authorities holding that a rule or regulation printed in a savings bank passbook accepted by the depositor is binding upon him. Practically all, if not all, of these cases, however, are cases wherein either the circumstances were such that the consent of the depositor to the by-law reasonably appeared, or the bank was a mutual one, the members of which were the depositors who as members were bound by the bank's rules. In practically all of them also the rule involved was a reasonable and customary one, which presumably the depositor would be aware of as an ordinary incident of the relation of savings depositor and bank."

In McQueen v. Tyler, 61 Cal.App.2d 263, 142 P.2d 466, this court recently considered the effect of a printed provision of a freight bill constituting the contract of the parties expressly limiting liability of the carrier. We there held that, under the circumstances of the case, the shipper was not bound by the terms of the receipt, he not having read it, even though he signed it.

[8] If it be the law, as these cases and others that might be cited indicate, that a person is not always bound by provisions limiting liability of one of the contracting parties printed on the very document constituting the contract of the parties, it is quite apparent that a person is not necessarily bound by the terms of a separate document purporting to limit materially the liability of the other contracting party where the evidence shows that the first party did not know of the terms of the incorporated document, that his attention was not directed to the incorporated document, and where the evidence shows that he did not assent thereto. If a trial court is justified in holding that a provision in a passbook printed in the front thereto constitutes a "trap for the unwary," as was held in the Home Savings Bank case, supra, the trial court in the instant case was much more justified in holding that plaintiff was not bound by the terms of the warehouse receipt where no copy of the receipt was furnished to plaintiff, and where its officers did not know its terms, and where no attempt was made to call the attention of Hunt or of plaintiff's officers to its terms. If defendant had desired to act fairly with its depositors it could have easily furnished each depositor with the form warehouse receipt instead of the hand receipt. Thus, even if plaintiff failed to comply strictly with the precise terms of the warehouse receipt (and, on this point we are rather of the opinion that in view of defendant's actual knowledge of the true value of the fruit the failure to state the true value in the hand receipt and the failure to request an inspection were excused and did not violate the terms of the warehouse receipt), we think that the trial court was fully justified in holding that under the facts here existing the terms of the warehouse receipt were not binding on plaintiff.

[9] It is next urged that the effect of the judgment here under review is to grant to plaintiff a preference over other depositors in violation of section 19 of the Public Utilities Act, Deering's Gen. Laws, Act No. 6386, prohibiting a public utility from granting preferences. This argument is necessarily grounded upon the assumption that all of the terms of the warehouse receipt are binding on plaintiff. In addition to the fact that there is no evidence that plaintiff was in fact granted a preferential rate, the argument under consideration necessarily falls with the holding that the trial court was justified in finding that the terms of the warehouse receipt were not part of the contract of bailment.

[10, 11] Defendant points out that there is no evidentiary support for the finding that plaintiff made a demand for the pears on September 13, 1943. Plaintiff, on oral argument, conceded that the finding was unsupported. A demand is, of course, normally a condition precedent to the bringing of a conversion action. However, a demand is not always indispensable. In ad-

dition to the fact that the case was tried on the theory of negligent destruction of the pears, as already pointed out, the finding that they were 75% destroyed and that each lug was more than 10% defective is supported. This being so, it would have been unlawful, under the provisions of the Agricultural Code to which reference has already been made, to move the pears without resorting and repacking. Under such circumstances a demand was unnecessary. The law does not require useless and futile acts. It would have been futile to have demanded that defendant do something the law forbade. Under such circumstances a demand was unnecessary. See, Mier v. Southern California Ice Co., 56 Cal.App. 512, 206 P. 83.

[12] The last major contention of defendant is that plaintiff failed to observe its duty to minimize damages. While it is no doubt true that the pears were not a total loss on September 13th, and while it is no doubt the law that an injured party is under a duty to minimize damages if he can reasonably do so, under the facts here involved that rule has no application. It apparently is defendant's theory that some material salvage could have been accomplished had the pears been removed on September 13th. While defendant's witnesses testified that some of the pears could have been sold on September 13th without resorting and repacking, and that it sold some of the pears on September 16th, and thereafter, without repacking, the witnesses for plaintiff, particularly the state inspector, testified that none of the pears in the "small" room could have been sold legally on September 13th without resorting and repacking. The verified cross-complaint of defendant alleges that the pears sold by it on September 16th and thereafter brought in $419.71 and that it expended the sum of $2,500 in its "efforts to minimize damages." Thus it would appear that the expenses incident to the resale were disproportionate to what could be realized on such sale. The evidence shows that defendant probably realized on such sales somewhat more than it pleaded. It failed to introduce detailed evidence of the cost of such salvage activities, but the evidence indicated that the cost of salvage was probably more than could be recovered. While more pears could have been salvaged on September 13th than were available three days later, it is a reasonable inference from the evidence that the cost of salvaging the few pears available for salvage would have exceeded the amount recovered. This being so, plaintiff's duty "to minimize damages" did not extend to the necessity of spending so much to realize so little. Had plaintiff attempted to salvage the pears it is reasonable to infer that such operation would have enhanced rather than minimized the damages.

[13] The duty to minimize damages is predicated upon the statutory rule that a person is required to use reasonable care to prevent an unwarranted piling up of damages. The extent of the duty is to use ordinary care and diligence to prevent the enhancement of damages, and the duty does not extend to the necessity of going to extraordinary or unusual lengths to minimize damages. Jegen v. Berger, 77 Cal.App. 2d 1, 174 P.2d 489; Baker v. Borello, 136 Cal. 160, 68 P. 591; Ash v. Soo Sing Lung, 177 Cal. 356, 170 P. 843. Under the circumstances the plaintiff was under no duty to attempt to salvage the few good pears available for salvage.

The judgment appealed from is affirmed.

BRAY, J., and OGDEN, Justice pro tem., concur.

81 Cal.App.2d 465

In re WATKINS' ESTATE.

Civ. 7388; Sac. 5837.

District Court of Appeal, Third District, California.

Sept. 8, 1947.

1. Wills 🔑384

On appeal by will contestants who contended that evidence was insufficient to support trial court's findings, District Court of Appeal was required to view the evidence in the light most favorable to proponents.

2. Wills 🔑55(1), 166(1)

Evidence sustained findings that, at time of execution of will by 91-year-old testatrix, she was of sound mind and not the subject of undue influence.

3. Wills 🔑163(6)

Evidence did not show that testatrix' devise of farm to her stepsons, rather than to her daughters, was an unnatural devise from which the stepsons unduly profited so as to impose on the stepsons the burden of showing that they did not unduly influence the testatrix.

4. Wills 🔑166(2)

Fact that confidential relationship existed between testatrix and her stepsons to whom she devised farm was insufficient to support a conclusion that the will was the result of undue influence by the stepsons.

5. Wills 🔑166(1)

In will contest, evidence failed to show that proponents, who were charged with having exercised undue influence on testatrix, actively participated in the procuring and in the execution of the will.

6. Wills 🔑166(7)

Proof of mere opportunity on part of devisees to influence testatrix' mind, even though coupled with an interest or motive to do so, was insufficient to show undue influence on part of the devisees.

7. Wills 🔑166(1)

In order to warrant setting aside a will on ground of undue influence, there must be substantial proof, direct or circumstantial, of a pressure which overpowers the volition of the testator and operates directly on the testamentary act.

8. Evidence 🔑14

The District Court of Appeal would not take judicial notice of alleged fact that arteriosclerosis and senile dementia are the same thing.

9. Witnesses 🔑276

In will contest, contestants were not authorized under statute providing for examination of an adverse party as if under cross-examination to call, as an adverse witness, subscribing witness to will who at time of the contest was the wife of one of the proponents and devisees, on ground that she had a pecuniary interest accruing to her under the will, since she was not an "adverse party" for whatever her husband took under the will would be his separate property. Code Civ.Proc. § 2055; Civ. Code, § 163.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Party".

10. Evidence 🔑568(2)

Witness' opinion that testatrix was of unsound mind was of no greater value than reasons given in support of such opinion.

11. Wills 🔑55(1)

Witness' opinion that testatrix was mentally incompetent in February "1943" was valueless on question of testatrix' competency to make will in February "1944".

12. Wills 🔑384

Contestants were not injured by court's action in striking out answer of witness as to his opinion of testatrix' competency, on ground that he was not an "intimate acquaintance" of testatrix within meaning of statute, where witness' opinion was valueless. Code Civ.Proc. § 1870, subd. 10.

13. Appeal and error 🔑971(2)
Evidence 🔑498½

The determination of who are intimate acquaintances of a testator, under statute authorizing an "intimate acquaintance" of the testator to testify as to his mental sanity, is committed to the trail court's sound discretion, and an appellate court will not interfere with the exercise of that discretion in absence of a clear abuse. Code Civ.Proc. § 1870, subd. 10.

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Proceeding in the matter of the estate of Olive Watkins, deceased, wherein Cora Kinser and others, contestants, filed a will contest against Ed Watkins and Sidney Watkins. From an adverse decree, from an order admitting the will to probate, and from an order denying contestants' motion for a new trial, the contestants appeal.

Appeal from order denying new trial dismissed, and decree and order admitting will to probate affirmed.

Fred M. Bollinger and J. Calvert Snyder, both of Stockton, for appellants.

Thomas E. Reynolds, of Davis, for respondents.

ADAMS, Presiding Justice.

Olive Watkins died testate on May 28, 1945, at the age of 92, leaving an estate alleged in the petition for probate of her will to consist of a 100 acre farm estimated to be worth $7500, 25 shares of California Western States Life Insurance Company valued at $900, and cash in three different banks amounting to $11,900. By the terms of her will the farm was devised to Sidney and Ed Watkins, the sons of her deceased husband by a former marriage, aged respectively 60 and 59 years. The stock and cash, after payment of debts, expenses of administration, etc., were bequeathed in equal shares to her three daughters, to wit: Mrs. Cora Kinser, aged 68 years, Mrs. Ella Monroe, aged 73 years, and Mrs. Laura Kinser, aged 71. The two stepsons were designated as residuary legatees, and Ed Watkins was named as executor.

Prior to the admission of the will to probate, Cora Kinser, Laura Kinser and Ella Monroe filed contests, the latter, an incompetent, appearing by her guardian, James E. Kinser, son of Laura Kinser. Grounds of contest asserted were that the testatrix was not of sound mind and was incompetent to make a will; that the will was the result of undue influence exerted over the decedent by Ed and Sidney Watkins; and that the will was not duly executed. The proponents of the will, the Watkins brothers, denied the foregoing allegations of the complaint of contest.

Trial of the proceedings was had on December 6 and 7, 1945, and resulted in a judgment in favor of the proponents and an order admitting the will to probate. Findings were filed in which it was recited that at the time said will was executed Olive Watkins was of sound and disposing mind and memory; that she was not acting under fraud, menace, duress or undue influence of any persons whomsoever; that she was in every respect competent by said last will to dispose of her estate; and that the will was executed, published and declared by her, in every respect as required by law. A motion for a new trial was denied, and from the judgment that followed and the order admitting the will to probate, as well as from the order denying a new trial, contestants have prosecuted this appeal, contending, as grounds for reversal, that the evidence produced is insufficient to support the trial court's findings regarding undue influence and competency, and that the trial court erred in certain rulings upon the admission of evidence. No contention is here made that the will was not duly executed.

Certain facts developed during the trial, which are not controverted, show that Olive Watkins married E. G. Watkins, the father of proponents, in 1900. Mr. and Mrs. Watkins and the two Watkins boys thereafter resided upon the farm property, which is in part in controversy here, until Mr. Watkins died in January, 1921. Upon his death the farm, which consisted of some 300 acres, was left to his widow and his two sons in equal shares; and by the exchange of deeds Mrs. Watkins became the owner of the 100 acres upon which the home stood. Mrs. Watkins and the son Ed continued to live there during the remainder of Olive Watkins' life, and Sidney made his home there most of the time. The two sons managed the farm and divided the proceeds therefrom with their stepmother. The evidence does not show that the daughters of Olive Watkins ever lived on this farm. All were adults at the time their mother was married in 1900, all of them married, and the record indicates that they maintained homes of their own.

For several years prior to Olive Watkins' death she suffered to some extent from the natural results of her advanced age; and for about five years prior to her decease a Mrs. Wood was employed in her home, performed the duties of housekeeper and took general care of the aging woman. After the death of the decedent Mrs. Wood married Ed Watkins.

[1] Other evidence, which, though in some respects conflicting, but which on this appeal must be viewed in the light most favorable to the prevailing parties, shows that shortly before the will of Olive Watkins was executed—which was about one year and three months before her death—she suggested to the Watkins brothers that perhaps she should make her will, and at that time told Ed to get Mr. Reynolds, an attorney, who had previously acted as attorney for both of them, to come out to the ranch. When Mr. Reynolds came he asked her how she wanted the will drawn, and she explained it to him as set forth, talking without any difficulty. The Watkins brothers were present, but there is no evidence that either one of them made any suggestion regarding the terms of the will, or influenced her in any way. Thereafter Mr. Reynolds brought the will to the house, read it to Mrs. Watkins and asked her if it was satisfactory, to which she replied that it was. She also read the will herself, signed it, and then asked Mrs. Wood and a neighbor to sign it as witnesses, which they did. In the meantime Mr. Reynolds had departed, and thereafter Ed Watkins took the will to him at his office and left it with him.

It is the contention of appellants that at the time this will was executed the testatrix was so debilitated that she did not know what she was doing; that she was unable to do any business or understand or know the nature of her property or who were the natural objects of her bounty; that she was nearly blind, and suffering from arterio sclerosis to the extent that she was demented; that she was unduly influenced by her stepsons with whom a confidential relationship existed, and that they unduly profited by the will.

However, the testimony of Ed Watkins shows that for about eight months after the will was signed, decedent was able to and did sign checks, that though she sometimes used a magnifying glass for reading she was still able to read, that he and his brother consulted with her about her business affairs, that she could move about without assistance until not long before her death, that as late as 1944 she was able to get out of the house getting in kindling, etc., that she could go to the bathroom unassisted, that her health was very good for a woman of her age, and that she could hear, though they had to talk to her "a little bit loud." Some 27 checks signed by decedent just prior to and after the execution of the will were introduced in evidence, one or two having been signed on that very day the will was signed, and another as late as June 6, 1944. Sidney Watkins gave testimony regarding the signing of the will, stated that decedent signed it while seated at a table in the kitchen; that she used an eyeglass; that she asked Mrs. Wood and Mr. Becker to sign as witnesses which they did; that in 1942 and 1943 her health and her mental condition were very good; that she got out of the house from time to time, though she was not spry; that she could wait upon herself; and that in January, February, March and April, 1944, he saw and talked to her every day, her physical condition was good, and her mental condition all right; that later in the year she had to have a cane to get about.

Mrs. Wood (then Mrs. Ed Watkins) testified that until shortly before Mrs. Watkins was taken to the hospital where she died, she had been able to take care of herself, except at times of illness; that she sometimes had dizzy spells, but of short duration; that her mental state never got so bad that she did not know what she was doing; that she knew everything she was doing and saying; that she usually got up late and sat in her chair, but could get up by herself; that in January, February and March of 1944 she signed the checks paid to Mrs. Wood for her services. Regarding the execution of the will she testified that Mrs. Watkins signed it while sitting in her chair at the table in the kitchen; that Mr. Reynolds brought the will out and read it to her; that she read it over herself with the use of her magnifying glass, signed it and gave it to the witnesses for them to sign, saying it was her will; that no one helped her sign.

Carl Becker, a neighbor who also witnessed the will, testified that he had known Mrs. Watkins as long as he could remember; that Mr. Reynolds brought the will and read it to her, and she said "That's the way I want it"; that she read it through a magnifying glass and signed it unassisted, while sitting at the dining table, in the presence of both subscribing witnesses; that she asked him to sign it, and declared it to be her will; that he did not observe anything wrong with her mental condition. He also testified that he was in the Watkins home nearly every day, that he had seen her sign checks, using the magnifying glass; that he always talked with her when he went there; that she called him Carl and he called her "Grandma."

Morris Carden, who had known Mrs. Watkins since 1934, testified that he had had business dealings with her every year, and saw her in the yard with Ed Watkins and Mrs. Wood in 1944; that about July of that year he called about dinner time and exchanged greetings with her; that he asked her about her health and she said it was about as usual; that during the beet season in October or November, 1943, he saw her at different times out in the yard where the chickens were feeding; that she was a little old lady, stoop shouldered, but that he did not recognize any difference in her physical condition.

Contestants rely on testimony showing that the testatrix was sick at times, that during periods of illness she was unable to take care of herself unassisted, that she had dizzy spells, that on occasions Ed Watkins had to cut her meat for her, that she wouldn't take a bath, and when asked to do so would get nervous and shaky; that at times she could not wait on herself, that she suffered from arterio sclerosis, that at times she did not know her daughters or their sons.

[2] But the testimony of contestants' witnesses was based upon visits to the Watkins home at intervals and upon the condition of decedent at times of illness. As is too often the case on appeals to this court, contestants set forth in their briefs only the evidence which is favorable to their contentions. But the veracity of their witnesses, the weight to be given to their testimony and the resolution of conflicts in the evidence were for the trial court; and we cannot say that there was not ample evidence to sustain its findings that at the time the will was executed the testatrix was of sound mind and not the subject of undue influence.

On this appeal appellants rely upon two propositions, that the evidence establishes that there was a confidential relationship between the Watkins brothers and the decedent, and that they unduly profited by the will; that for these reasons the burden of showing that they did not unduly influence the testatrix in the making of her will shifted to proponents, and that they did not meet that burden.

[3] That there was a confidential relationship between the decedent and her two stepsons may be admitted; but that the will was unnatural we cannot concede. Appellants' argument that it is unnatural is based solely upon the fact that decedent left the farm to her stepsons instead of to her daughters. Under the circumstances of this case we think that such disposition was entirely natural and reasonable. The mere fact that the stepsons were not blood relations of Mrs. Watkins is not controlling. In Re Estate of Morcel, 162 Cal. 188, 195, 121 P. 733, where the testatrix executed a will in favor of a man to whom she was not married but with whom she had lived for twenty years in amity and accord, to the exclusion of a daughter, the court said that in view of the circumstances there was nothing unnatural or unreasonable about the will. In Re Estate of Nolan, 25 Cal.App.2d 738, 741, 78 P.2d 456, in which case decedent devised his estate to a cousin to the exclusion of nieces and nephews who contested, the giving of an instruction to the jury that in the absence of evidence explaining the testamentary disposition of decedent's estate his will was to be considered unnatural if, to the exclusion of natural objects of his bounty, it left property to persons who would receive nothing in case he died intestate, was held to be reversible error.

In Re Estate of Smith, 200 Cal. 152, 160, 252 P. 325, the court said regarding a will in which the decedent left his property to a friend to the exclusion of his wife from whom he was estranged, that the evidence tended to stamp the will as fair and just where it was shown that decedent and proponent had been intimate friends for many years, that decedent had been solicitous of proponent's well-being and had lent him money, and where proponent had cared for decedent in his last illness.

In Re Estate of Fleming, 199 Cal. 750, 251 P. 637, where the beneficiary of decedent's will was a stranger to the blood, and testator's mother contested, the court said that the will was not unnatural as the devisee was the daughter of close friends, and the evidence furnished a reasonable explanation of the testamentary act. In Re Estate of Arnold, 16 Cal. 2d 573, 588, 107 P.2d 25, where the testator left the bulk of his estate to friends who had been kind to him, and gave his nephew, the contestant, but $1000, the court said that the will was "perfectly natural."

Such may well be said in this case of the devise of the farm to decedent's stepsons. The property had come to decedent from her husband, and was his separate property. It was a part of the original farm of 300 acres which was the home of Mr. and Mrs. Watkins and the two stepsons who were lads about 14 and 15 years of age at the time decedent married their father; and the house itself was on the 100 acres which, by exchange of deeds between Mrs. Watkins and her stepsons after the father's death, had been conveyed to her. Mrs. Watkins had continued to live on the farm, and the two stepsons successfully managed the property for her, called her "Mother" and took good care of her until her death. There is not even a suggestion that they ever failed in their scrupulous care of her and her affairs, and the relationship between them was apparently as close as it could have been had they been the natural sons of testatrix. To have willed this property away from them would have been to dispossess them of the home where they were born and had lived practically all their lives. On the other hand, the daughters of decedent were all married, or had been, and had families of their own, the evidence showing that Laura had at least one son, contestant herein as guardian of Ella Monroe, and that Cora Kinser had four sons, two of whom were witnesses in the case. While the evidence does not indicate any unfriendliness between decedent and her daughters, it does show that they did not take upon themselves the care of their mother in her declining years; and though they visited her occasionally, Laura Kinser testified she did not see her mother from November, 1943, until she died. They were all adults when their mother married Mr. Watkins, and for all the evidence shows never thereafter made their home with her. At the time of her death they were advanced in years and would have been incapable of managing the farm as such. We think the foregoing disposes of appellants' contention that decedent's will was in any respect unnatural or that proponents unduly profited thereby.

[4] On this appeal appellants have apparently abandoned the charge in their complaint of contest that decedent was incompetent since they make no argument in support of same. At any event the evidence as above set forth fully supports the findings of the trial court that decedent was competent. As for their contention that the will was the result of undue influence by the stepsons or either of them, the matter of the unnaturalness of the will being eliminated, that the testatrix was unduly influenced must find support, if it has any, on the fact that there was a confidential relationship between testatrix and her stepsons. However, such relationship alone is insufficient to support a conclusion that a will is the result of undue influence.

In Re Estate of Hull, 63 Cal.App.2d 135, 146 P.2d 242 (hearing in Supreme Court denied), where decedent, a woman about 78 years of age left the bulk of her estate to a friend to the exclusion of a sister, and it was contended that the will was the result of undue influence on the part of proponent, and where the existence of a confidential relationship was conceded, and the court said there was evidence sufficient to support an inference that such relationship afforded an opportunity to control the testamentary act, it was said, nevertheless, that such opportunity coupled with a motive, did not sustain a finding of undue influence in the absence of testimony showing that there was pressure operating directly upon the testamentary act. The court said, 63 Cal.App.2d at page 142, 146 P.2d at page 245:

> "Before there is imposed upon the proponent of a will the obligation of presenting evidence of violation, and before the question as to undue influence becomes one of fact for determination by a jury or the court sitting without a jury, there must be evidence, the probative force of which establishes (1) the relations between the one charged with exercising the undue influence and the decedent, affording the former an opportunity to control the testamentary act; (2) that the decedent's condition was such as to permit of a subversion of her freedom of will; (3) that there was activity on the part of the person charged with exercising undue influence, and (4) that such person unduly profited as beneficiary under the will. Estate of Graves, supra [202 Cal. 258, 259 P. 935]; [In re] Estate of Hampton, supra, 39 Cal.App.2d 488, [103 P.2d 611]. And a presumption against the validity of the will is not created by the existence of any one of the circumstances just narrated, standing alone. It is only when a combination of all these circumstances is present in the evidence that their probative force is sufficient to justify the denial of a non-suit, and place upon the proponent of a will the burden of submitting evidence that the testamentary document was executed free from the taint of undue influence."

It also said, 63 Cal.App.2d at pages 143, 144, 146 P.2d at pages 246: "The burden was on the contestants to show undue influence, and in meeting that obligation it is not sufficient for them merely to show circumstances consistent with the exercise of undue influence, but before a duly and solemnly executed will can be invalidated, circumstances must be shown that are inconsistent with freedom of action on the part of the testatrix, [In re] Estate of Burns, supra [26 Cal.App.2d 741, 80 P.2d 77]."

In the case before us, as we have eliminated the element of undue profit by proponents, under the foregoing decisions the conclusion of the trial court finds adequate support.

[5-7] Also, we think that the evidence fails to show that proponents actively participated in the procuring and execution of the will. If they can be said to have participated at all, it was only passively. The evidence relied upon by appellants to show that proponents were active in this respect is that Ed Watkins called Mr. Reynolds in to draw the will, and that both brothers were present when he interviewed the testatrix and when she executed the will, that Ed Watkins took possession of the will after its execution, and that he paid Mr. Reynolds for preparing it. These circumstances are plainly insufficient to compel a conclusion that proponents influenced the testatrix to make the will or as to its terms. At most it shows that they had an opportunity to influence her. But, as was said in Re Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614, 617, "proof of mere opportunity to influence the mind of the testatrix, even though coupled with an interest or with a motive so to do, is insufficient. In order to warrant setting aside a will on this ground, there must be substantial proof, direct or circumstantial, of a pressure which overpowers the volition of the testator and operates directly on the testamentary act"; also that mere suspicion that undue influence may have been used is not sufficient to warrant the setting aside of a will on that ground; citing In re Estate of Morcel, supra.

Innumerable other cases might be cited holding that the existence of a confidential relationship alone is not enough; that to justify a conclusion that a will was the result of undue influence it must be shown that there was activity on the part of the beneficiary in the matter of the preparation of the will, and that circumstances such as are relied upon here as constituting activity on the part of a beneficiary are not enough to justify a conclusion that the will was the result of undue influence, especially where a trial court has found to the contrary. See In re Estate of Shay, 196 Cal. 355, 362, 237 P. 1079; In re Estate of Fleming, 199 Cal. 750, 756, 251 P. 637; In re Estate of Morcel, supra; In re Estate of Burns, 26 Cal.App.2d 741, 80 P.2d 77; In re Estate of Ross, 117 Cal.App. 574, 577, 4 P.2d 164;

In re Estate of Jacobs, 24 Cal.App.2d 649, 652, 653, 76 P.2d 128; In re Estate of Knight, 9 Cal.App.2d 454, 50 P.2d 475; In re Estate of Muller, 14 Cal.App.2d 129, 57 P.2d 994; In re Estate of King, 63 Cal.App. 2d 365, 146 P.2d 952; In re Estate of Garvey, 38 Cal.App.2d 449, 462, 101 P.2d 551; In re Estate of Valladao, 31 Cal.App.2d 355, 88 P.2d 187.

[8] Appellants in their brief assert that as the death certificate recited that Mrs. Watkins died of arterio sclerosis with which she had been afflicted for ten years, the trial court should have taken judicial notice arterio sclerosis is "commonly known as senile dementia," a progressive, incurable form of insanity. They also urge that we should do so. We have no knowledge, either judicial or otherwise, that arterio sclerosis and senile dementia are the same thing. We are referred to no testimony or medical authority so stating. The former means no more than hardening of the arteries, with which many persons past middle age are afflicted without loss of mental capacity. Senile dementia is defined as severe mental deterioration occurring in the aged, with brain atrophy and loss of memory, etc.; but not all aged persons have senile dementia; and the evidence in this case does not show that the testatrix suffered from same or from brain atrophy, loss of memory, etc.

Appellants also complain that proponents did not call as witnesses Mr. Reynolds, the attorney who drafted the will, and Dr. Cooper who had been decedent's doctor, and that the conclusion from that fact must be that had they been called their testimony would have been adverse to proponents. If any such conclusion follows, it was a matter for the trial court's consideration and not for this court. As Mr. Reynolds was in court at the trial representing proponents, it seems improbable that his testimony would have been adverse to his clients; and at any event, both he and Dr. Cooper were available to contestants had they seen fit to secure their testimony.

Also, appellants complain that the trial court erred in not permitting them to go back more than five years prior to the date of the execution of the will, "in producing evidence that would show state of mind of the testatrix, a confidential relationship between the Watkins brothers and testatrix and undue influence on their part." However, reference to the record shows that the question asked upon which the court limited the testimony was the question addressed to Ed Watkins as to how long he, his brother and decedent had operated her property in equal shares. Appellants made no offer to prove anything which was excluded by the court's statement, which was that he did not think they were entitled to go back as far as they were attempting to do; and we cannot say that had they been permitted to go further they would have shown anything pertinent regarding the state of mind of the testatrix, or a confidential relationship, or undue influence.

[9] Appellants further argue that the trial court erred in refusing to permit them to call Mrs. Wood (then Mrs. Ed Watkins) as an adverse witness under section 2055 of the Code of Civil Procedure, saying she had a "pecuniary interest accruing" to her under the will. Appellants admit they have no authority for their contention; and section 2055 by its own language excluded her. She was not an adverse party nor one for whose immediate benefit such action was prosecuted or defended. She had no pecuniary interest as the wife of Ed Watkins, for whatever he took under the will would be his separate property. Civ.Code, sec. 163.

Error is also premised upon the refusal of the trial court to permit appellants "to prove the extent and nature of the property of the testatrix and the value left to each of the devisees in the will." We can find in the record no attempt to prove those matters, nor anything indicating they were other than stated in the petition for probate. The ruling of the court, to which appellants direct our attention in support of this argument, followed a question addressed to Ed Watkins, who filed the petition for probate, as to how he obtained the sums listed in the petition as accounts in bank, and the question whether Mrs. Watkins, at the time the will was made, obtained from him the amount of her indebtedness. The witness was asked if he knew what her debts were at the time she made the will and he said no; and that he had no conversation with decedent about it.

It is complained by appellants that the trial court erred by expressing bias and prejudice against contestants, by being officious and facetious, in constantly taking contestants' case out of their hands, and in aiding the proponents in the trial of their case. We find nothing in the record justifying any such criticisms and consider them not only unjustified but highly improper. And in this connection, since appellants assert that "their attorneys were very fair and honest in the presentation of their case," we note in their brief in this case a statement which is hardly of that nature for they state that "Mrs. Woods was called by the proponents, but irrespective of this fact, the trial court allowed the proponents to cross-examine her, due to the surprise. It is hard to see how, under the circumstances of this case, a proponent could be surprised by his wife's testimony." The record shows that while Mrs. Wood was called by proponents as a witness to the will she was cross-examined only by counsel for contestants; that subsequently she was called as a witness by contestants themselves, and that it was their own counsel, and not the counsel of proponents, who were permitted to cross-examine her on the ground of surprise.

[10-13] Appellants' final assertion of error on the part of the trial court is that it refused to permit Reise Kinser, son of Cora Kinser, to testify as to the "mental competency" of testatrix under section 1870, subdivision 10, of the Code of Civil Procedure. This witness testified that he last saw his grandmother in September, 1944, when he was in her home for approximately ten days except for two days when he went to San Francisco; that he then tried to carry on a conversation with her but could not; that she did not know him; that previous to that he had seen her in February, 1943, on the occasion of her birthday, when he was in her home overnight; that he then spoke to her but there was no recognition—that is, she did not say anything; that he had seen her during 1940, 1941 and 1942, when he would be there for a week, or two or three. He was then asked: "Q. From your visits with her and your seeing her and talking with her and visiting at the ranch, have you an opinion as to her mental competency as of February, 1943? A. I do." Counsel for proponents objected on the ground he was not qualified as an intimate acquaintance. Counsel for contestants then asked the witness several questions as to the length of time he had spent at the farm in previous years and he said a week or ten days each year during which time he saw her every day. He was asked then if from that he had an opinion as to her mental competency in February, 1943. His reply, "She was incompetent and unable to do her own work," was stricken out on objection thereto by proponents' counsel. The witness then stated, apparently as ground for his conclusion, that in February, 1943, and even previously, Mrs. Watkins was aged, infirm and unable to take care of herself; could not get out of her chair without help; had to be dressed in the mornings, and led to the table; "practically had to be taken care of like a baby"; that he never heard her suggest that it was time to eat; never saw her go to bed voluntarily; never saw her dress herself; had to be served at meals; did not see her reading; never saw her outside the house; going to the bathroom she had to have assistance; did not see anyone submit checks to her in 1943. From the foregoing it is obvious that any opinion of this witness as to the competency of decedent to make a will in February, 1944, would have been valueless, since it would have been of no more probative value than the facts given by him upon which it was based. In re Estate of Short, 7 Cal.App.2d 512, 526, 47 P.2d 555; In re Estate of Sexton, 199 Cal. 759, 771, 251 P. 778; In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456. Contestants therefore suffered no injury by the court's striking out the answer of the witness, even if it could be said that he was qualified as an "intimate acquaintance" under section 1870, subdivision 10, of the Code

of Civil Procedure to testify as to the "mental sanity" of the testatrix. It is well settled that the determination of who are intimate acquaintances under that section is committed to the sound discretion of the trial court, and an appellate court will not interfere with the exercise of that discretion unless there has been a clear abuse of it. In re Rich's Estate, 79 Cal. App.2d 22, 179 P.2d 373.

The appeal from the order denying a new trial is dismissed, and the decree of the trial court and its order admitting the will to probate are affirmed.

PEEK and THOMPSON, JJ., concur.

30 Cal.2d 549

In re BARTER'S ESTATE.

KUCHEL, State Controller, v. FIRST TRUST & SAVINGS BANK OF PASADENA et al.

L. A. 19801.

Supreme Court of California.
Sept. 10, 1947.

1. Taxation ⚷876(1)

Provision of the Inheritance Tax Act exempting transfers devoted to any charitable, educational, or public purpose applies to a transfer in trust for such purpose whether the transfer is limited to use within the state or not. Gen.Laws, Act 8495 § 1(3).

2. Wills ⚷439

A court has the duty to interpret a will so as to carry out the testator's ascertainable intention provided no law is violated thereby.

3. Trusts ⚷160(2)

If testamentary language evidences a plain intent to create a trust with respect to any portion of testator's estate, equity will not permit the trust to fail for want of a trustee, but will appoint one.

4. Taxation ⚷876(2, 5)

A bequest of a fund to the British Government for British refugee children was entitled to exemption from inheritance taxation as a bequest for charitable purposes, where the probate court appointed a California corporation as trustee in place of the British Government which was incapacitated to act, as against contention that the exemption could not be claimed because the bequest had been transferred to the British Government at the moment of testator's death and that the state's right to collect the tax accrued at that time. Gen.Laws, Act 8495, § 6(1) (b).

5. Taxation ⚷856

An "inheritance tax" is not a tax on the property of a decedent, but is an excise imposed on the privilege of succeeding to property on the death of the owner.

See Words and Phrases, Permanent Edition, for all other definitions of "Inheritance Tax".

6. Taxation ⚷893

The assessment of an inheritance tax against a trust estate is not to be governed solely by the language of the will creating the trust, but also by such events as affect the beneficial succession of the estate.

7. Trusts ⚷155

A testamentary trustee is not automatically qualified as such by virtue of his nomination by the testator.

8. Judgment ⚷564(1)

Where "agreed statement on appeal" recited that certain matter had been finally determined, the point was res judicata.

9. Wills ⚷10

A California resident had no authority to make a testamentary transfer of property to a foreign government. Probate Code, § 27; Gen.Laws, Acts 261, 652.

10. Taxation ⚷859(5)

The act exempting charitable bequests from inheritance taxation is not rendered unconstitutional as applied to a bequest to the British Government for British refugee children for whom the probate court appointed a California corporation as trustee, on the ground that the exempt character of the bequest was made to depend upon an order of the probate court. Gen. Laws, Act 8495, § 6(1)(b).

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of John D. Barter, deceased, wherein the Inheritance Tax Appraiser filed a tax report that residuary estate was taxed to British Government and tax was assessed against residue. The First Trust & Savings Bank of Pasadena filed objections to the tax report. From an order that the residue did not pass to the British Government but was transferred to the Combined British Charitable Fund, and that the transfer was not subject to inheritance tax, Thomas H. Kuchel, Controller of the State of California, appeals.

Order affirmed.

Prior opinion, 177 P.2d 574.

James W. Hickey, Inheritance Tax Atty., and Raymond G. LaNoue, Deputy Inheritance Tax Atty., both of Sacramento, and Donald R. Peck and Morton L. Barker, both of Los Angeles, for appellant.

Boyle, Holmes, Fry & Garrett, John W. Holmes, and S. T. Hankey, all of Los Angeles, for respondents.

SPENCE, Justice.

The State Controller has appealed from an order of the Probate Court of Los Angeles County exempting "the residue of [this] estate" from the payment of an inheritance tax. Appellant challenges the propriety of this exemption under section 6, subdivision (1) (b), of the Inheritance Tax Act of California (Stats.1935, p. 1266, Deering's Gen.Laws, Act No. 8495), but the determinative factors of record herein do not sustain his position.

The case is submitted upon an "agreed statement on appeal."

John D. Barter died testate on October 15, 1941, a resident of Los Angeles County. The residuary clause of his will provided as follows: "The balance of my property I bequeath to the British Government to be administered & applied for the benefit of British refugee children or similar purpose." Upon request of the executor for instructions, the probate court decreed that the quoted provision "constituted and created a valid charitable trust for the use and benefit of the class of persons therein described, and that upon application therefor at time of distribution of the assets of said estate the court would appoint a trustee to receive and administer the assets of said charitable trust." That decree became final.

Thereafter the probate court made its order appointing the Combined British Charitable Fund, a California corporation "exclusively engaged in or devoted to charitable work," to "fill the vacancy in said trusteeship caused by the incapacity of the British Government to so act." That order likewise became final.

In due course the inheritance tax appraiser filed his report, in which the "residuary estate" of decedent "was taxed to the British Government and a tax assessed against said residue in the sum of $4,380.93." The executor filed objections to that report and a hearing was had. In resolving the issue so presented with respect to the inheritance tax computation, the probate court concluded that the residue of the estate did not pass to the British Government but was transferred to the Combined British Charitable Fund, the California charitable corporation; that such transfer was not subject to tax under the law; and that the tax of $4,380.93 was erroneously fixed in the inheritance tax appraiser's report and should not have been assessed. Accordingly, it was ordered that the tax report be modified by striking therefrom the assessment upon the residuary estate. From such order the state controller has appealed, and he is resisted herein by the Combined British Charity Fund as well as by the executor.

The Inheritance Tax Act in force at the date of the testator's death provided that a tax shall be "imposed upon the *transfer* of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted * * *" (Inheritance Tax Act of 1935, sec. 2, Stats.1935, ch. 358, p. 1266, 1268, as amended by Stats.1941, ch. 177, p. 1220; emphasis added), and defined the word "transfer" to "include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest * * * or *exempt property orders in probate* * * *." Inheritance Tax Act of 1935, sec. 1, subd. (3), Stats.1935, ch. 358, p. 1266, 1267. (Emphasis added.) The exemption allowance under said act, so far as here pertinent, read as follows: "All property transferred to * * * any society, corporation, institution, or association of persons exclusively engaged in or devoted to any charitable, educational, public, or other like work (pecuniary profit not being its object or purpose); or to any person, society, corporation, institution, or association of persons in trust exclusively for or to be devoted exclusively to any charitable, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled in possession or expectancy to any such property or to the income thereof, shall be exempt;

provided, however, that such society, *corporation,* institution or association *be organized solely for charitable,* educational, public or other like *work under the laws of this State* or of the United States, or that the property transferred be limited for use within this State; * * *." Inheritance Tax Act of 1935, sec. 6, subd. (1) (b), Stats. 1935, ch. 358, p. 1266, 1274, as amended by Stats.1939, ch. 694, p. 2210, Stats.1941, ch. 833, p. 2387, 2388. (Emphasis added.) The above italicized language sustains the tax-exempt ruling with respect to the transfer of the residuary estate herein.

[1] In his attack upon the premise of the exemption, appellant at the outset queries the scope of the allowance under the terms of the quoted proviso. He argues that the alternative conditions expressed therein should be read distributively so as to differentiate them in application between an *outright transfer* and a *transfer in trust.* Thus, he urges that the consideration of whether or not the recipient charitable corporation is "organized * * * under the laws of this State or of the United States" relates wholly to the *former* as distinguished from the *latter* type of testamentary disposition of property, so that the *transfer in trust* achieves a tax-exempt status *only* if limited to "use within this State." Were such concept of the proviso adopted, appellant's tax claim would prevail without further argument, for the testator's bequest of his residuary estate "for the benefit of British refugee children" has no correlating limitation to "use within this State." Appellant's argument rests upon the restricted analysis of the proviso as made in the dissenting opinion in Re Estate of Irwin, 196 Cal. 366, 379, 380, 237 P. 1074, a construction which the majority of the court deemed inconsistent with the spirit and tenor of the statutory exemption.

The Irwin case concerned the inheritance tax liability of a charity foundation to be formed in pursuance of the testatrix' will for the purpose of administering a trust fund, the net income of which was to be paid to "such charitable uses, including medical researches and other scientific uses, designed to promote or improve the physical condition of mankind, as [the trustees] in their judgment may [deem] worthy of support * * * as [they] may exist in the Hawaiian Islands or the state of California." 196 Cal. at page 370, 237 P. at page 1075. Obviously, this testamentary *transfer in trust* did not qualify for exemption under the *second* alternative condition in the proviso regarding limitation "for use within this state," but it was held to comply with the *first* in that it was to be administered by "an association organized or existing under the laws of this state, although its formal functioning was consummated subsequent to the time of the death of the decedent." 196 Cal. at page 373, 237 P. at page 1076. Correlative to that conclusion is the following statement, 196 Cal. at page 373, 237 P. at page 1076: "The law should be liberally construed so as to favor and encourage such charitable foundations, and should not be construed so as to lay the heavy burden of inheritance taxes upon the property devoted to such uses, and thus, to the extent of such burden, hamper and limit the resources of the trust intended for such beneficial uses. (Citing authority.)" While the dissenting opinion adopted a "narrow interpretation" of the qualifying language in denying the property transfer the benefit of the exemption because the "association [was not] actually engaged in or devoted to a charitable work and * * * existing under the laws of this state" at the time of the testatrix' death (196 Cal. at pages 379, 380, 237 P. at page 1079), the dissenting opinion no less than the majority opinion in the Irwin case considered the question of the tax liability of the trust transfer in the light of application of *either* of the alternative conditions stated in the proviso. Such feature of agreement between the two opinions accords with the broad and comprehensive design of the statutory language evidencing the intent of the legislature to favor and encourage "charitable" and kindred transfers of property by providing a tax exemption therefor so as not to diminish their ultimate benefits, and in line with such policy there would be no logical basis for predicating the exemption allowance to a transferee "organized solely for charitable, educational, public, or other like work under the laws of this State or of the United States" on whether or not the property transfer was outright or in trust. Rather it would appear that it is the character of the *transferee* not the character of the transfer—whether "in trust or otherwise"—that is the first consideration under the terms of the proviso; and it is only in the event that the transferee does not so qualify in purpose and place of organization that the restriction as to "use within this State" becomes material. Such view coincides with the principle of liberal construction of exemptions in favor of charitable organizations. Cooley, Taxation, Fourth Edition, Vol. 2, sec. 673, p. 1415; Sutherland, Statutory Construction, Third Edition, Horack, Vol. 3, sec. 6702, p. 296.

There now remains for consideration the eligibility of the "residue of [this] estate" for the inheritance tax exemption by virtue of the first alternative condition in the proviso above quoted. Appellant maintains that settlement of this point depends on the testator's will rather than the probate court's order declaring the identity of the trustee. Accordingly, it is his theory that the transfer of the residue to the British Government was effected at the moment of the testator's death and of necessity the transfer tax thereupon became payable; that the right of the state to collect a tax on the residuary estate attached at the same time, and the probate court's action in "diverting the funds" cannot affect the assessment. As authority for this position, he cites the cases of In re Estate of Kennedy, 157 Cal. 517, 108 P. 280, 29 L.R.A.,N.S., 428, and In re Estate of Steehler, 195 Cal. 386, 233 P. 972, where it was held that in the absence of express statutory provision, homesteads and family allowances, as property distributions made in the probate proceeding pending the administration of the estate and not passing by will or by the intestate laws of the state, were not subject to the burdens of the inheritance tax. But no such consideration of the severance and "diverting" of funds from the inheritable estate arises here where the probate court, in the exercise of its "control" over the decedent's property "for the purposes of administration, sale or other disposition" (Prob.Code, sec. 300), made its order effectuating the testamentary trust.

[2, 3] It is the duty of the court so to interpret a will as to carry out the ascertainable intention of the testator, provided no law is violated thereby. If the testamentary language evidences a plain intent to create a trust with respect to any portion of the decedent's estate, equity will not permit the trust to fail for want of a trustee but will appoint one. Estate of McCray, 204 Cal. 399, 402, 403, 268 P. 647; In re Estate of McDole, 215 Cal. 328, 332, 333, 10 P. 2d 75. Where the nominated trustee refuses to act, dies or is incapacitated for such office, "a court of chancery will execute [the trust]" by appointing a trustee. Smith v. Davis, 90 Cal. 25, 33, 27 P. 26, 28, 25 Am. St.Rep. 92. As is aptly said in Fatjo v. Swasey, 111 Cal. 628, at page 635, 44 P. 225, at page 226: "* * * no rule is better settled than that 'courts of equity have inherent jurisdiction over all matters of trusts and trustees, and they never allow a trust to fail for want of a trustee.' Perry, Trusts, § 240."

[4] The beneficiaries of the testamentary trust herein are an indefinite class of persons, that is, British refugee children. They are essentially the devisees under the will (In re Estate of Loring, 29 Cal.2d 423, 430, 175 P.2d 524), and the British Government was the designated trustee. But the British Government having been found to be incapacitated to act as such trustee, it was incumbent upon the probate court to fill the vacancy so resulting and to appoint a trustee which could qualify. Pursuant to such duty, the probate court designated the Combined British Charitable Fund, a California corporation. It qualified and the transfer of the residuary estate was to such trustee. Such residue did not for one moment pass to the British Government; that entity could not and did not make any attempt to assume the testamentary office. Hence in no view of its rights or of its relation to the beneficiaries of the trust does it necessarily follow that the residuary estate was transferred to the British Government, but rather such estate passed by due and proper order of the court to a charitable corporation of this state qualified to administer a charitable trust. That event

exempted it from liability within the scope of the inheritance tax law.

[5, 6] The inheritance tax is not a tax on the property of the decedent but is an excise imposed on the privilege of succeeding to property upon the death of the owner. In re Estate of Watkinson, 191 Cal. 591, 598, 217 P. 1073; In re Estate of Letchworth, 201 Cal. 1, 5, 255 P. 195; Cohn v. Cohn, 20 Cal.2d 65, 67, 123 P.2d 833. In the light of such definition, the assessment of the tax against a trust estate is not to be governed solely by the language of the will, but also by such events as affect the beneficial succession to the estate. Apt illustration of this principle is found in the case of In re Estate of Rath, 10 Cal.2d 399, 75 P.2d 509, 115 A.L.R. 836, where a trust or charge extrinsic to the will determined the devisees' beneficial enjoyment of the property and gave them a greater exemption status in relation to the inheritance tax. After observing at page 405 of 10 Cal.2d, 75 P.2d at page 512, 115 A.L.R. 836, that the "amount of the tax is proportionate to the benefit received" and that "transfers by instruments which are nontestamentary, as well as those which arise by will, or by intestate succession" affect the rate of taxation, the court concluded the point, 10 Cal.2d at page 406, 75 P.2d at page 512, with the statement that though "distribution may be ordered only in accord with the instrument which is testamentary," yet "for purposes of fixing the inheritance tax beneficial succession is the measure." Likewise in Re Estate of Belknap, 66 Cal.App.2d 644, 152 P.2d 657, the same principle was applied to exempt the beneficiary from payment of an inheritance tax on certain annuity bonds purchased by the executor pursuant to instructions in the will but in fulfillment of the testator's obligations as fixed by a property settlement agreement. The "benefit received" came not from the will but from an extrinsic agreement to which the probate court properly gave due regard in fixing the transfer tax. So it is here where an event dehors the will—the order of the probate court appointing the trustee—determined the transferee succeeding to the residuary estate and effected the transfer of the trust property. The benefit of administering such estate thereupon was correlated with the appointed California charitable corporation and the exemption allowance provided by statute. Since no such benefit passed to the British Government, there would be no basis for assessing the transfer tax against it.

[7] A testamentary trustee is not automatically qualified as such by virtue of his nomination by the testator. Such designation by the testator is in effect nothing more than a recommendation. While the testamentary declaration of the subject matter of the trust, the purpose thereof, and the persons beneficially interested therein determine the fact of the creation of the trust, the identity of the trustee is not determined prior to the moment the order appointing him to act in such capacity is entered. In other words, though the transfer of the estate to the beneficiaries results at the instant of death, yet there is no official trustee, no transferee, until the court finally names him. While the appointment of the trustee is the significant taxable event in relation to the exemption claim here in question, other events also occurring subsequent to the death of the testator have been held to affect the inheritance tax assessment. Thus in Re Estate of Parrott, 199 Cal. 107, 248 P. 248, the creditor filed his claim for the total amount due on the promissory note of decedent and her brother; but because the decedent's brother as a joint obligor thereafter paid one-half of the debt, the inheritance tax appraiser in making his report deducted from the taxable estate only the balance remaining unpaid after the brother's contribution. There had been an understanding from the inception of the indebtedness that the share owing by the joint obligor was not to be considered as the decedent's obligation notwithstanding the potential enforcibility of the entire debt against her or her estate. If the value of the taxable estate transferred by such decedent's will could be determined by the payment of one-half of her debt after the creditor had filed his claim, by a parity of reasoning the taxability of the residuary estate here was properly determinable after the probate court had named the transferee of such residue. As was said in the Parrott case, 199 Cal. at page 112, 248 P. at page

250, while "the right of the state to the tax accrues at the time of death, * * * this does not mean that the tax may not be thereafter determined, and when so determined it relates back to the time of death." And in the Matter of LeFevre, 233 N.Y. 138, 135 N.E. 203, the testatrix directed her trustees to incorporate a home for the care of needy children, and then to transfer to that entity a portion of the residue of her estate. In holding such property transfer to come within the statutory tax exemption granted to charitable institutions, the court at page 141 of 233 N.Y., at page 204 of 135 N.E., treated it "as if it were in the possession of a corporation already formed under the * * * will, or as in the control of the [probate] court, for the purpose of carrying out the [testatrix'] charitable scheme, although at present actually in the hands of the individual trustees." To like effect, see the Estate of Irwin, supra, 196 Cal. 366, 373, 374, 237 P. 1074, wherein the LeFevre and similarly adjudicated cases are discussed and their reasoning approved in their determination that the benevolent property transfer took effect eo instante upon the death of the decedent and the formation of the charitable organization was merely a detail of court administration.

[8-10] Analogous considerations prevail here where instead of the trustees forming a corporation to administer the trust and operate as the conduit through which the decedent's bounty flows to the beneficiaries, the probate court supplies the supplementary act, within the scope of the tax exemption in question, by appointing a California charitable corporation to execute the testamentary trust created by the testator. Appellant unavailingly argues that no reason for the incapacity of the British Government to act as the trustee appears in the record. That matter has been finally determined, as the above recital of the "agreed statement on appeal" discloses, and the point is now res judicata. However, it may be said that there is no authority for a California resident to make a testamentary transfer of property to a foreign government. See Prob.Code, sec. 27; The Bank Act, Stats. 1909, p. 87, Deering's Gen.Laws, Act No. 652; The Alien Property Initiative Act of 1920, Stats.1921, p. lxxxiii, Deering's Gen. Laws, Act No. 261. Furthermore, the prudence of the probate court's rejection of the British Government as trustee of the residuary estate herein is emphasized by the knowledge that our courts have no jurisdiction over that government. In the event it should as trustee disregard judicial orders with respect to the management of the trust property, our probate court would be helpless to enforce them. See Rustomjee v. The Queen, Law Reports, 1 Q.B.D. (1875-6) 487, 495. From these observations, it is apparent that the probate court, confronted with a vacancy in the trusteeship, "stepped into the shoes of the testator" and named as trustee a corporation which could qualify to act under the laws of this state. It thereby identified the transferee of the testamentary trust estate. While, in so acting, it appointed a trustee entitled to claim the exemption contemplated by section 6, subdivision (1) (b), of the Inheritance Tax Act as above quoted, that was a matter within the exercise of its discretion. Appellant suggests that such conclusion would render the act unconstitutional because "the exempt character of a charitable bequest is made to depend upon * * * a purely discretionary" order and "the equal burden of the tax * * * is * * * destroyed." But there is no force to such position, for the probate court did no more than what the testator himself might have done in choosing a trustee to effectuate the charitable object of his testamentary trust, and the fact that under the prevailing circumstances the probate court was forced to act so as to prevent the trust from failing does not render the act open to constitutional objection.

The order from which this appeal was taken is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and TRAYNOR, JJ., concur.

81 Cal.App.2d 547

CRAWFORD v. RAGAN et al.

Civ. 3467.

District Court of Appeal, Fourth District, California.

Sept. 18, 1947.

1. Appeal and error ⟹1012(1)

The weight of defendants' evidence, opposed to that of plaintiff, was for trial court to determine.

2. Contracts ⟹322(3)

In action for balance due, under oral agreement, for moving houses, evidence supported judgment for defendants on counterclaim in amount of offset allowed as damages for plaintiff's negligence in transporting and unloading one of houses.

Appeal from Superior Court, Inyo County; William Dehy, Judge.

Action by G. Crawford against W. E. Ragan and others for the balance due, under an oral agreement, for moving certain houses at defendants' request, and for materials furnished and labor performed, in which defendants filed a counterclaim to recover damages for negligence in transporting and unloading one of the houses and other defective workmanship. From a judgment for defendants on the counterclaim as a set-off against the unpaid balance, plaintiff appeals.

Affirmed.

Jess G. Sutliff, of Independence, for appellant.

Robert D. Loundagin, of Independence, for respondents.

GRIFFIN, Acting Presiding Justice.

This is an action to recover a balance claimed due plaintiff and appellant from defendants and respondents growing out of an oral agreement whereby appellant agreed to move certain houses from Bishop to Inyokern at respondents' request, for the sum of $2,800 and an additional sum of $23.50 claimed due for materials furnished and labor performed. It is conceded that respondents paid appellant the sum of $2,471.37 on account. Plaintiff's action was for the claimed balance of $352.23.

Respondents, by their answer, admitted the payment made, but claimed by way of counterclaim that they only agreed to pay appellant the reasonable value of services performed in moving the houses, and further claimed that appellant transported and unloaded one of respondents' buildings in a careless manner with insufficient timbering, causing the framework to warp and sag, and claimed other defective workmanship. They sought damages against appellant in the sum of $1,225.

The trial court denied appellant an affirmative judgment but gave judgment in favor of respondents on the counterclaim "as a set-off only against the unpaid balance of $352.23" claimed due by appellant.

Appellant contends that there is not sufficient evidence to justify the judgment for respondents and that there is "an abundance" of evidence to justify judgment in his favor. We agree with appellant that there is "an abundance" of evidence to justify a judgment in his favor in the total sum sought. However, by the court's judgment, it has allowed that sum in full but has also allowed $352.23 as an offset, so the only question before us is whether the evidence supports the offset thus allowed.

Respondent W. E. Ragan testified that in moving the house appellant represented to him that "there may be paper-cracking damage" but did not tell him that there would be "partition damage." In reference to this damage he testified that he was present and that appellant, in letting the building down with jacks, failed to put timbers under any of the "main court" which had cement floors; that he jacked them down unevenly by letting one side down about 18 inches before he ever touched the other jacks, as a result of which "the partitions were knocked out" and the "plumbing wrecked," and that particular portion of the building was left 34 inches away from the other sections; that he protested while appellant was letting the building down but that he paid no attention to him. Many other and similar damages were described by the witness. He then testified that it cost him approximately $1,200 to repair the damage as a "result of the moving"; and that it would be necessary to send to Los Angeles to obtain moving equipment to align the building.

[1] The question of the weight to be given the evidence of respondents, opposed to that produced by appellant, was for the trial court to determine. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

[2] Without further recitation of the evidence it is clear from a reading of the transcript that the record fully supports the trial court's judgment in the amount of the offset allowed by way of damages.

Judgment affirmed.

MARKS, J., concurs.

81 Cal.App.2d 487

ROGERS v. KABAKOFF.

Civ. 15728.

District Court of Appeal, Second District,
Division 1, California.
Sept. 11, 1947.

1. Assault and battery 🔑35

Evidence that, when defendant returned to plaintiff's parking lot to obtain defendant's automobile, plaintiff demanded more for parking than defendant believed was owing and that, after plaintiff removed key from ignition after defendant had entered automobile and inserted key, defendant got out of automobile and knocked down and severely injured plaintiff, sustained finding that assault was malicious. Pen.Code, § 7, subd. 4; Code Civ.Proc. § 1962, subd. 1.

2. Assault and battery 🔑9

Where defendant bailed his automobile to plaintiff for parking purposes and plaintiff secured possession of automobile legally, fact that defendant was entitled to possession of automobile did not entitle defendant to take automobile from plaintiff by force when plaintiff made an allegedly excessive and unlawful charge for parking the automobile.

3. Assault and battery 🔑35

Evidence that defendant knocked down and severely injured plaintiff sustained finding that force used by defendant in regaining possession of automobile from plaintiff, in whose possession defendant had put his automobile for parking purposes, was more than reasonably necessary. Pen.Code, § 7, subd. 4; Code Civ.Proc. § 1962, subd. 1.

4. Assault and battery 🔑35

In action for assault and battery, plaintiff's testimony that he paid amounts on account of medical treatment and hospitalization represented by statements of account offered in evidence and marked for identification was some evidence that the amounts paid were reasonable for services rendered and was sufficient in absence of a showing to the contrary.

5. Assault and battery 🔑24(1)
Trial 🔑392(1)

In action for assault and battery where facts justifying recovery of punitive damages were pleaded punitive damages were not required to be specifically demanded nor were punitive damages required to be segregated in the findings from actual damages awarded where segregation was not requested.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Harry F. Rogers against Harry Kabakoff for assault and battery, wherein defendant cross-complained. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

James M. Gammon, of Los Angeles, for appellant.

Robert McWilliams, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action to recover damages for assault and battery allegedly committed upon him by defendant. The cause was tried before the court sitting without a jury, resulting in a judgment for plaintiff in the sum of $1,500. Defendant appeals.

Narrating the evidence in a light most favorable to plaintiff who prevailed at the trial, the record discloses that defendant parked his automobile in plaintiff's parking lot in such a way that it occupied portions of two different parking stalls, locked the vehicle and left it on the lot all day. Upon the lot plaintiff had posted a sign reading, "Locked cars 50¢." When he returned for his automobile defendant handed plaintiff 25¢ for the parking fee, but because the vehicle was locked and was occupying parts of two stalls, plaintiff demanded a fee of $1. Defendant, thereupon, entered his automobile and inserted the key in the ignition. Reaching into the automobile, plaintiff removed the key from the ignition, whereupon defendant alighted from his vehicle, and according to plaintiff's testimony "stood there for a moment—I guess we just looked at each other for a minute—and all at once he hit me." There was evidence that defendant struck plaintiff twice in the face, that after the first blow plaintiff "staggered a little bit," and following the second blow, "went down backwards, clear to the cement."

Plaintiff further testified that when he was knocked down "I was kind of out of my head and I jumped up and run around to the other side of the car to get something to protect myself, and after I came back, the man was gone."

Defendant filed a cross-complaint for a statutory penalty of $50 for overcharge in violation of an order of the United States Office of Price Administration. Judgment thereon was for plaintiff and cross-defendant.

Plaintiff testified that as a result of the aforesaid altercation, his right cheekbone was fractured, that he was hospitalized for four days, underwent an operation to reduce the aforesaid fracture, and continued to suffer pain from time to time up to the date of trial. The trial court found that the foregoing injuries to plaintiff were occasioned "as a direct and proximate result of defendant's wrongful, unlawful and malicious assault and beating" of plaintiff.

Appellant's contention that the evidence does not support the judgment is grounded entirely upon a discussion of the weight of the evidence, and therefore must fail when confronted by a record which shows a substantial conflict in the evidence adduced by the whole case concerning the circumstances which led up to the altercation and the conduct of the parties thereto at the time thereof.

[1] It is earnestly urged by appellant, however, that the evidence fails to support the finding of the court that the assault on the defendant was malicious.

Subdivision 4 of section 7 of the Penal Code defines the words "malice" and "malicious" as "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law"; while subdivision 1, section 1962 of the Code of Civil Procedure requires a conclusive presumption of "a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another."

Manifestly, under the circumstances here present, the court was justified in finding from the evidence that appellant committed an unlawful and deliberate act for the purpose of injuring respondent. The circumstances of the assault as heretofore narrated, coupled with the force used, as well as the severity of the injuries inflicted, warranted a finding of malice under the aforesaid code definition of that term.

[2] Appellant insists that his conduct was not unlawful because respondent made an excessive and unlawful charge for parking the former's automobile, and was unlawfully withholding his vehicle from him. This argument is unavailing. Appellant bailed his vehicle to respondent for parking purposes and the latter secured possession of it legally. The fact that appellant was entitled to the right of possession of the automobile did not entitle him to take the same from respondent, who was in the actual rightful possession, by force or violence. The rule in that regard is thus stated in Deevy v. Tassi, 21 Cal.2d 109, 118, 130 P.2d 389, 395:

"The assumed fact that Mr. and Mrs. Deevy were in default under the terms of the chattel mortgage and that Tassi had a legal right to acquire possession of some or even all of the cattle he attempted to take, does not justify the commission of assault and battery in effecting recaption. Admittedly the Deevys' possession had been lawfully acquired. The rule is stated by the American Law Institute in Restatement of the Law (Torts, § 108, p. 240) as follows: 'The use of force against another for the purpose of recaption of a chattel, which the other is tortiously withholding from the actor, is not privileged if the other's possession was rightfully acquired.' The comment, on the same page, is: 'An invasion of another's interests of personality for the purpose of regaining a chattel, the possession of which the other has rightfully acquired, is not privileged. This is so although the other's right to possession has ceased and he is therefore a wrongdoer in refusing to give the chattel up to the actor, who is entitled to the possession thereof. Thus, if the actor has bailed his chattel to the other, he is not privileged to use force to retake it, even though the bailment is at an end and the bailee's retention of it is a conversion.' "

[3] Furthermore, even though it be conceded that appellant's vehicle was being wrongfully withheld from him, and though he be conceded a legal right to use force to retake his property, nevertheless, the judgment must be sustained on the theory that by its findings the trial court held that he resorted to more force than was reasonable, necessary or proper. The question of the amount of force justifiably used in maintaining the possession of one's property is essentially within the province of the trier of facts. Fawkes v. Reynolds, 190 Cal. 204, 212, 211 P. 449. Since there is evidence herein that appellant struck respondent in the face with his fists with such force that he staggered him, and then again struck him with such force that respondent was knocked down and severely injured, a conclusion was justified on the part of the trial court that the force used was unreasonable, unwarranted, and was consciously intended by appellant to be willful, malicious and excessive.

[4] Appellant next complains that no evidence was offered by respondent to show that the amounts paid on account of medical treatment and hospitalization were reasonable for services rendered. Respondent's testimony that he paid the amounts represented by the statements of account offered in evidence and marked for identification, was some evidence of reasonable value, and in the absence of a showing to the contrary, such evidence must be held to be sufficient. Dewhirst v. Leopold, 194 Cal. 424, 433, 229 P. 30; Townsend v. Keith, 34 Cal.App. 564, 565, 566, 168 P. 402.

[5] Finally, appellant contends that the court wrongfully concluded that the assault was malicious when no punitive damages were pleaded. The first amended complaint alleges malice in paragraphs I to IV thereof, and the prayer of such pleading was for general damages of $15,000 without specifying whether they were claimed as compensatory or exemplary damages. In view of the fact that a total of $394.25 was shown to have been paid for medical treatment and hospitalization for which no award was made as special damages, coupled with the fact that respondent was painfully and severely injured, a judgment for $1,500 does not compel the conclusion that other than compensatory damages were included in the judgment. However, as heretofore stated, the allegations of the amended complaint and the testimony presented a case in which punitive damages might have been awarded. And, if the facts justifying their recovery were pleaded it was not necessary that exemplary damages be specifically demanded. Neither is it necessary that they be segregated in the findings from the actual damages awarded, unless such segregation be requested. Turner v. Whittel, 2 Cal.App.2d 585, 590, 38 P. 2d 835.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

81 Cal.App.2d 452

COSTELLO v. CAMPBELL.

Civ. 13332.

District Court of Appeal, First District,
Division 2, California.

Sept. 8, 1947.

Hearing Denied Nov. 6, 1947.

1. Licenses 🔑39

In contractor's action for value of cold storage plants installed on defendant's premises, evidence sustained finding that equipment installed was pre-fabricated and did not become a permanent fixture and hence contractor was not barred from recovery though he was unlicensed. Business and Professions Code, § 7045.

2. Work and labor 🔑28(6)

In action for value of cold storage plants installed on defendant's premises, evidence sustained finding that the materials furnished were free from defects.

3. Licenses 🔑39

A contract for installation of cold storage plants on defendant's premises was not indivisible so as to preclude the contractor making the installation and who was unlicensed from recovering the value of the equipment where the contractor's demand for services as such was waived. Business and Professions Code, § 7045.

4. Appeal and error 🔑1071(3)

Where complaint was framed on an open book account, indebitatus assumpsit, and on account stated and the latter two counts incorporated all of the first, and judgment was based upon a finding of open book account and that defendant was indebted for the reasonable value of materials furnished and labor performed, any defect in proof of an open book account was not prejudicial.

◆

Appeal from Superior Court, Contra Costa County; Homer W. Patterson, Judge.

Action by John Costello, as trustee of the estate of Lee Gooch, bankrupt, substituted in the place and stead of Lee Gooch, doing business as Lee's Refrigeration Service, against W. F. Campbell, for the value of equipment and for work of installation of two cold storage plants on defendant's premises. From an adverse judgment, defendant appeals.

Judgment affirmed.

Sefton & Quattrin, of San Francisco, for appellant.

Shapro & Rothschild, by August B. Rothschild, all of San Francisco, and Forrest H. Bailey, of Walnut Creek, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the value of equipment and for work of installation of two cold storage plants on defendant's premises to be used in the operation of a hatchery and poultry ranch. Plaintiff was not a licensed contractor and the demand for services as such was waived. The trial court awarded plaintiff judgment for the balance of the account having found that the equipment installed was pre-fabricated and did not become a permanent fixture. Judgment therefor followed covering the cost of installation and the value of this material on the basis of section 7045 of the Business and Professions Code which reads: "This chapter does not apply to the sale or installation of any finished products, materials or articles of merchandise, which are not actually fabricated into and do not become a permanent fixed part of the structure."

[1, 2] Appellant raises two main grounds for a reversal of the judgment—that it was error to hold that the award came within the exception of section 7045, and it was error to hold that the materials furnished were free from defects. Both issues are simple questions of fact. Both were met by conflicting testimony of expert and lay witnesses. In both instances the trial judge made a personal examination and drew his findings in accord with the evidence which he heard and saw.

[3] Appellant states two other matters which might present grounds for appeal. First, that the contract was indivisible, and that respondent should not recover for the installation of the finished products which were found not to be permanent fixtures.

But such recovery is specially authorized by section 7045. Any other construction of the section would make the entire statute "an unwarranted shield for the avoidance of a just obligation." Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 690, 166 P.2d 265, 266.

[4] Second, it is suggested that there might have been error in holding appellant indebted on an open book account. It does not appear how appellant has suffered any prejudice. The complaint was framed in three counts—on an open book account, indebitatus assumpit, and on an account stated. The second and third counts incorporated all of the first. The judgment was based upon the finding of an open book account and that defendant was indebted for "the reasonable value of said materials furnished and labor performed." There is no contention that the second count did not state a good cause of action. The finding on the reasonable value is sufficient to support the judgment and if there was any defect in the proof of an open book account, that portion of the finding may be treated as surplusage.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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81 Cal.App.2d 521

INDEMNITY INS. CO. OF NORTH AMERICA v. AMERICAN AUTOMOBILE INS. CO.

Civ. 15481.

District Court of Appeal, Second District, Division 1, California.

Sept. 16, 1947.

Rehearing Denied Oct. 6, 1947.

Hearing Denied Nov. 13, 1947.

Insurance 🔑604

In action by accident liability insurer against motor vehicle liability insurer for contribution on account of settlement of death action made after defendant stipulated that settlement should have effect of a final judgment, complaint not alleging that a motor vehicle covered by defendant insurer's policy was proximate cause of death did not state cause of action.

DORAN, J., dissents.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Indemnity Insurance Company of North America, a corporation, against American Automobile Insurance Company, a corporation, for contribution and apportionment of a loss.

Plaintiff's motion for judgment on the pleadings was granted, and defendant appeals.

Reversed with direction.

For prior Opinion, see 180 P.2d 917.

Parker, Stanbury & Reese, of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondent.

YORK, Presiding Justice.

By the instant action, plaintiff Indemnity Insurance Company of North America, hereinafter referred to as Indemnity, seeks contribution from defendant American Automobile Insurance Company, hereinafter referred to as American, on account of settlement of a loss made by Indemnity pursuant to liability insurance policies issued by Indemnity and American to Simmons Tank Service, Inc., hereinafter called Simmons.

The policy of American indemnified Simmons for losses incurred through the ownership, maintenance or use of motor vehicles; the policy of Indemnity insured Simmons against liability imposed by law upon him for bodily injuries or death "caused by accidents"; said policy *excluding* "ownership, maintenance or use of * * * automobiles or trailers," *except* "to the use of special auxiliary equipment while * * * in actual use on any work site."

The limits of liability were fixed in both policies at $100,000 for each person injured, and $200,000 for each accident.

The complaint alleges that on October 17, 1941, while both policies were in effect, Simmons was engaged in cleaning a large oil storage tank in Ventura, and was using "certain tools, equipment, appliances, motors and automobile trucks"; that the trucks were covered by American's policy, and the tools, equipment, appliances and motors were covered by Indemnity's policy; that during the progress of the work the said oil storage tank exploded, fatally injuring one Bertes M. Miller; that on March 17, 1942, the heirs of decedent Miller brought suit against Simmons for recovery of damages for his death, caused by the alleged negligence of Simmons.

While the Miller case was on trial, counsel for plaintiffs therein offered to settle the litigation, give a full release and dismiss the action with prejudice in consideration of the sum of $20,000. It is further alleged in the complaint that after said offer of settlement was made, to-wit, on November 19, 1942, Indemnity and American "entered into a written contract and agreement" whereby it was agreed that Simmons was the insured of both companies under their respective policies; that a difference of opinion then existed between Indemnity and American as to which of the policies covered the accident, or whether it was covered by both; that a trial of the Miller action was then in progress and that counsel for both companies were defending said action "with a full reservation of rights of their respective companies * * * without waiving any provisions of either of said policies and without admitting that either of said policies covered the accident"; that an offer of settlement had been made in the sum of $20,000; that Indemnity "proposed to pay said sum of $20,000.00, or a lesser sum if possible, in settlement of said action"; that Indemnity "intends to sue" American under its policy; and that Indemnity "will not pay said sum of $20,000.00 unless the American Automobile Insurance Company agrees that it will stipulate, in any such suit above mentioned hereafter being filed against it, as follows:

" 'It is hereby stipulated and agreed by the American Automobile Insurance Company:

" 'I. * * * that any sum up to $20,000.00 is a fair and reasonable sum in settlement of said action and would constitute a good settlement, and if paid shall not be construed as a voluntary payment, and American will not question the propriety of said settlement.

" 'II. That Indemnity * * * may maintain any contemplated action in its own name * * *.

" 'III. That if said action be settled as above contemplated the settlement and amount paid in settlement shall be considered as having been done with the same force and legal effect as if said action had been fully tried before a jury and the jury had rendered its verdict in favor of the plaintiffs above named (Miller) and against the defendant above named (Simmons), and judgment had been entered thereon, which judgment became final and the defendant in suit No. 24915 above named had paid the sum of $20,000.00 in full satisfaction thereof. * * *

" 'V. That any truck or trucks mentioned in the complaint in the "Miller case" are trucks mentioned in said policy of insurance of the American * * * and covered thereby, and the "tools, equipment and appliances", mentioned in said complaint are tools, equipment and appliances covered by said policy of insurance of Indemnity * * *.

" 'VI. That although American * * * denies that it is obligated for any portion of any sum which may be paid by Indemnity * * * under circumstances as above set forth, in settlement of the said action, it is stipulated that if it is found that American * * * is liable at all its liability shall not exceed fifty per cent of any such sum paid in settlement up to $20,000.00.' * * *

"The above stipulation is accepted by American * * *."

Thereafter Indemnity settled the Miller suit for $17,700 and a full release was executed by the plaintiffs in that case. When the instant action by Indemnity for contribution from American of one-half of the $17,700 paid in settlement of the Miller suit came on for trial, Indemnity's motion for judgment on the pleadings was granted, apparently on the ground that American was not entitled to a trial on the merits because the stipulation constituted an adjudication of American's liability.

From the judgment rendered upon the pleadings, defendant American presents this appeal. It is contended on rehearing, as it was in appellant's briefs on appeal, that the complaint does not state a cause of action because it fails to allege the basic issue involved herein, to-wit, that a risk insured by American caused the loss for which contribution is sought.

In order for respondent to prevail herein, it must allege liability on the part of appellant.

While it is true that the complaint alleges that the trucks being used by Simmons were trucks mentioned in and covered by the policy issued by American, it also alleges that counsel for both Indemnity and American defended the Miller v. Simmons action "with a full reservation of rights * * * without waiving any provision of either of said policies and without admitting that either of said policies covered the accident."

Respondent urges that the stipulation pleaded in its complaint constitutes the basis of its right to recover from American; and that by the execution thereof "Indemnity and American fixed the liability of each and placed themselves in the exact position as if the trial had continued and the jury had rendered its verdict in favor of the plaintiff (Miller), in which event the allegations of the Complaint would have been found to be true and American would have been obligated to pay one-half of the Judgment and Indemnity would have been obligated to pay one-half of it." This argument is based upon paragraph III of the stipulation, to-wit:

"That if said action is settled as above contemplated the settlement and amount paid in settlement shall be considered as having been done with the same force and legal effect as if said action had been fully tried before the jury and the jury had rendered its verdict in favor of the plaintiffs above named and against the defendant above named, and judgment had been entered thereon, which judgment became final and the defendant in suit No. 24915 above named (Simmons) had paid the sum of $20,000.00 in full satisfaction thereof."

Here again, this argument disregards paragraph VI of the stipulation reading as follows:

"That although the American * * * denies that it is obligated for any portion of any sum which may be paid by the Indemnity * * * under circumstances as above set forth, in settlement of the said action, *it is stipulated that if it is found that the American * * * is liable at all its liability shall not exceed fifty per cent of any such sum paid in settlement up to $20,000.00.*" (Emphasis added.)

It is obvious from the foregoing that neither the complaint nor the stipulation which is made a part thereof directly alleges that a motor vehicle covered by American's policy was the proximate cause of the death of Bertes Miller. As a consequence, the complaint fails to state a cause of action for contribution, and the judgment on the pleadings was improperly granted.

For the reasons stated, the judgment is reversed with direction to the trial court to permit respondent to amend its complaint if it sees fit to do so.

WHITE, J., concurs.

DORAN, J., dissents.

81 Cal.App.2d 480

In re POWERS' ESTATE.

McMAHON v. McCULLOCH et al.
Civ. 13331.

District Court of Appeal, First District,
Division 2, California.
Sept. 10, 1947.

Rehearing Denied Oct. 10, 1947.

Hearing Denied Nov. 6, 1947.

1. Evidence 🔑383(7)

Hospital records showing intermittent periods of mental confusion and irrationality of testatrix on days preceding execution of will, but containing no entry with reference to mental condition on such date, did not constitute substantial evidence sufficient to support jury's finding of lack of testamentary capacity when will was executed.

2. Wills 🔑21

Invalidity of will on ground of lack of testamentary capacity depends upon condition of testator's mind at the very time of execution of will.

3. Wills 🔑52(1)

Substantial evidence is required to overcome the presumption of testamentary capacity.

4. Wills 🔑52(4)

Adjudication of incompetency and appointment of a guardian, though evidence of mental condition on date of adjudication, is not prima facie evidence of testamentary incapacity so as to shift burden of proof to proponent of will, since such adjudication establishes only that incompetent person is unable, unassisted, properly to manage and take care of himself or his property and is therefore likely to be deceived or imposed upon. Probate Code, § 1460.

5. Wills 🔑50

Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity.

6. Wills 🔑55(1)

Competent evidence is not necessarily, standing alone, substantial evidence of testamentary incapacity sufficient to take question to jury.

7. Wills 🔑55(1)

That signature on will was scrawling and illegible compared to earlier samples of testatrix' signature was as readily attributable to physical as mental weakness, and did not constitute substantial evidence sufficient to support jury's finding of testamentary incompetency.

8. Evidence 🔑571(2)

Testimony of physicians as to mental incompetency of testatrix, based wholly on hospital records and showing that they rejected those portions of record which contradicted their opinions, did not constitute substantial evidence to support verdict of lack of testamentary capacity.

9. Evidence 🔑571(1)

Opinion testimony of an expert witness, which is not based upon facts otherwise proved or assumes facts contrary to the only proof, cannot rise to the dignity of substantial evidence.

10. Wills 🔑386

On appeal from an order refusing to revoke probate of a will notwithstanding jury's verdict that testatrix lacked testamentary capacity, conflicting evidence must not be weighed.

11. Wills 🔑324(2)

Where the evidence on one side consists of opinions based upon a state of facts not shown by the record to exist, while that on the other side is based upon facts actually shown to exist or rests upon the testimony of physicians who actually treated and examined testator, there is no true conflict in the evidence as to testamentary capacity which would warrant submission of the question to jury.

12. Wills 🔑341

Record contained no substantial evidence to support jury's finding that testatrix lacked testamentary capacity, and hence trial court properly refused to revoke probate of her will notwithstanding jury's finding.

◆

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Proceeding in the matter of the estate of Josephine Frances Powers, deceased, by Joseph Whalen McMahon against Alexander McCulloch and others to revoke probate of decedent's will. From an order refusing to revoke probate of the will, notwithstanding jury's verdict that decedent was not competent to make the will, plaintiff appeals.

Order affirmed.

Robert E. Hatch, of San Francisco, for appellant.

George K. Ford, Simpson Finnell, Jr., Charles R. Collins, Tobin & Tobin, and Frank J. Fontes, all of San Francisco, for respondents.

DOWLING, Justice.

This is an appeal from an order refusing to revoke the probate of the last will of Josephine F. Powers, notwithstanding the verdict of a jury that the testatrix was not competent to make the will. The question presented is whether as a matter of law there was no substantial evidence to support the jury's finding that the testatrix lacked testamentary capacity, since concededly the court cannot in such a case make an order notwithstanding the verdict if there is substantial evidence to support the jury's finding.

The testatrix consulted an attorney about making this will at a time when there is no dispute as to her testamentary capacity and the will in question was drawn in accordance with her directions given at that time. It was not immediately executed because of her supervening illness which ultimately led to her death. On May 16, 1943, the testatrix was taken to the San Francisco Emergency Hospital and from there removed to the San Francisco Hospital where she remained until June 12. On that date she was transferred to St. Mary's Hospital, also in San Francisco. On June 18 the will in question was executed at St. Mary's Hospital and the testatrix continued as a patient in that hospital until her death on July 20. The immediate cause of her hospitalization was traumatic injury and collapse from a fall but she was also suffering from a cancerous condition in an advanced stage. The records of the two hospitals were admitted in evidence. That of the San Francisco Hospital contains entries indicating such varying mental states as that she was in a confused mental state on her admittance, later unconscious, not totally clear mentally, improving, irrational to a slight extent at times, rational but very fretful and restless. The entries as to her mental condition at St. Mary's Hospital likewise indicate that prior to June 18 (the date of the will's execution) she was at times confused, speaking very loud and incoherently, very irrational, not quite so depressed and confused, irrational at times, hysterical. Coming to June 17, the day before the will's execution, the following entries appear: "12 noon. Confused, irrational at times." "4 in the afternoon * * * Very depressed. Sleeps at 15 and 20 minute intervals." "9 o'clock, crying account severe pain. 10 o'clock * * * condition same. Fair day." On June 18 there is no entry with reference to her mental condition.

[1-3] We cannot agree with appellant that the entries on the hospital charts constitute substantial evidence that the testatrix did not possess testamentary capacity on June 18. The critical inquiry is directed to the condition of the testatrix' mind at the very time of the execution of the will (Estate of Sexton, 199 Cal. 759, 765, 251 P. 778; Estate of Perkins, 195 Cal. 699, 706, 707, 235 P. 45; Estate of Dupont, 60 Cal.App.2d 276, 286, 140 P.2d 866) and there is a presumption of testamentary capacity which it requires substantial evidence to overcome. Estate of Arnold, 16 Cal.2d 573, 586, 587, 107 P.2d 25; Estate of Perkins, supra, 195 Cal. 699, 703, 235 P. 45; Estate of Sexton, supra, 199 Cal. 759, 766, 251 P. 778. The most that can be said for the hospital records is that they show intermittent periods of mental confusion and irrationality and as we approach the critical date of June 18 we find that the record shows on June 17 "Confused, irrational at times," which carries the clear implication that the testatrix was only intermittently confused and irrational on that date, and on June 18 there is a complete absence of any entry which would tend in the slightest to prove that the testatrix lacked testamentary capacity on that day.

[4] After her admission to the San Francisco Hospital and on May 26 the Superior Court adjudged the testatrix to be incompetent and appointed a guardian. It is claimed that this adjudication is prima facie evidence of her subsequent incompetency to make a will. In support of this argument Estate of Johnson, 200 Cal. 299, 252 P. 1049 is cited. The opinion in that case holds to the exact contrary. After saying on page 303 of 200 Cal., 252 P. 1049, that an adjudication of *insanity* raises a presumption of want of testamentary capacity on the date of the adjudication, the supreme court says of an adjudication of incompetency on page 305 of 200 Cal., on page 1051 of 252 P.: "Proof of incompetency in a guardianship proceeding is evidence of mental condition on the date of the adjudication, but it is not prima facie evidence of testamentary incapacity so as to shift the burden of proof to the proponent of the will."

[5] The reason for this holding seems obvious. A guardian may be appointed for "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons." Prob.Code, sec. 1460. All that such an adjudication can judicially establish is the existence of a state of facts falling within the quoted definition, but the establishment of such facts would fall short of proving testamentary incapacity. It is thoroughly established by a series of decisions that: "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity * * *." Estate of Arnold, supra, 16 Cal.2d 573, 586, 107 P.2d 25, 32; Estate of Sexton, supra, 199 Cal. 759, 768, 251 P. 778; Estate of Holloway 195 Cal. 711, 733, 235 P. 1012.

We are not unmindful of the dictum in Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 604, 275 P. 794, 799 (a case not cited or relied upon by appellant, perhaps because the passage quoted was recognized as dictum) that: "It is the settled law of California that an adjudication of the incompetency of a testator is merely prima facie evidence of his incapacity to make a valid will." Since the question of capacity to make a will was not involved in the Hellman case the quoted sentence was clearly only dictum as pointed out in Estate of Worrall, 53 Cal.App.2d 243, 248, 127 P.2d 593. That it was not even a carefully considered dictum is evident from the fact that Estate of Johnson, supra, 200 Cal 299, 252 P. 1049, 1052, is cited in its support; and the court in the Johnson case in the passage which we have quoted said just the opposite, that such an adjudication of incompetency "is not prima facie evidence of testamentary incapacity."

Since the Johnson case is the latest ruling of the supreme court on an appeal in which the question was actually presented to the court we are bound to follow it.

[6] Appellant seizes upon the expression in the Johnson case that such an adjudication "is evidence of mental condition on the date of the adjudication" and argues that if evidence of mental condition it must be sufficient to take the case to the jury. This is a non sequitur. Appellant overlooks the qualifying words "on the date of the adjudication." In our case the hospital records introduced by appellant as part of his case show that the mental condition of the testatrix was not constant from the date of the adjudication. Appellant also overlooks the fact that competent evidence is not necessarily, standing alone, substantial evidence of lack of testamentary capacity. Cf. 26 Cal.Jur. 667, 668.

[7] The fact, adverted to by appellant, that the signature on the will was scrawling and illegible compared to earlier exemplars of testatrix' signature is at least as readily attributable to physical as mental weakness and cannot constitute substantial evidence of incompetency.

There remains the medical testimony produced by appellant. This falls into two classes. Dr. Simon examined the testatrix prior to the hearing in the guardianship proceeding. He testified that on May 28, the only day on which he saw the testatrix, he found her incompetent. That his testimony had no bearing on the testatrix' testamentary capacity on June 18, 1943 is clear from the following question and answer:

"Q. Did you formulate an opinion at that time as to whether her mental condition would improve, remain static or deteriorate? A. I don't think—I didn't form any opinion at that time."

Doctors Alden and Catton gave opinion evidence as experts. Neither of them ever saw the testatrix and their testimony was based entirely upon a reading of the hospital records. Without deciding whether their evidence was otherwise sufficient to show testamentary incapacity as distinguished from mental aberration in the medical sense (26 Cal.Jur. 631), an examination of the record makes it clear that they did not accept the hospital records in toto as the basis for their expressed opinions, but rather accepted only those portions of the hospital records which supported their opinions and rejected those portions which contradicted their opinions. For example, although the hospital records contain entries such as "rational but very fretful and restless" and "irrational at times" Dr. Alden testified:

"Q. So with the patient in the hospital and records being made from time to time, and you mentioned noticing in there the nurses noted the patient was rational. A. Yes.

"Q. Do you include that period when you say she was irrational? A. Yes, I include that period as being fundamentally irrational as far as being able to think, think anything through that is very complicated."

Likewise in the face of these entries Dr. Catton testified: "In my opinion, the irrationality was continuously present under the surface of the mind and continuously present to a degree also on the surface of the mind for a reasonable period of the time previous to the date you mentioned. By reasonable period, I mean days and days, and for a similar period after, and I see nothing in the hospital record, not one single entry at this moment, or hour or day she has returned to any rational behavior."

[8, 9] It is impossible for any expert basing his testimony solely upon other evidence introduced in the case thus to lift himself by his own bootstraps. If his opinion is not based upon facts otherwise proved or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence. Estate of Gould, 188 Cal. 353, 205 P. 457; Estate of Purcell, 164 Cal. 300, 307, 308, 128 P. 932; Winthrop v. Industrial Acc. Comm., 213 Cal. 351, 2 P.2d 142, as explained in Nielsen v. Industrial Acc. Comm., 220 Cal. 118, 121, 122, 29 P.2d 852, and Alaska Packers Ass'n v. Industrial Acc. Comm., 1 Cal.2d 250, 263, 264, 34 P.2d 716; Pacific Freight Lines v. Industrial Acc. Comm., 26 Cal.2d 234, 239, 157 P.2d 634; Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 733, 734, 135 P.2d 396; Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 500, 84 P.2d 1071.

[10, 11] Mindful of the rule, reiterated in Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384, that on appeal conflicting evidence must not be weighed, we have refrained from referring to any of respondents' evidence. However we deem it pertinent to say that both the physician who attended testatrix in St. Mary's Hospital and under whose supervision the records of that hospital here in evidence were made, and the nurse on duty at the time of the execution of the will, who actually made many of the entries in that record, testified that on June 18 the testatrix was rational and competent. If the evidence of the two doctors who purported to base their testimony on the records, but actually assumed the portions of the records to be inaccurate which contradicted their expressed opinions, was allowed to prevail we would have a situation in direct conflict with the statement quoted by the supreme court in Alaska Packers Ass'n v. Industrial Acc. Comm., supra, 1 Cal.2d 250, 263, 34 P.2d 716, 722, that: "there was no true conflict in the evidence where that on one side consisted of opinions based upon a state of facts not shown by the record to exist while that on the other side was based upon facts actually shown to exist or rested upon the testimony of physicians who had actually treated and examined the patient."

[12] Our examination of the record satisfies us that there was no substantial evidence to support the jury's verdict.

The order appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

81 Cal.App.2d 384

HOHREITER v. GARRISON, Insurance Commissioner.

No. 13338.

District Court of Appeal, First District, Division 1, California.

Sept. 4, 1947.

1. Insurance 🔑12

Evidence supported findings of hearing commissioner, Commissioner of Insurance, and trial court that insurance agent consistently misrepresented the extent of coverage of a hospital benefit policy and deliberately made false entries in application blanks as to the physical condition of applicants, warranting revocation of agent's license as a "life agent". Insurance Code, §§ 781, 782, 1731(d–g); Government Code, §§ 11503, 11505, 11506, 11512.

2. Insurance 🔑12
Mandamus 🔑187(9)

If evidence substantially supported anyone of six counts in accusation against insurance agent who allegedly misrepresented extent of coverage of a hospital benefit policy and knowingly made allegedly false entries in application blanks as to physical condition of applicants, Insurance Commissioner was empowered to revoke the agent's license, and the District Court of Appeal would have no power to reverse the trial court's decision denying the agent a writ of mandate to review the commissioner's ruling. Insurance Code, § 1731.

3. Insurance 🔑12

Proceedings for revocation of insurance agent's license because of alleged violations of the insurance code were not improper because of the fact that insurance department investigators solicited facts, which constituted the alleged violations, from policyholders without prior complaint having been made by such policyholders. Insurance Code, § 1731.

4. Insurance 🔑12

Proceedings against insurance agent charged with violations of the insurance code, for purpose of revoking his license, were not improper because of the fact that Insurance Commissioner who filed the accusation against the agent did so on the basis of a report of an investigator, without interviewing policyholders, and then acted as "prosecutor" before the hearing officers. Insurance Code, § 1731.

5. Insurance 🔑12

Proceedings for revocation of insurance agent's license on ground of violations of the insurance code were not improper because Insurance Commissioner, who, acting through his deputy, brought the accusation against the agent, thereafter acted as judge at the hearing. Insurance Code, § 1731.

6. Officers 🔑103

One of the primary purposes of the administrative procedure act is to remedy the evils in connection with hearings before administrative boards frequently composed of laymen, untrained in procedure. Government Code, §§ 11500–11528.

7. Statutes 🔑181(1)

In absence of compelling language in statute to contrary, it will be assumed that the Legislature adopted proposed legislation with the intent and meaning expressed by the council drafting the statute.

8. Insurance 🔑12

The Insurance Commissioner may adopt hearing officer's decision in a proceeding for revocation of an insurance agent's license, without reading or otherwise familiarizing himself with the record. Government Code, § 11517.

9. Administrative law and procedure 🔑13
Constitutional law 🔑318
Insurance 🔑12

Section of the government code which provides that, when hearing officer acts alone, the administrative agency, such as the Insurance Commissioner, may adopt the hearing officer's decision without reading the record, is not unconstitutional on ground that it denies due process to one whose license is revoked by the hearing officer. Government Code, § 11517.

10. Mandamus ⚷172

Superior court, in reviewing by mandamus the action of an administrative agency revoking a license, must exercise an independent judgment on the facts.

11. Constitutional law ⚷251

Due process requires that a fair trial be had, but not two or three fair trials.

12. Constitutional law ⚷287

Insurance agent, whose license as a "life agent" was revoked for violations of the insurance code, could not claim that he was denied due process because the Insurance Commissioner affirmed the hearing officer's decision revoking the license, without reading the record of the hearing before the hearing officer, where superior court in agent's mandamus proceeding decided the case on the full record, including the transcript of proceedings had before the hearing officer, and exercised an independent judgment on the facts. Insurance Code, §§ 781, 782, 1731(d–g), Government Code, §§ 11503, 11505, 11506, 11512, 11517.

13. Constitutional law ⚷287

Fact that Insurance Commissioner saw fit to adopt recommendation of hearing officer revoking insurance agent's license, so that agent's right to petition Insurance Commissioner for a rehearing was cut off, invaded no constitutional rights of agent, since there is no constitutional right to a petition for a rehearing. Government Code, §§ 11519, 11521, 11523.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Mandamus proceeding by Emil A. Hohreiter against Maynard Garrison, Insurance Commissioner of the State of California, to secure a judicial review of the commissioner's finding that the plaintiff had engaged in acts in violation of the insurance code, requiring revocation of his license as a "life agent". From a judgment denying application for writ of mandate, plaintiff appeals.

Affirmed.

U. S. Webb and Webb, Webb, & Crites, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and T. A. Westphal and Harold B. Haas, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

Prior to March of 1946 Emil A. Hohreiter was duly licensed by the Insurance Commissioner as a "life agent," and as such entitled, among other things, to solicit disability insurance. On January 10, 1946, the Insurance Commissioner, by his deputy H. E. Wikstrom, filed an accusation against Hohreiter charging that in the solicitation and sale of four designated insurance policies he had misrepresented the benefits of the policies and had entered false answers in the applications, thus violating sections 781, 782, and 1731(d), (e), (f) and (g) of the Insurance Code. The accusation sets forth in detail the nature of the charges, the names of the policyholders to whom the misrepresentations are alleged to have been made, all pertinent dates, the numbers of the policies issued, and in all respects fully complies with the law. Sec. 11503, Gov. Code. In due course, Hohreiter requested a formal hearing to present his defense (Secs. 11505, 11506, Gov.Code), the Insurance Commissioner determined that a hearing officer selected as provided in the administrative procedure act should hear the case alone (Sec. 11512, Gov.Code), and Bradford Bosley was assigned as such hearing officer. A hearing and trial were duly had before Bosley on February 20, 1946, and on March 4, 1946, Bosley prepared and delivered to the Insurance Commissioner a "Proposed Decision," in which he found that the allegations of the accusation were true; that Hohreiter had engaged in acts in violation of certain sections of the Insurance Code; and recommended that Hohreiter's license be immediately revoked upon the adoption, which Bosley recommended, of the proposed decision by the Insurance Commissioner. On March 7, 1946, the Insurance Commissioner adopted in toto the proposed decision of Bosley including the portion recommending the immediate enforcement of the recommended penalty. It is admitted that in thus adopting the hearing officer's proposed decision the commissioner did not read or have available the record of the trial before Bosley, the transcript of such trial not having then been prepared. On March 26, 1946, Hohreiter filed a petition for reconsideration and rehearing, which was denied by the commissioner the next day, the letter of denial stating that the petition had not been considered on its merits and had not been submitted to the commissioner because the order provided that the decision should immediately become effective and, as the department interpreted section 11521(a) of the Government Code, under such circumstances it had no power to order a reconsideration or rehearing. Within the time permitted by law (Sec. 11523, Gov.Code) Hohreiter filed a petition for a writ of mandate in the superior court to secure a judicial review of the commissioner's ruling. Before that court he contended, and on this appeal he now urges, that the findings of the commissioner are unsupported by substantial evidence, that the judgment of the commissioner is arbitrary, capricious, unreasonable, and constitutes a gross abuse of discretion in various specified ways, that the commissioner decided the case without any knowledge of the facts, that such procedure violates the provisions of the Government Code, properly interpreted, and that if that code purports to permit such procedure it is unconstitutional under the due process clause.

A trial was had before the superior court. There was introduced into evidence the transcript of the Bosley hearing, and in addition, both sides produced and there was received into evidence additional and new evidence not presented to Bosley. The trial court, after finding in detail the historical facts, found that "as found by said hearing officer and by the Insurance Commissioner of the State of California, it is hereby found by this Court, exercising its independent judgment upon the evidence and law that each of the allegations of said accusations were true"; that it is true that Hohreiter has engaged in acts in violation of certain sections of the Insurance Code; "that a fair trial was given petitioner by the proceedings herein set forth. Respondent proceeded within its jurisdiction and there was no abuse of discretion by said respondent and the findings of said respondent * * * are supported by the weight of the evidence"; that in addition to the record of the Bosley hearing new and additional evidence was introduced by both sides; that "the Court has carefully weighed and considered both the evidence before the Commissioner and said new and additional evidence, and upon said consideration the Court additionally and in the exercise of an independent judgment expressly finds that it is true that petitioner here was guilty of acts" in violation of certain sections of the Insurance Code; that the decision and order revoking the license was "lawful, valid and within the jurisdiction of respondent." The court then finds that it is not true that the penalty is excessive or that the order is arbitrary, capricious, unreasonable or constituted an abuse of discretion, or that any constitutional rights of Hohreiter were adversely affected. The court, therefore, entered its judgment denying the application for the writ. From that judgment Hohreiter appeals.

[1, 2] Appellant seriously urges that there was no substantial evidence to support the findings of the hearing officer, the commissioner and the trial court. The contention is without merit. The evidence is ample and substantial to support the findings. The accusation contains six charges, and it has been found that all six charges are true. We are of the opinion that the evidence amply supports the findings that appellant violated the law as charged in all six counts, but it should be pointed out that if the evidence substantially supports any one of the six points, the insurance commissioner was empowered, under section 1731 of the Insurance Code, to revoke the license, and this court would have no power to reverse the decision of the trial court. Rink-

er v. State Board Medical Examiners, 59 Cal.App.2d 222, 138 P.2d 403.

All of the charges contained in the accusation relate to the solicitation and sale by appellant of a certain type of limited hospital benefit policy of the Westland Insurance Company to the several parties and on the date set forth in the accusation. These parties are Frank and Florence Drouet, Allen E. Pelton, Merita E. Wieck and Etta P. Dallas. Charge 1 alleged that appellant falsely misrepresented to Frank and Florence Drouet that the policy being solicited would pay for all hospital bills, including doctor bills and all other expenses that might arise from sickness or accident, while Charge 2 alleged that in soliciting the Drouet policy appellant made false entries in the application concerning prior surgery undergone by Mrs. Drouet. Charge 3 alleged that appellant misrepresented to Pelton that the policy would cover all hospital expenses arising from sickness or accident, while Charge 4 alleged that in soliciting the Pelton policy appellant made a false entry in the application concerning Pelton's prior affliction with tuberculosis. Charge 5 alleged that appellant misrepresented the the terms and effect of the policy being solicited from Merita Wieck in that appellant told her that the policy would cover expenses incident to an existing hernia condition of her husband after such policy had been in effect for six months. Charge 6 alleged that in connection with the policy solicited by appellant from Mrs. Dallas, appellant made a false entry on the application therefor concerning Mrs. Dallas' prior surgical treatment for a gallstone condition.

The Evidence of Charges 1 and 2.

Frank Drouet testified at the Bosley hearing that appellant called at his (Drouet's) home, and solicited the policy in the presence of Drouet and his wife Florence; that appellant "told us how good it was and that we didn't have to worry any more"—that "the insurance company would pay for everything"; that when he discovered that the hospital coverage was only $5 per day he permitted the policy to lapse; that his wife told appellant that she had diabetes, but appellant said, "That doesn't mean a thing. You look perfectly healthy"; that Florence Drouet had lost her ankle through surgery prior to the time of this interview, and that she had her crutches with her when appellant was in their living room with them; that Florence told appellant she had lost her foot, but appellant said "it didn't make a particle of difference." They never told appellant to put the answer "No" to the application query "Have you, or any member of the Family Group, listed above in question No. 3, ever had or been advised to have a surgical operation or hospital care?" Drouet also said that he did not read the answers put upon the application by appellant, but "we gave him the $7.50 and that is all." Florence Drouet did not testify before the hearing officer, although she had been subpoenaed. She was then unable to attend because of her physical condition. She did testify before the trial court. She said that when appellant was interviewing her husband and herself about taking out the policy she was sitting on her hospital bed, and that she had her crutches beside her; that when appellant was preparing to leave the house, she accompanied him to the door on her crutches. She also said that she had diabetes, but appellant said that "I looked healthy enough, and he wouldn't have to ask me any questions"; that appellant did not ask her if she had had diabetes, and that she showed him her amputated foot—but "He said it would be all right, that I could take out the insurance any time."

In connection with the Drouet transaction appellant testified that he "told them both about the hospital policy. I asked whether they were in good health or not, and then I went through the policy from one end to the other"; that he read each question on the application to Drouet, and that Drouet gave him the answers which he entered on such application, that he told Drouet that the policy only afforded coverage to the amount of $5.00 per day for 70 days. He further testified that when he visited the Drouet home he did not see Mrs. Drouet, and that Mr. Drouet made no mention of his wife's amputated foot; that even had he known of such amputation "It would not harm the sale. I would put a rider on to cover anyone who had been injured."

Evidence on Charges 3 and 4.

Pelton testified that appellant solicited him at the front door of his home; that he did not clearly remember the conversation, but he "got the impression that the company would pay all the hospital bills that I or my wife might incur"; that he was "absolutely" certain that appellant did not tell him that the policy only allowed $5 per day, but he knew that it afforded no coverage other than hospital expenses. In explaining his belief about the extent of the coverage, Pelton said "I wouldn't altogether say I got it from him, but I got it from the radio. I was listening to the radio broadcast in which they asserted they would do thus and so, and when he came I was more or less under the impression that was the condition under which they were selling the policy. I wouldn't say definitely that he didn't say it, but I was under the impression they would pay more than $5.00." He also testified that appellant did not ask him if he or his wife (who was also covered under the "family group" provision) had ever had any prior illness or physical disability; that appellant had written "No" after most of the questions contained in the application, but that he (Pelton) did not read the application. Question 6 on the application refers, inter alia, to previous conditions of tuberculosis. Appellant entered "No" after that question. Pelton said that appellant never asked him if he had had tuberculosis, and that "I certainly would have told him if he had asked me"; that "three different times in my life I have had tuberculosis."

Appellant testified that Pelton made a study of the application; that he asked Pelton each question contained in the application, and that Pelton gave him the answers which were made to the questions. He did not remember telling Pelton that the policy would cover all hospital expenses.

Evidence on Charge 5.

Merita Wieck testified that she asked appellant if the policy covered a case of an old injury or operation, and that she told appellant that her husband had had an "old injury"—a rupture, and that appellant told her that an "old injury" would be covered after "six or eight months"; although she was uncertain as to the exact time limit which appellant had expressed. She also testified that it was her impression that full hospital expense coverage was given.

Appellant testified that Mrs. Wieck fully read the application, and that he read all of the questions to her. He said that she answered the questions, but that she made no mention of her husband's condition.

Evidence on Charge 6.

Mrs. Dallas testified that in regard to question 6 on her application appellant made entry of the word "No," but that he did not ask her if she had ever had gall bladder trouble. She did not read the application to see if the answers were correct, but she had a prior medical history of gall bladder trouble. She said "if he had asked that I would have told him, but he didn't specify." Question 6 on the application sets out "gall bladder or kidney stones" as one of the included diseases concerning which medical history must be set out.

Appellant testified that he read question 6 to Mrs. Dallas, and that she supplied him with the "No" answer which he placed on the application form.

At the hearing on the mandate petition, appellant introduced the testimony of two former employers in the insurance business (Harry C. Smith and Robert R. Smith), with whom he had been associated for about 10 years. Each testified that they knew him to be honest and capable, and that no complaints against him had ever been brought to their attention.

Section 1731 of the Insurance Code provides in part as follows: "The commissioner may suspend or revoke any license of an insurance agent * * * if * * * he determines that any of the following facts exist in respect to any person authorized to act under such license: * * *

"(d) Such person has engaged in a fraudulent practice or conducts his business in a dishonest manner.

"(e) Such person has shown that he was incompetent or untrustworthy in the conduct of his business or has by commission of a wrongful act or practice in the course of his business exposed the public or those dealing with him to the danger of loss.

"(f) Such person has knowingly misrepresented the terms or effect of an insurance policy or contract while acting in the course of his business.

"(g) Such person has failed to perform a duty expressly enjoined upon him by a provision of this code, or has committed an act expressly forbidden by such provision."

It is quite apparent that the findings under attack are supported by ample and substantial evidence, and that the record amply supports the action of the commissioner in revoking appellant's license. The record demonstrates that appellant consistently misrepresented the extent of the hospital coverage, and deliberately and knowingly made false entries in the application blanks as to the physical condition of the applicants. Such tactics cannot be condoned and amply warranted the commissioner's order.

[3] Appellant makes several complaints relating to the manner in which the accusation was filed and the proceeding handled. These require but brief consideration. The record shows that insurance department investigators solicited the facts (to which the policyholders subsequently testified) from the policyholders without any prior complaint from such policyholders. Just what relevancy this may have does not clearly appear. It would seem quite obvious that it is immaterial that the facts showing appellant's misdeeds were solicited rather than volunteered—the only important question is whether those facts were true.

[4] Complaint is also made that a deputy commissioner filed the accusation in the name of the Insurance Commissioner without having personally interviewed the policyholders, upon the basis of a report of an investigator who had made such interviews, and then the same deputy acted as "prosecutor" before the hearing officer. Such procedure in no way invaded any of the legal rights of appellant. It is common practice for a district attorney to file an information against an accused based on facts secured by his investigators, and then to prosecute the accused in the trial court. No one could properly contend that such procedure invades the rights of the accused.

[5] Appellant next complains that the commissioner, acting through his deputy, brought the accusation, and then, by adopting the findings and recommendations of the hearing officer, thus making them effiective, acted as judge. Thus, says appellant, the commissioner acted as accuser and judge and by his decision won his own case. Such procedure is common before most administrative boards. While it is most important that the adjudicating process should be kept as impartial as possible, as will later appear, this appellant was accorded not one but two impartial trials. Moreover, it has never been held that simply because the administrative board both prefers and tries the charge that that fact alone invalidates the proceedings, renders the trial abortive, and deprives the accused of due process of law. It has been specifically held in this state that the mere fact that the administrative board is both accuser and judge in no way adversely affects the legal rights of the accused. Berry v. Alderson, 59 Cal. App. 729, 211 P. 836; Winning v. Board of Dental Examiners, 114 Cal.App. 658, 300 P. 866. While it is true that in both of the above cases the accusation was signed by an employee or agent of the board involved, while in the instant case it was filed by the commissioner through a deputy, that fact has no legal significance. An accusation by an agent of the board is just as much an accusation by the board as is a direct accusation by the board. Moreover, it is not contended that the hearing officer was acquainted with the charges or made any prejudgment of the case, and it was before him that the charges were actually tried. The commissioner merely adopted the findings of such hearing officer, as provided by law. Sec. 11517, Gov.Code.

This leaves for consideration the most important contention of appellant, namely, that he was deprived of due process of law because the commissioner adopted the findings and proposed decision of the hearing officer, without reading or hearing the evidence produced before the hearing officer. It is urged that the commissioner "decided" the case, and that due process requires that "he who decides must hear." This argument is predicated upon appellant's conceived effect of the so-called Morgan cases—Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, and 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129.

This contention raises, apparently for the first time before an appellate court of this state, the question as to the constitutionality and interpretation of the administrative procedure act of 1945, and particularly of section 11517 of the Government Code adopted in that year. This requires a brief reference to the history, background and purposes of the statutes in question.

As early as 1941 the Legislature of this state became aware of the need for reform in the administrative procedure field. In that year the Judicial Council, by legislative mandate, was directed to undertake a thorough investigation of administrative procedure and the judicial review of administrative determinations (Stats. 1941, chap. 1190, p. 2961), and to report back to the 1943 Legislature. Action was postponed by the Council because of lack of funds. (Ninth Report of the Judicial Council of California (1943) p. 5.) The identical statute was reenacted in 1943 (Stats.1943, chap. 991, p. 2903), the Council was directed to report its recommendations to the 1945 Legislature, and sufficient money appropriated to permit the Council to carry out its functions. The Council, through its staff and membership, with the assistance and cooperation of the State Bar, the Attorney General and many other agencies, and with the help of many official investigations and reports carried on and made by other bodies, undertook the task assigned. (For a complete description of how the Council operated, see "California's Approach to the Improvement of Administrative Procedure," by Ralph N. Kleps, Director, Administrative Agencies Survey of the Judicial Council of California, 32 Cal.Law Rev. 416; "Report on the Reform of Administrative Procedure" by Ralph N. Kleps, 20 Journal of the State Bar of California, p. 124; Tenth Report of the Judicial Council of California (December 31, 1944) p. 8 et seq.) In due course the Council made its report to the Legislature suggesting various proposed legislative changes together with a full explanation of the purpose, intent, meaning and effect of the proposed statutory changes. (See Tenth Report, supra, p. 8 et seq.) The Legislature at the 1945 session adopted the proposals (Stats.1945, chaps. 867 to 902) with only minor changes, and as to the section here involved with no changes at all. Among other things, the Legislature passed the administrative procedure act by adding sections 11500 to 11528 to the Government Code.

[6] One of the primary purposes of the Legislature in passing and of the Council in proposing the legislation was to remedy the evils in connection with hearings before administrative boards frequently composed of laymen, untrained in procedure. To this end there was created the position of hearing officer. Such officer is a civil service employee and must be an experienced lawyer. All administrative hearings relating to the revocation of licenses by the agencies designated in the act must be conducted by these legally trained hearing officers (Sec. 11512(a), Gov.Code). The Council was much concerned with the problem as to who should make the adjudication and how it should be made. Its first tentative proposal was to permit the person or body that heard the case, i. e., the hearing officer or the agency as the case might be, to decide the controversy (see Tenth Report, supra, p. 23), but the proposal later made and the one adopted by the Legislature is found in sections 11512(a) and 11517 of the Government Code. Section 11512(a) provides: "The agency itself shall determine whether the hearing officer is to hear the case alone or whether the agency itself is to hear the case with the hearing officer." If the case is heard by the hearing officer and the agency, the agency decides the case with the assistance and advice of the hearing officer (Sec. 11517(a) Gov.Code). Subdivisions (b) and (c) of section 11517 provide the procedure where the hearing officer, as in the instant case, conducts the hearing alone. Those subdivisions provide:

"(b) If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

"(c) If the proposed decision is not adopted as provided in subdivision (b) each party shall be furnished with a copy of the proposed decision. The agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. If the case is so assigned to a hearing officer he shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of such proposed decision shall be furnished to each party. The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself no agency member may vote unless he heard the additional oral evidence."

It is the interpretation and constitutionality of these provisions with which we are now concerned. It is the thought of appellant that these provisions required the commissioner to read the record before he adopted or rejected the hearing officer's recommendations, and that if the sections do not so provide they are violative of the due process clause as interpreted in the Morgan cases, supra.

On the question of interpretation there can be no reasonable doubt that the Council intended and the Legislature provided that, where the hearing officer alone hears the case, the agency has the power of adjudicating, but in so deciding the case, if it is satisfied with the proposed decision of the hearing officer, it may adopt the decision of the hearing officer without first reading the record, but, if not satisfied with such decision, before a contrary decision may be rendered, it must give the parties a chance to argue and must read the record. In other words, in cases where the hearing officer sits alone, the administrative agency may, by adopting his proposed decision, in legal effect, and with statutory permission, delegate the power to decide to the hearing officer. But, if dissatisfied with such proposed opinion, the administrative agency may, in legal effect, grant a hearing and decide the case anew on the record and argument. That this was the intent of the Judicial Council is made crystal clear by the language used in its explanatory report. After first pointing out why its original tentative suggestions were changed the report continues: "The proposals were modified considerably, therefore, with respect to the decision process. The Council's final recommendation * * * [as set forth in section 11517 of the Government Code] is substantially the 'recommended decision' procedure which is in current use. Present practice varies greatly, however, and there is a great difference in the extent to which the ultimate deciding authority becomes familiar with the facts involved in the cases which he purports to decide. *In fact, it is not realistic to require that the head of an agency or the agency members be thoroughly familiar with all of the cases which come before the agency.* Thus, the Council's proposal, which allows the agency itself to retain direct control over the adjudicating functions, will nevertheless permit expeditious handling of routine cases where the agency finds no fault with the hearing officer's proposed decision. If the agency itself hears the case, it decides it. If a hearing officer alone hears the case he prepares a proposed decision in the form required for the final decision. The agency may adopt this proposed decision or it may reduce the penalty and adopt the balance. If the agency does not so adopt the proposed decision, it must furnish the parties with copies of the proposed decision and must allow them to argue either orally or by brief. It may then decide the case itself on the basis of the record before the hearing officer and the arguments. If new evidence is to be taken, the agency may hear it itself or it may assign the case to a hearing officer. He also prepares a proposed decision but this time the parties must be given a chance to argue to the agency before the agency decides.

"This procedure is in line with California case law which indicates that when an agency adopts the facts found and the award recommended by a referee who heard the evidence the agency need not review the record, but if different findings and award are made the record must be reviewed. The result of the Council proposal is that, in fact, the decision is made in every case by someone familiar with the proceedings and before whom an opportunity to argue the case is afforded: the hearing officer if his decision is adopted; the agency itself if it does not adopt the proposed decision. But each decision carries the official sanction of the agency itself; and the agency becomes responsible for all decisions and is able by its close control and supervision over all decisions to adhere to a consistent policy." (Tenth Report, supra, p. 24; italics added.)

[7] This report is a most valuable aid in ascertaining the meaning of the statute. While it is true that what we are interested in is the legislative intent as disclosed by the language of the section under consideration, the Council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation it told the Legislature what it intended to provide by the language used. In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the Council in its report. (See many cases collected and commented on, 2 Sutherland on Statutory Construction, 3rd ed. p. 491, sec. 5006, p. 498, sec. 5010; see also Crawford on Statutory Construction, p. 381, sec. 215.)

That the language used in section 11517 is not only susceptible of the interpretation that the agency need not read the record where it adopts the proposed decision of the hearing officer who alone hears the case, but that that is the most reasonable interpretation, is demonstrated by a comparison of the language used in subdivisions (b) and (c). Subdivision (b) provides that where the hearing officer alone hears the case he shall prepare a proposed decision and the agency "may adopt the proposed decision in its entirety, or may reduce the proposed penalty." Not one word in that subdivision requires the agency to know the record. But in subdivision (c) it is provided that if the agency does not want to adopt the proposed decision each party must be furnished a copy, the parties must be given an opportunity to argue, and "the agency itself may decide the case upon the record, *including the transcript.*" The two subdivisions cannot possibly be reconciled unless the proposed interpretation is sound.

This procedure, leaving the adjudicating power in the agency, but not requiring the agency to know the record in all cases where an opportunity for a fair trial has been afforded before a hearing officer or referee, is not new to California procedure. It has been expressly upheld in relation to the procedure adopted by the Industrial Accident Commission. There the commission alone has the power to adjudicate, but the cases are tried before a referee who makes a recommended decision. It is now settled that where the commission adopts the facts found and the award recommended by the referee who has heard the evidence, it need not review the record; but if the commission makes a different finding and award it must itself review the evidence. Taylor v. Industrial Acc. Comm., 38 Cal.App.2d 75, 100 P.2d 511; Bethlehem Steel Co. v. Industrial Acc. Comm., 42 Cal.App.2d 192, 108 P.2d 698; Helmick v. Industrial Acc. Comm., 46 Cal.App.2d 651, 116 P.2d 658; California Shipbuilding Corporation v. Industrial Acc. Comm., 64 Cal.App.2d 622, 149 P.2d 432; certiorari denied 324 U.S. 843, 65 S.Ct. 675, 89 L.Ed. 1405; California Shipbuilding Corporation v. Industrial Acc. Comm., 27 Cal.2d 536, 165 P.2d 669; Pacific Indem. Co. v. Industrial Acc. Comm., 28 Cal.2d 329, 170 P.2d 18. That the Council had in mind the rule of the Taylor case, supra, reaffirmed in the other cases cited, supra, is made clear by its report. On page 24, as above quoted it stated that the procedure provided in section 11517 not requiring a reading of the record where the recommended decision was adopted was "in line with California case law" which so holds. On page 119 of its official report it discusses the cases upon which the proposed sections are based, discusses the Industrial Accident Commission rule, and cites the Taylor case.

While it is true that the powers and duties of a referee of the Industrial Accident Commission are somewhat different from those of a hearing officer, it is quite apparent that, insofar as the power of the administrative agency to adopt the hearing officer's recommended decision without reading the record is concerned, the Legislature intended to and did adopt the Industrial Accident Commission procedure then existing and judicially approved.

[8] We conclude this point with the holding that section 11517, properly interpreted, provides that where the hearing officer acts alone the agency may adopt his decision without reading or otherwise familiarizing itself with the record.

[9] But, says appellant, if that be the interpretation of the section, then it is unconstitutional under the rule of the Morgan cases. The first Morgan case, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, involved a review of an order of the United States Secretary of Agriculture fixing certain maximum rates to be charged by market agencies for buying and selling livestock. Under the federal statute involved it was provided that the Secretary, "after full hearing," could fix such rates. After such a rate had been fixed by the Secretary, review proceedings were instituted in the District Court. The complaint in that court alleged that the Secretary assigned the duty of hearing to two acting secretaries, and that he thereafter made his order fixing the rates without having heard or read any of the evidence. The District Court struck out these allegations. The Supreme Court held that these allegations disclosed that plaintiffs "have not been accorded the hearing which the statute requires," (298 U.S. at page 473, 56 S.Ct. at page 908, 80 L.Ed. 1288), and concluded that the striking of these allegations was error. Note that there was no hearing officer clothed with statutory power to recommend a decision, and no statutory delegation of any power to the persons who heard the evidence. There was no indication that these persons had even prepared a report. The Supreme Court stated (298 U.S. at page 477, 56 S. Ct. at page 910, 80 L.Ed. 1288): "Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing," and then continued (298 U.S. at page 480, 56 S.Ct. at page 911, 80 L.Ed. 1288): "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

There is thus no basis for the contention that the authority conferred by section 310 of the Packers and Stockyards Act [7 U.S.C.A. § 211] is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. * * * It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. * * * But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them."

In the second Morgan case, 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129, the court considered an appeal from a District Court dismissal of the bill by which the review of the Secretary's order was sought. The court stated that it was not concerned with the merits of the order, but considered again the contention that the Secretary's order was made without the hearing required by the statute. The court held that the hearing was inadequate for essentially the same reasons discussed in the first case.

It is most difficult to tell from the Morgan cases whether they state a rule of due process applicable to all administrative hearings, or whether they merely involve the interpretation of a particular statute. They apparently have been interpreted in this state as declaring a rule of due process. See Bandini Estate Co. v. Los Angeles, 28 Cal.App.2d 224, 82 P.2d 185; Universal Cons. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746. But they cannot be interpreted to mean that, where a fair trial is required by the statute before a fair and impartial hearing officer who is required by the statute to weigh and appraise the evidence and to prepare a proposed decision, the Legislature cannot provide that the administrative agency may adopt his proposed decision without reading the record. What the Supreme Court was interested in in those cases was in seeing to it that the administrative agency gave those adversely affected the right to a full and fair hearing. In the federal statute there involved there was no statutory officer clothed with statutory powers comparable to a hearing officer as provided in section 11517 of our Government Code. There was no provision at all for weighing the evidence, except by the Secretary, and there was no indication that anyone except the Secretary ever weighed the evidence. Due process requires a fair trial before an impartial tribunal, and that requires that the person or body who decides the case must know the evidence, but due process is not interested in mere technical formalism. It is the substance that is determinative of whether due process has been afforded.

The Supreme Court of California has held recently in relation to the identical procedure set up for the Industrial Accident Commission that "There is nothing inconsistent in such procedure with the doctrine that 'he who decides must hear,' announced in Morgan v. United States * * *. The Supreme Court there pointed out (page 479 of 298 U.S., page 911 of 56 S.Ct. page 1294 of 80 L.Ed.) that 'The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, [as does the hearing officer or referee] and the Secretary, who had not heard, did assume that responsibility.'" California Shipbuilding Corporation v. Industrial Acc. Com., 27 Cal.2d 536, 544, 165 P.2d 669, 673. That reasoning clearly distinguishes the rule of the Morgan cases.

[10-12] There is another additional and cumulative reason why, in the instant case, due process was afforded appellant. We are here involved with an administrative agency exercising statewide jurisdiction. It now seems settled in this state that the superior court in reviewing the actions of such agencies in revoking licenses in a mandamus proceeding must exercise an independent judgment on the facts. Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Sipper v. Urban, 22 Cal.

2d 138, 137 P.2d 425. Thus the ultimate power of decision rests with the trial court. That court decided this case upon the full record, including the transcript of proceedings had before the hearing officer, and in so doing, according to its express findings, exercised an "independent judgment" on the facts. Due process contemplates that somewhere along the line a fair trial be had—not that there be two or three fair trials. In any event, therefore, appellant having had a fair and impartial trial before a superior court, is in no position to contend he has not been afforded due process.

In conclusion on this point, it is our view that, to contend that the procedure under which appellant has been deprived of his license did not afford him due process, is to ignore the realities of the situation. Here appellant was tried before a trained hearing officer, an independent civil service employee not directly connected with the Insurance Commissioner. The hearing officer weighed the evidence and his recommendations were then submitted to the commissioner. The commissioner could have refused to follow them, but did not see fit to do so. Then appellant was afforded a complete hearing and trial before the superior court, and that court exercised an "independent judgment" on the facts. Appellant, in being given two complete trials, has been afforded more protection of his rights than is normally afforded a person accused of crime, who is legally entitled to but one trial.

[13] The last contention of appellant is equally without merit. It is that because the commissioner saw fit to adopt the recommendation of the hearing officer it cut off his right to petition the commissioner for a rehearing, and that this was an abuse of discretion and invaded his legal rights. The procedure adopted by the commissioner was in exact accord with the statute. Section 11519 of the Government Code provides that normally decisions become effective 30 days after they are delivered or mailed unless "the agency itself orders that the decision shall become effective sooner." In reference to this provision the Council has the following to say as to its intent: "In determining the question of when an agency decision should become effective the Council had to consider conflicting policies. It is desirable to allow a period within which the agency can reconsider a case and correct its own errors, thus avoiding the necessity and expense of taking the matter to the courts. It would be improper, however, to make a decision effective during the period allowed for reconsideration if the respondent had no right to appeal to a court. It would be equally improper to allow respondent to have a choice between applying for reconsideration and court review during the same period because of the overlapping jurisdiction between the agency and the court. It is therefore provided that the decision will normally become effective 30 days after its delivery or mailing to respondent [Sec. 11519]. During this 30-day period reconsideration may be granted [Sec. 11521], and only after the decision becomes effective is a petition for review proper [Sec. 11523]. The second policy considered was the necessity of making some decisions effective immediately, or at least sooner than 30 days, in order to prevent a respondent from abusing his license privileges during the period following an adverse decision. To meet this situation it is provided that by special order the agency can shorten the 30 day period and make the decision effective sooner [Sec. 11519]. By this action the agency cuts down or eliminates the time for granting reconsideration, because the decision is subject to court review immediately after it becomes effective and no reconsideration can be ordered by the agency." (Tenth Report, supra, p. 25.) It is obvious that the section provides what the Council says it intended to provide. There is no constitutional right to petition for rehearing, and by thus making it discretionary with the agency as to when the decision should become effective no constitutional rights of appellant were invaded. There was no abuse of discretion in this case in making the decision immediately effective.

The judgment appealed from is affirmed.

BRAY, J., and OGDEN, Justice pro tem., concur.

30 Cal.2d 575

BURUM et al. v. STATE COMPENSATION INS. FUND.

L. A. 19805.

Supreme Court of California.
Sept. 17, 1947.

1. Officers 🔑11

State Insurance Fund which, as employer's insurance carrier paid award of compensation to dependents of deceased employee, could contract with attorneys who had been employed by dependents to bring damage action against third-party tortfeasors for death of employee, to recover amount of fund's lien against any judgment recovered in such damage action for contingent fee of 25 per cent. without violating requirements of civil service, where services contracted for could not be performed competently by attorneys selected under civil service. Gen.Laws, Act 1404; Insurance Code, §§ 11662, 11775, 11783; Labor Code, §§ 3850(b), 3851–3853, 3856; Const. art. 24.

2. Attorney and client 🔑20

Attorneys, who were employed by dependents of deceased employee to bring damage action against third-party tortfeasors for death of employee, and who were employed by State Compensation Insurance Fund, which, as insurance carrier, paid award of compensation to widow and minor children, to recover amount of the Fund's lien against any judgment suffered in damage action, did not represent conflicting interests so as to invalidate attorneys' employment by the Fund.

3. Statutes 🔑225½

A special statute dealing expressly with a particular subject controls and takes priority over a general statute.

4. States 🔑197
Workmen's compensation 🔑1048

State Compensation Insurance Fund is self-operating and of a special unique character and can be sued for attorney's fees of attorneys employed by the Fund to recover the amount of the Fund's lien against a judgment recovered in a damage action against third-party tort-feasors by deceased employee's dependents to whom the Fund as insurance carrier paid an award of compensation, without a previous filing of such claim with the State Board of Control. Pol.Code, §§ 667, 688; Insurance Code, §§ 11771, 11778, 11783.

EDMONDS, J., dissenting.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action to recover attorneys' fees by R. Y. Burum and John Shortridge against the State Compensation Insurance Fund. From a judgment for the defendant, the plaintiffs appeal.

Reversed.

Prior opinion 169 P.2d 256.

R. Y. Burum, of Bakersfield, and John Shortridge, of San Francisco, pro se.

Robert W. Kenny, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

This is an appeal from a judgment for defendant which was entered in consequence of the sustaining of special and general demurrers to plaintiffs' second amended complaint without leave to amend.

Plaintiffs, a firm of attorneys, seek to recover from defendant, State Compensation Insurance Fund, certain attorneys' fees in pursuance of a written contract alleged to have been made between the parties. The trial court ruled adversely to plaintiffs' claim for compensation "on the ground that the Fund has no authority to make the contract sued on in this case." Plaintiffs properly challenge the propriety of that ruling in view of the facts alleged and the law applicable thereto.

From the second amended complaint, it appears that plaintiffs, as attorneys for the widow and three minor children of one E. E. Davis, who was killed in an industrial accident, brought an action for damages against the alleged negligent third parties. The State Compensation Insurance Fund, which was the insurance carrier for Davis' employer, paid the widow, for herself and as guardian ad litem of the three minor children, the sum of $6300 in pursuance of an award of the Industrial Accident Commission. The Fund claimed the right to recover said amount of death benefits "as special damages against [the responsible] third parties, either in a separate suit brought in its own name, or by lien imposed on the judgment in any action brought by the widow on behalf of herself and the minor children." Electing to follow the latter course, the Fund entered into a written contract with plaintiffs for them to represent it in the death action and "to recover the amount of its lien against any judgment obtained or amount paid in settlement of said case" for a contingent fee of twenty-five per cent. As reason for their employment by the Fund, plaintiffs allege that "an action instituted in the Fund's name, as an insurer claiming subrogation, would be likely to encounter prejudice and hostility on the part of a jury, while an action prosecuted in the name of the widow on behalf of herself and of said minor children would be likely to excite a sympathetic consideration of all the evidence on the part of the jury"; that "at the time of negotiation of [said] contract * * * neither the widow nor the Fund knew of the existence of any insurance or property from which a judgment in excess of Five Thousand Dollars ($5,000.00) could be satisfied"; that "the Fund was entitled to payment of Sixty-three Hundred Dollars ($6300.00) before any damages were payable to the widow, and in view of this priority no incentive existed for the widow to continue the prosecution of her action"; that under the contract, an incentive for her attorneys, plaintiffs herein, existed to obtain a judgment and "explore the possibility of discovering additional assets subject to execution, if [they] could look to the Fund as well as to [the] widow for a fee"; and that through the services of her attorneys, "performed simultaneously and incidentally in the interest of the Fund," there would be "a better prospect of obtaining damages on behalf of the Fund" than would be the case if the Fund relied on "the services of attorneys in the civil service employ of [the] Fund."

It is then alleged that plaintiffs "fully performed their part of [the] agreement and obtained judgment for, and actually collected * * * and caused to be paid to the Fund * * * Fifty-eight Hundred Dollars ($5800.00)," of which amount "plaintiffs [are] entitled to receive from the Fund the sum of Fourteen Hundred Fifty Dollars ($1450.00)" under the terms of the contract; that "the services contracted for and performed by plaintiffs * * * were of such a nature that they could not be performed adequately or competently or satisfactorily by an attorney or attorneys selected under the provisions of the Civil Service Act of the State of California [Gen.Laws, Act 1404]"; that "by reason of the selection and employment of plaintiffs by the Fund, it was possible for the Fund to obtain greater, speedier, more satisfactory and more adequate service than it could have obtained by use of any attorneys other than plaintiffs acting as attorneys for the widow and minor children in [the death] action"; that at all times "plaintiffs were actively in charge of the litigation" and "by reason of the investigation they had made, the preparation of pleadings by them, and their familiarity with the facts and the law pertaining to said litigation, and their concurrent representation of the widow and minor children in [the death] action, they were in a position to render adequate, competent, speedy and satisfactory service to the Fund and on the Fund's behalf"; that as a result of plaintiffs' efforts the Fund was reimbursed to the extent above noted; that "the widow and minor children entered into an agreement approved by the Court to pay * * * plaintiffs * * * a percentage of any amounts recovered over and above the amount of the lien of the Fund"; that "because of the facts and under the circumstances above alleged, the Fund could not be adequately represented by one of its attorneys selected under civil service, and consequently [it] employed the plaintiffs, as aforesaid"; and that "plaintiffs demanded * * * from the Fund" their fee but it has been refused and still remains unpaid.

The pivotal question presented by this appeal from a judgment on demurrer is the sufficiency of plaintiffs' allegations to sustain their claim for compensation against the Fund. In support of the judgment, defendant Fund first argues that approval of its contract with plaintiffs would involve violation of article XXIV of the state Constitution, being the so-called Civil Service

Amendment adopted in 1934. This argument accords with the view of the trial court that the Fund was without "authority" to negotiate such independent arrangements for legal services as were performed by plaintiffs. In this connection defendant relies upon the case of State Compensation Insurance Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, 986, 111 A.L.R. 1503, wherein the Fund entered into an agreement with a special attorney calling for him "to act as attorney for [its secretary] Gallagher" in the prosecution of certain federal tax litigation and "to protect the fund" in its correlative interest therein. After the agreement was made the State Controller refused to draw a warrant for the stipulated retainer fee. An action in mandamus ensued. In denying the writ, this court discussed at length the purport of the state civil service system as reflected by the history of the constitutional amendment above mentioned and the statutes enacted relating thereto. Without repeating that discussion, suffice it to say that the civil service provisions were expressly declared to be "comprehensive in their scope" and "to embrace within their terms professional as well as nonprofessional service" performed for the state. Thus, while recognizing that the legal services there in question were "urgent, temporary and require[d] expert knowledge, experience and ability," this court significantly stated, 9 Cal.2d at pages 134, 135, 69 P.2d 989, 111 A.L.R. 1503, that it was "not alleged" in the petition that the "services * * * involved could not be rendered by one selected under the provisions of the Civil Service Act." In line with this pertinent observation, this court continued, 9 Cal.2d at page 135, 69 P.2d at page 989, 111 A.L.R. 1503: "There undoubtedly is a field in which state agencies may enter into contracts with independent contractors. But the true test is, not whether the person is an 'independent contractor' or an 'employee,' but whether the services contracted for, whether temporary or permanent, are of such a nature that they could be performed by one selected under the provisions of civil service. If the services could be so performed, then in our opinion it is mandatory upon such appointing power to proceed in accordance with the provisions of the Constitution and statute above summarized. As already stated, *the petition does not allege that the services here involved could not be performed satisfactorily by an attorney selected under civil service.* The services contracted for are the services of an attorney. Attorneys are included within civil service, and in the absence of a showing to the contrary we must assume that such services could be adequately and competently performed by one selected in accordance with the mandate of the Constitution." (Emphasis added.)

Plaintiffs' second amended complaint, as above reviewed, demonstrates their awareness of the exception noted in the Riley case as ground for removing the contract here in question "from the operation of civil service." Thus, it is alleged that "the services contracted for and performed by plaintiffs * * * were of such a nature that they could not be performed adequately or competently or satisfactorily by an attorney or attorneys selected under the provisions of the Civil Service Act." The force of such allegation stems from the fact that in the conduct of its insurance business the Fund operates on a "fairly competitive" basis with private insurance carriers and has the power to "enter into any contracts or obligations relating to the State Compensation Insurance Fund which are authorized or permitted by law." Ins. Code, secs. 11775, 11783. So pertinent are these statutory provisions in measure of the Fund's rights here. If the employer is insured against Workmen's Compensation liability, the insurer has the same right of action as the employer, or is subrogated to the employer's right. Labor Code, sec. 3850, subd. (b); Ins.Code, sec. 11662. In enforcing its cause of action the insurer may (1) bring suit in its own name (Labor Code, secs. 3851, 3852); (2) join as party plaintiff in the suit previously filed by the employee (Labor Code, sec. 3853); or (3) abstain from suit and claim as a first lien against the entire amount of any judgment recovered by the employee, the amount of expenditures for compensation (Labor Code, sec. 3856).

[1] In the present case, according to the facts pleaded, the Fund elected the third

course of procedure, the lien method of recovery in the death action, as best calculated to assure its recoupment of "expenditures for compensation." By that election, so it is alleged, the Fund avoided any prejudice which might accrue were it to appear before a jury as a party litigant seeking from "third parties" a recovery to reimburse itself against an insurance loss. Moreover, in line with the allegation that the reimbursement claim of the Fund exceeded the amount of known assets from which a judgment against the responsible "third parties" could be satisfied and the consequent priority right of the Fund in the damage recovery, the widow manifestly would have had no incentive to employ attorneys to prosecute the action for the sole benefit of the Fund and at the same time the Fund was without legal right to substitute in such litigation its attorneys or any other attorney selected by civil service examination in the place of the attorneys selected by the widow. But the Fund had a recognized *interest* in the death action by virtue of its claim of a lien upon any judgment that might be obtained therein and, *a fortiori*, it was to the Fund's advantage to have that action continued in pursuance of an approved means of effecting its reimbursement for "expenditures for compensation." Labor Code, sec. 3856. Such claim of lien undoubtedly constituted an interest in the death action as would warrant the Fund's employment of special counsel for its protection, consistent with its broad powers to conduct its insurance business on a "fairly competitive" basis and to take such steps as it should deem proper to keep its losses at a minimum. Cf. State Compensation Insurance Fund v. Riley, supra, 9 Cal.2d 126, 131, 132, 69 P.2d 985, 111 A.L.R. 1503. In so attempting to bring about a recovery in the pending litigation, the Fund was proceeding not on any theory of subrogation to the heirs' right to maintain their damage action (Jacobsen v. Industrial Acc. Comm., 212 Cal. 440, 446, 299 P. 66), but on the premise of safeguarding its legitimate lien interest as created by statute. Merino v. Pacific Coast Borax Company, 124 Cal.App. 336, 344, 12 P.2d 458. Thus, according to plaintiffs' pleading, the Fund contracted for them (1) "to represent it" in the death action as well as (2) "to recover the amount of its lien against any judgment obtained or amount paid in settlement of said case." By such contract of employment, the Fund allegedly undertook to secure representation in litigation vital to the protection of its undisputed interest and to give it actual value. Likewise, in the exercise of its discretion with respect to the performance of its essential business functions, it allegedly deemed provision for plaintiffs, the attorneys for the widow, to share in the Fund's recovery to the extent of a contingent fee of twenty-five per cent would prove an incentive for the discovery of additional assets from which a judgment in the death action could be satisfied, and it elected to proceed on that basis as a matter of efficient handling of its lien claim. By reason of the unique set of facts alleged by plaintiffs, the services which they were required to, and did, perform in accordance with their contractual arrangements with the Fund involved considerably more than "the collection of a lien." Allegedly, as a matter of tactics and in recognition of certain practical considerations affecting its status with reference to the death action (cf. Jacobsen v. Industrial Acc. Comm., supra, 212 Cal. 440, 446, 447, 299 P. 66), the Fund negotiated its contract with plaintiffs in pursuance of one of the approved methods designed to keep its losses at a minimum by reason of compensation paid as part of its insurance business. Labor Code, sec. 3856. Accordingly, the facts pleaded support plaintiffs' allegation that the particular services here in question "could not be performed adequately or competently or satisfactorily" by attorneys selected under civil service; and such pleading is sufficient, on demurrer, to bring plaintiffs' case within the exception above noted in State Compensation Insurance Fund v. Riley, supra, 9 Cal.2d 126, 135, 69 P.2d 985, 111 A.L.R. 1503.

Defendant next challenges "the ethics of employing the widow's attorneys to do the work of recovering the amount of the Fund's lien against her judgment." Such arrangement, it is argued, placed plaintiffs "in the position of representing adverse interests" and, as supporting authority, Anderson v. Eaton, 211 Cal. 113, 293 P. 788, 789, is cited. But that case is wholly distinguishable upon its facts. There the plaintiff, suing for attorney's fees, had undertaken to represent defendant, the mother of a deceased employee, in an action against a third party tort-feasor at a time when plaintiff was also acting as attorney for the insurance carrier in resisting defendant's claim against the insurance carrier before the Industrial Accident Commission. Plaintiff represented to defendant that the insurance carrier "would not contest her claim before the Industrial Accident Commission" and "advised the defendant not to employ an attorney to represent her at the hearings before the Industrial Accident Commission," and "not to divulge that he was representing her in her claim" against the third party tort-feasor. Upon such representations and advice, defendant signed a contract employing plaintiff "on a one-third contingent fee basis" to "press her claim" against the third party tort-feasor. Thereafter, and while under employment by both defendant and the insurance carrier, plaintiff appeared at the several hearings before the Industrial Accident Commission on behalf of the insurance carrier and "while admitting liability, apparently contested or questioned defendant's claim as to the degree of dependency. As a result of these hearings, the defendant received an award of $309, although plaintiff, prior to his employment by defendant, had approximated the claim against the employer to be worth $1,500." With that factual situation before it, the trial court denied relief upon findings that the contract with defendant "had been procured by fraud" on the part of plaintiff, and "that it was against public policy and void." The judgment for defendant was affirmed. In so deciding, this court found it unnecessary to pass upon the sufficiency of the evidence to sustain the finding of fraud as it declared, 211 Cal. at page 116, 293 P. at page 789, that "as found by the court below, the contract sued on is clearly against public policy and void."

While in its consideration of the Anderson v. Eaton case, this court did refer to a possible conflict of interests in the event of an offer of settlement of the claims of defendant and the insurance carrier against the third party tort-feasor, the decision was grounded upon the actual conflict of interests between defendant and the insurance carrier in the pending litigation before the Industrial Accident Commission. Thus it was said, 211 Cal. at pages 116 and 117, 293 P. at page 790: "While the defendant had knowledge that plaintiff was the legal representative of the insurance carrier of the gas company and received an annual retainer therefor, plaintiff failed to explain to her wherein the two employments were adverse. As attorney for the defendant, plaintiff could, and probably did, secure certain confidential information concerning the degree of her dependency upon her deceased son. On the other hand, his representation of the gas company's compensation insurance carrier required him to contest defendant's claim before the Industrial Accident Commission, at least upon the issue of dependency. His dual employment thus placed him in a position to use this confidential information to the defendant's detriment. As already intimated, it is immaterial whether or not plaintiff, as counsel for the insurance carrier, actually availed himself before the commission of information received from the defendant while acting as her attorney. The impropriety of the dual employment is readily apparent." But the cited case does not hold that a contract of employment whereby an attorney undertakes to represent the dependent of a deceased employee in an action against a third party tort-feasor, while also representing the compensation insurance carrier of the employer, is necessarily and under all circumstances against public policy and void.

[2] In the present case, the litigation of the compensation claim had been entirely completed, the award had been paid, and plaintiffs had already brought the action on behalf of the widow before they entered into their contract with the Fund looking toward the recovery of its lien against any judgment obtained or settlement made. Plaintiffs' pleading shows that "it was to the best advantage of all parties that one firm of attorneys should represent both the widow and minor children and the Fund," and that the widow and minor children en-

tered into a written contingent fee contract with plaintiffs, with the approval of the court, after a full disclosure of the factors motivating plaintiffs' employment by the Fund. Plaintiffs' pleading does not show any actual or undisclosed adverse interests, or that any advantage was taken of any of the parties, or that plaintiffs were "required to choose between conflicting duties" or "to reconcile conflicting interests" rather than "enforce to their full extent" the rights of all parties. Anderson v. Eaton, supra, 211 Cal. 113, 116, 293 P. 788. Apparently the only possible conflict of interests between the widow and the Fund which could have arisen might have developed in the event of an offer of settlement, but such *mere possibility* does not necessarily invalidate plaintiffs' contract of employment. Thornton on Attorneys at Law, Vol. I, secs. 174 et seq., pp. 307 et seq., and cases cited. As was said in the cited text, section 176, page 314: "The question as to whether there is any inconsistency in representing particular interests must depend largely upon the facts presented by each case." Under the facts presented by plaintiffs' complaint here, we are satisfied that no such inconsistency appears and that the contract should not be declared to be against public policy and void.

Defendant finally raises the matter of plaintiffs' failure to allege that they had filed a claim with the State Board of Control pursuant to sections 667 and 688 of the Political Code; and contends, in reliance upon Bekins Van & Storage Company v. State of California, 135 Cal.App. 738, 28 P.2d 61, 62, that the filing of such claim by plaintiffs was a condition precedent before a court could acquire jurisdiction to entertain the cause for trial. But the cited case is not in point, for there the claim was "against the state" while here the claim is "against the Fund," a "self-supporting" and independent "agency of the state" as declared by statute. Cf. Gilmore v. State Compensation Insurance Fund, 23 Cal.App. 2d 325, 329, 330, 73 P.2d 640.

At the time this action was commenced, section 11783 of the Insurance Code provided that "[T]he [Industrial Accident] commission may, on behalf of the fund and in the [fund's] name * * * sue and be sued in all actions arising out of any act or omission in connection with the fund, or in connection with its business or affairs." (Stats.1935, ch. 145, p. 725; amended in 1945, Stats.1945, ch. 1431, p. 2711, in a manner immaterial to this decision.) Section 11771 expressly precludes any liability against the state "beyond the assets of the [fund]" for the payment of any such claim as is here involved. Section 11782 declares that "all business and affairs of the fund shall be conducted in [its] name," and section 11774 provides that "[its] assets * * * shall be applicable to the payment of losses sustained on account of insurance and to the payment of the salaries and other expenses charged against it." Section 11778 gives general authority to "the fund [to] transact workmen's compensation" business "to the same extent as any other insurer."

[3, 4] Sections 667 and 688 of the Political Code are general in their application to the presentation of claims against the state. The Workmen's Compensation law, the Insurance Code and the Labor Code are special statutes. In Brill v. County of Los Angeles, 16 Cal.2d 726, 732, 108 P.2d 443, 446, it was held that "a special statute dealing expressly with a particular subject controls and takes priority over a general statute." See, also, Birch v. County of Orange, 186 Cal. 736, 743-745, 200 P. 647. In line with these observations, the conclusion is inescapable that the entire framework of the Fund—its organization, its powers, its duties, and its obligations—shows that it was designed to be self-operating, and of a special and unique character; and as such, it may be sued, upon the claim here presented, without a previous filing of such claim with the State Board of Control.

From what has been said, it follows that the trial court erred in sustaining the demurrers to plaintiffs' second amended complaint without leave to amend.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, and TRAYNOR, JJ., concur.

EDMONDS, Justice (dissenting).

In my opinion, assuming that plaintiff has pleaded sufficient facts to avoid, as against a demurrer, the bar of the Civil Service Act, the complaint does not state a cause of action because its allegations show that the contract sued upon is contrary to public policy and void.

The attorneys plead, as the basis for the recovery of fees, that, at the time the contract was made, neither the widow of Davis, nor the Fund, knew of any assets of the tort-feasor from which a judgment in excess of the lien for compensation could be satisfied. As further justification for their employment, it is charged "* * * that an action instituted in the Fund's name, as an insurer claiming subrogation, would be likely to encounter prejudice and hostility on the part of a jury, while an action prosecuted in the name of the widow on behalf of said minor children would be likely to excite a symapthetic consideration of all the evidence on the part of the jury. * * *" In other words, the allegations of the complaint, in effect, are that the Fund is suing in the name of the widow.

At one time, the Workmen's Compensation Act allowed subrogation, but since the amendment of 1927, "in lieu thereof, the employer is granted the right to sue or to acquire a lien for his expenditures in the event the employee sues and recovers judgment. * * * [Labor Code secs. 3852, 3854, 3856] The purpose of the change in the substantive rights of the employer and employee in such cases does not definitely appear. Counsel for the respondent corporation suggests that it was to remedy a certain abuse wherein subrogated employer plaintiffs had compromised cases for just enough to satisfy their claims and leave the employee without satisfaction of his just claim for additional damages." Jacobsen v. Industrial Acc. Comm., 212 Cal. 440, 446, 299 P. 66, 68. The effect of the majority opinion is to allow an insurance carrier, under the guise of "protecting its lien," to sue in the employee's name. By this simple device the door is again opened to the abuses mentioned in the Jacobsen case.

There is broad opportunity for taking advantage of an employee under the circumstances shown by the present record. Where an attorney is hired to represent both the insurance carrier and employee in the suit against the tort feasor, he may be required to choose between the conflicting interests of his two clients. If the suit goes to trial, the injured workman may obtain a judgment for much more than the amount of compensation paid to him under the provisions of the Labor Code. There is also the possibility of an adverse judgment, in which event the insurance carrier would obtain no recovery for compensation by it. Counsel, "though in good faith intending to discharge his obligation as * * * [the injured party's] attorney, would be in such a position as might have unconsciously caused him to accept an offer of compromise or settlement of her claim * * * rather than run the risk of bringing an action and jeopardizing" the carrier's rights. Anderson v. Eaton, 211 Cal. 113, 117, 293 P. 788, 790. Cf. Lessing v. Gibbons, 6 Cal.App.2d 598, at page 604, 45 P.2d 258.

In Anderson v. Eaton, supra, as in the present case, the widow of the deceased employee was represented by counsel also employed by the carrier. She had full knowledge of his dual employment. After she discharged him and settled with the tort feasor, the attorney sued her for his fee. The court held that the contract was void as against public policy because of the conflict of interest between the two clients. Although in that case there was evidence as to fraudulent representations by the attorney and here the plaintiffs' good faith is not questioned, the ruling does not rest upon the ground of the representations of the attorney.

The distinction made in the majority opinion overlooks the vice inherent in such contracts. Although in the representation of more that one party who may benefit by the litigation, an attorney may not be called upon to choose between the interests of one of them in preference to that of another, public policy bars him from serving persons whose interests may at any time become adverse. "By virtue of this rule," it was said in the Anderson case, "an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed, not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."

The facts pleaded in the present case show a cause of action based upon a contract which public policy forbids. A fundamental rule of the legal profession is that "a lawyer can under no conceivable circumstances recover for services rendered in the same suit to parties having opposing interests." Strong v. International Bldg., Loan & Investment Union, 183 Ill. 97, 102, 55 N.E. 675, 676, 47 L.R.A. 792.

For these reasons, I would affirm the judgment.

30 Cal.2d 589

PEOPLE v. GREER.

Cr. 4792.

Supreme Court of California, in Bank.
Sept. 17, 1947.

1. Infants 🔑20
Rape 🔑52(1)

Evidence sustained conviction of statutory rape and of lewd and lascivious acts against a child under 14 years of age. Pen. Code, § 261, subd. 1, § 288.

2. Infants 🔑20
Rape 🔑57(1)

Where testimony of prosecutrix in prosecution for statutory rape and lewd and lascivious acts against a child under 14 years of age, though contradicted, was neither incredible nor completely overwhelmed, any minor inconsistencies or contradictions were for jury. Pen. Code, § 261, subd. 1, § 288.

3. Criminal law 🔑782(15)

Instruction to jury respecting weight of evidence of alibi, was not objectionable as instructing jury to disregard evidence of alibi if satisfied of defendant's guilt from other evidence.

4. Criminal law 🔑739(4)

If, as a matter of law, previous prosecution could not constitute double jeopardy, trial court need not submit the question to jury for a finding upon such plea.

5. Criminal law 🔑185

Disagreement of the jury does not preclude a new trial for the same offense on ground that defendant would be thus placed in double jeopardy. Pen. Code, § 1023; Const. art. 1, § 13.

6. Criminal law 🔑199

Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily "included offense" within statute making conviction or acquittal a bar to subsequent prosecution for included offense. Pen. Code, § 1023.

See Words and Phrases, Permanent Edition, for all other definitions of "Included Offense".

7. Criminal law 🔑193½

Under statute making conviction or acquittal a bar to subsequent prosecution for included offense, acquittal or conviction of offense included in greater offense bars subsequent prosecution for greater offense. Pen. Code, § 1023.

8. Criminal law 🔑193½, 200(1)
Infants 🔑20

The "offense" of contributing to the delinquency of a minor is necessarily "included" in the offenses of statutory rape and lewd and lascivious conduct against a child under 14 years of age within rule that acquittal or conviction of offense included in greater offense bars subsequent prosecution for greater offense. Pen. Code, § 261, subd. 1, §§ 288, 1023; Welfare and Institutions Code, § 702.

9. Criminal law 🔑193½
Indictment and information 🔑191, 191(8)

Under indictment or information charging statutory rape and lewd and lascivious conduct, defendant may be convicted of offense of contributing to delinquency of a minor without any express charge of such offense and such conviction would necessarily constitute aquittal of the greater offenses of statutory rape and lewd and lascivious conduct. Pen. Code, § 261, subd. 1, §§ 288, 1023; Welfare and Institutions Code, § 702.

10. Criminal law ⚷199

Conviction on each count of indictment charging statutory rape, and lewd and lascivious conduct and contributing to the delinquency of a minor respectively, all based on the same acts would necessitate reversal of conviction on lesser offense of contributing to delinquency of a minor which is included in the other offenses. Pen. Code, § 261, subd. 1, §§ 288, 1023; Welfare and Institutions Code, § 702.

11. Criminal law ⚷193½

The doctrine that acquittal or conviction of offense included in greater offense bars subsequent prosecution for greater offense is applicable only where the same act is relied upon for more than one conviction. Pen. Code, § 1023.

12. Criminal law ⚷739(4)

Where offenses are necessarily included, whether the acts relied upon are the same so that acquittal or conviction of one offense will bar subsequent prosecution for the other is a question for jury, unless as a matter of law the acts are not divisible. Pen. Code, § 1023.

13. Criminal law ⚷200(7)

Conviction of contributing to delinquency of a minor would bar subsequent prosecution for statutory rape if touching of prosecutrix' body which allegedly contributed to her delinquency was essentially such touching as would be considered a part of the rape itself, but if it was clearly not a part of the rape but a part of a separate course of conduct, it could be held a separate offense and not a bar to prosecution for statutory rape. Pen. Code, § 261, subd. 1, § 1023; Welfare and Institutions Code, § 702.

14. Criminal law ⚷295

Refusal to permit defendant on trial for statutory rape and lewd and lascivious conduct to prove previous conviction of contributing to delinquency of a minor was error, since if the same acts were involved in each charge, previous conviction for included offense would bar prosecution for statutory rape and lewd and lascivious conduct. Pen. Code, § 261, subd. 1, §§ 288, 1023; Welfare and Institutions Code, § 702.

15. Criminal law ⚷200(7)

Statutory rape committed upon a child under 14 years of age is punishable as lewd and lascivious acts against a child, but defendant cannot be punished twice for the same act as constituting both statutory rape and lewd and lascivious conduct. Pen. Code, § 261, subd. 1, §§ 288, 654.

16. Statutes ⚷241(2)

Doubts as to the meaning of a statute are resolved against a construction which would result in double punishment for the same act. Pen.Code, § 654.

17. Criminal law ⚷200(7)

Where charges of statutory rape and lewd and lascivious conduct against a child under 14 years of age were based upon the same acts defendant could not be convicted on both charges, where except for the rape itself, the only act of which prosecutrix accused defendant was the forcible removal of her underclothing immediately preceding the rape. Pen. Code, § 261, subd. 1, §§ 288, 654.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Albert R. Greer was convicted of statutory rape and of lewd and lascivious acts against a child under 14 years of age, and he appeals.

Judgment of conviction and order denying a new trial reversed and defendant remanded for new trial in conformity with opinion.

Prior opinion, 177 P.2d 990.

Morris Oppenheim, of San Francisco, for appellant.

Robert W. Kenny, of San Francisco, and Fred N. Howser, Atty. Gen., Carl W. Wynkoop and Clarence A. Linn, Deputy Attys. Gen., Edmund G. Brown, Dist. Atty., and Vincent J. Mullins, Asst. Dist. Atty., both of San Francisco, for respondent.

TRAYNOR, Justice.

Defendant was charged in an amended information with violations of Penal Code sections 261(1) (statutory rape) and 288 (lewd and lascivious conduct). He pleaded not guilty to both counts, but the jury brought in verdicts of guilty and recommended that defendant serve one year in the county jail for the rape.

Defendant appeals on the grounds that the evidence is insufficient to support the verdict, that the court erroneously instructed the jury as to the defense of alibi, that he was subjected to double jeopardy, and that under section 288 he cannot be convicted of both statutory rape and lewd and lascivious conduct.

Sufficiency of the Evidence.

The two counts in the amended information refer to a single act of intercourse forced by defendant upon his stepdaughter, a minor 13 years of age. The first count alleges that on November 1, 1945, defendant accomplished an act of intercourse with the prosecutrix, who was under the age of 18 years; the second count alleges that on November 1, 1945, he committed certain acts upon the body of the same child who was under the age of 14 years.

[1] The evidence against defendant, though not overwhelming, was sufficient to support a verdict of guilty on both counts. According to the prosecutrix, defendant compelled her to submit to intercourse on many occasions during a period beginning about August 25, 1945 and ending about November 1, 1945. Defendant threatened to kill her if she exposed him. Some time in September, the prosecutrix revealed the facts to a friend of her mother, as well as to a priest and to a nun. Subsequently she complained again to the friend who, with prosecutrix, recounted the entire affair to the prosecutrix' mother.

The offenses charged in the amended information occurred at about noon on November 1st. The prosecutrix's mother testified that she and defendant left the house shortly before noon on that day and that he returned alone. She found him sleeping when she returned at about 3:00 p.m. and told him to go to work. Defendant, on the other hand, testified that on November 1st he left the house at about 9:00 a.m. on an errand concerning a washing machine and that a friend helped him bring the washing machine home at about 11:15 a.m. Upon returning home he received a call to go to work, and he left the house with his wife at about 11:45. Defendant testified that he left his employer's place of business at about 2:00 p.m. and was in Gilroy by 3:30. He did not return that day.

Defendant's employer testified that he did not recall when defendant checked out on November 1st, but his log book showed that defendant could not have done so before 3:00 p.m. Defendant's friend, who is supposed to have helped him with the washing machine, was not certain of the date and testified in a previous trial that it was around November 16th. The friend of the family, prosecutrix's confidant, corroborated much of the testimony of the prosecutrix.

The medical testimony showed that the prosecutrix's hymen was intact but considerably stretched. The examining physician for the girls of the Juvenile Court testified that the prosecutrix's hymen was "very stretchable." This witness had made approximately 5,000 vaginal examinations within the two years preceding the trial, and she stated that the prosecutrix's condition was uncommon in girls of that age. She was of the opinion that the prosecutrix could have had intercourse, with slight penetration, without a rupture of her hymen. She recognized the possibility of masturbation, but when asked if it was her opinion "that this could have been caused by any such thing as masturbation" she replied, "That was not my opinion."

The prosecutrix's attending physician testified that he examined her in February of 1945 and that she then had a normal and virginal hymen; but when he examined her in November, her hymen was stretched, and he gave her "a normal examination you would make on a adult woman who was non-virginal." From his examination, the witness drew the conclusion "that some foreign body had penetrated the vagina through the hymen some time between February 16th and November 22nd last year." He stated on cross-examination that "it could have been the fingers." The medical testimony established that it was possible for defendant to commit the acts complained of without rupturing the hymen and that the prosecutrix's hymen was not that of a normal 13-year old child.

[2] We are unable to agree with defendant's contention that "the testimony of the prosecutrix is so palpably false and incredible that it cannot form a basis for a verdict of guilty." Her failure to complain to her mother immediately after the alleged offense is stressed by defendant; but the record shows that she sought counsel from others on several occasions before any one advised her to tell her story to her mother. The medical testimony, according to defendant, is destructive of her story of the duration and vigor of defendant's conduct; but the prosecutrix, under the circumstances, could not be expected to remember every detail, and her account was not substantially shaken on cross-examination. Moreover, the defendant's version of the affair was rendered exceedingly doubtful by the failure of the trucking company records to support his alibi. This was, therefore, a case in which the testimony of the prosecutrix, though contradicted, was neither incredible nor completely overwhelmed; and any minor inconsistencies or contradictions were to be resolved by the jury. People v. Huston, 21 Cal.2d 690, 693, 694, 134 P.2d 758; People v. Fremont, 47 Cal.App.2d 341, 349, 117 P.2d 891.

The Instructions Regarding Alibi.

The jurors were instructed upon the subject of alibi as follows: "I instruct you that the evidence of the defendant establishing an alibi tending to show that the defendant was not present at the actual place where the offense or offenses charged in the information were supposed to have been committed, should be weighed as any other fact established, and that it might be sufficient to create a reasonable doubt as to the guilt of the defendant. *However, if you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt of the offense or offenses stated in the information, it is your duty to convict the defendant notwithstanding such evidence of an alibi.*

"I instruct you that the defendant is not required to prove by a preponderance of the evidence that he was not present where the offense is alleged to have been committed, but that he is entitled to an acquittal if the testimony tends to establish an alibi raising a doubt in your minds that he was present at the place at which the crime charged is alleged to have been [committed]." [Italics added.]

[3] Defendant contends that the words italicized above vitiated the favorable parts of the instruction that preceded and followed them on the ground that they instructed the jury to disregard the evidence tending to prove an alibi if the jury were satisfied of the guilt of the accused from *other* evidence. We find no such statement or implication in the instruction. The members of the jury were told that they must weigh the evidence of alibi as they would any other evidence. The jurors were further instructed that if they were convinced beyond a reasonable doubt of defendant's guilt the evidence of alibi would be of no avail. The effect of the instruction was that their verdict was to be based upon *all* the evidence, not merely upon *other* evidence, particularly in view of the court's succeeding words that if the testimony directed at establishing an alibi was sufficient to raise a doubt in the jurors' minds that defendant was present at the place at which the crime is alleged to have been committed, he would be entitled to an acquittal.

Double Jeopardy and Necessarily Included Offenses.

Defendant contends that the trial court erred in its rulings regarding double jeopardy. Defendant was subjected to a previous trial in which he was charged not only with the present offenses but with contributing to the delinquency of a minor (Welf. & Inst.Code, § 702). In his first trial , defendant was found guilty of violating section 702, but the jury disagreed as to the counts now before this court.

In the present trial defendant pleaded double jeopardy and offered to prove both the verdict finding him guilty of contributing to the delinquency of a minor and the disagreement of the jury as to the other two counts. He contended that he had been acquitted of the present offenses and had been once in jeopardy. The trial court refused the offer of proof.[1]

[4] Defendant maintains that the trial court's refusal to permit him to offer evidence on the issue of double jeopardy, and the consequent failure of the jury to make a finding upon that special plea, constituted reversible error regardless of the merits of his plea. He relies upon several early cases in which this court held that the mere failure of the jury to make a finding upon a plea of double jeopardy constituted a ground for reversal. People v. Tucker, 115 Cal. 337, 338, 47 P. 111; People v. Hamberg, 84 Cal. 468, 473, 24 P. 298; People v. Fuqua, 61 Cal. 377, 378; People v. Helbing, 59 Cal. 567; People v. Kinsey, 51 Cal. 278, 279. The strict rule expressed in the foregoing cases, however, has been modified by subsequent cases. As the rule now stands, the plea of double jeopardy does not necessarily require a finding by the jury but may require a conclusion of law by the trial court. People v. Newell, 192 Cal. 659, 668, 221 P. 622; In re Begerow, 136 Cal. 293, 297, 68 P. 773, 56 L.R.A. 528; People v. Ammerman, 118 Cal. 23, 28, 50 P. 15; People v. Grace, 88 Cal.App. 222, 232, 263 P. 306; People v. Frank, 75 Cal.App. 74, 81, 241 P. 924. If, as a matter of law, the previous prosecution could not constitute double jeopardy, the trial court is not required to submit the question to the jury for a finding upon that plea. People v. Wilson, 193 Cal. 512, 515, 226 P. 5; People v. McNeer, 8 Cal.App.2d 676, 683, 47 P.2d 813; People v. Brannon, 70 Cal.App. 225, 236, 233 P. 88.

[5] We must therefore determine whether the trial court erred in refusing to permit proof of the previous prosecution. Defendant contends that the disagreement of the jury on the two counts for which he is now being tried constitutes double jeopardy. It is well settled, however, that disagreement of the jury does not preclude a new trial for the same offenses. People v. Greene, 100 Cal. 140, 142, 34 P. 630; People v. James, 97 Cal. 400, 403, 32 P. 317. On the other hand, defendant's previous conviction of contributing to the delinquency of a minor presents the question whether that offense is necessarily included in the offenses defined in sections 261(1) and 288.

[6] Section 1023 of the Penal Code provides that "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, *or for an offense necessarily included therein,* of which he might have been convicted under that indictment or information." (Italics added.) The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. People v. Krupa, 64 Cal.App.2d 592, 598, 149 P.2d 416.[2] Thus, a prosecution for battery cannot be followed by a prosecution for assault based upon the same acts. An assault is a necessary element of battery, and it is im-

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[1] The offer of proof is before this court on a settled statement signed by the trial judge. There was considerable controversy as to whether the statement was settled in accord with the Rules on Appeal and was properly part of the record. The Attorney-General has now stipulated, however, that the statement should be considered as properly before this court. Defendant, on the other hand, objects to the mention of the section 702 offense, contending that he merely offered to prove double jeopardy and was denied that opportunity. The settled statement upon which he relies clearly states, however, that he offered to prove a conviction under section 702.

[2] See Official Draft on Double Jeopardy, Administration of the Criminal Law, American Law Institute. Thirty-five state constitutions, and the Constitution of the United States, contain a double jeopardy provision in substantially the same words as art. I, § 13 of the California Constitution: "No person shall be twice put in jeopardy for the same offense * * *." (Official Draft, p. 7.) The Institute defines "same offense" as follows: "Prosecutions are for the same offense when they are for violations of the same provision of the criminal law and when the facts on which they are based are the same." (Official Draft, § 5.) The doctrine of double jeopardy is thus strictly de-

possible to commit battery without assaulting the victim. The assault, to adopt the statutory language, is "necessarily included therein." People v. McDaniels, 137 Cal. 192, 194, 69 P. 1006, 59 L.R.A. 578, 92 Am. St.Rep. 81.

[7] Although section 1023 refers to a situation where the prosecution for the greater offense is first in time, there is no such limitation in the cases. If the defendant is tried first for assault and later for battery, the prosecution for the included offense bars the subsequent prosecution for the greater offense. People v. McDaniels, supra, 137 Cal. at page 195, 69 P. 1006, 59 L.R.A. 578, 92 Am.St.Rep. 81; People v. Defoor, 100 Cal. 150, 154, 34 P. 642; People v. Ny Sam Chung, 94 Cal. 304, 306, 29 P. 642, 28 Am.St.Rep. 129; see, Official Draft on Double Jeopardy, supra, § 17; 1 Bishop's Criminal Law (9th Ed.) § 1057; 2 Freeman On Judgments (5th Ed.) § 559. "A conviction of the lesser is held to be a bar to prosecution for the greater on the theory that to convict of the greater would be to convict twice of the lesser." People v. Krupa, supra, 64 Cal.App.2d at page 598, 149 P.2d at page 420. If this were not the rule, section 1023 could be vitiated by the simple device of beginning with a prosecution of the lesser offense and proceeding up the scale.

[8] In the light of this rule, the error of the trial court in this case is apparent. Statutory rape (section 261(1)) and lewd and lascivious conduct (section 288) are offenses against minors under 18 and 14 years of age respectively, whereas section 702 protects minors under 21. Consequently, the age groups covered by sections 261 (1) and 288 of the Penal Code are necessarily included within the age group covered by section 702 of the Welfare and Institutions Code. It is inconceivable that the acts described in sections 261(1) and 288 would not contribute to the delinquency of a minor. See, Rodriguez v. Superior Court, 27 Cal.2d 500, 502, 165 P.2d 1; People v. Tenner, 67 Cal.App.2d 360, 366, 154 P.2d 9; People v. Krupa, supra, 64 Cal. App.2d at page 601, 149 P.2d 416. Since every violation of sections 261(1) and 288 is also a violation of section 702, the offense defined in the latter is an offense necessarily included in the offenses defined in sections 261(1) and 288. People v. Lopez, 46 Cal.App.2d 857, 858, 117 P.2d 10.

Respondent contends, however, that all three of the offenses involved herein contain different elements. It is true, that each offense is stated differently in the codes and that defendant could have contributed to the delinquency of a minor without committing statutory rape or a lewd and lascivious act. Rodriguez v. Superior Court, supra, 27 Cal.2d at page 502, 165 P.2d 1. Nevertheless, the converse is not true. We are holding, not that these offenses are identical, but that every violation of sections 261(1) and 288 necessarily constitutes a violation of section 702 and that therefore the offense defined in section 702 is an offense necessarily included in the offenses defined in sections 261(1) and 288.

[9] In the first trial, therefore, it was not necessary for the district attorney to charge a violation of section 702 to obtain a conviction of defendant for committing that offense. He could have charged statutory rape and lewd and lascivious conduct, and the jury, under proper instructions, could have returned a verdict of guilty of contributing to the delinquency of a minor. People v. Lopez, supra, 46 Cal.App.2d at page 858, 117 P.2d 10. Had the jury done so, defendant would necessarily have been acquitted of the greater offenses. People v. McFarlane, 138 Cal. 481, 484-486, 71 P. 568, 72 P. 48, 61 L.R.A. 245; People v. Muhlner, 115 Cal. 303, 307, 47 P. 128; see, 1 Bishop's Criminal Law (9th Ed.) § 1056; 2 Freeman on Judgments (5th Ed.) § 559. Instead, he is now convicted of both the included and the greater offenses. He has been subjected to more than an additional

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fined. The Institute nevertheless retains the doctrine of included offenses, but not as double jeopardy. "The scheme of this chapter is to confine the meaning of 'same offense' to its one and true meaning, and then to prohibit in other sections second prosecutions where in sound policy the defendant should not be subjected to a second prosecution, even though it is not for the 'same offense.'" (Official Draft, pp. 10, 11; see, also, §§ 16, 17.)

trial. The trial court has ordered that he serve overlapping sentences, for he has already been imprisoned for contributing to the delinquency of a minor, and his present sentence runs concurrently with his previous one only as to time not yet served. Moreover, his several convictions would place him at a disadvantage when he sought parole.

[10] The prosecution cannot avoid the consequences of a conviction of a necessarily included offense by charging the included offense in a separate count, on the theory that a conviction under such circumstances constitutes a conviction of a separate offense. Had the jury been properly charged, there would have been no disagreement as to the greater offenses. The jurors would have made their choice. If the jury had erroneously convicted defendant of all three offenses in the same trial, it would have been necessary to reverse the conviction on the count involving the lesser offense. People v. Degnen, 70 Cal.App. 567, 578, 234 P. 129. The form of pleading cannot assume such importance that it will permit defendant to be convicted of both the included and the greater offense.

Respondent relies upon Rodriguez v. Superior Court, 27 Cal.2d 500, 165 P.2d 1; People v. Bevans, 19 Cal.App.2d 288, 65 P.2d 92; and People v. Lett, 69 Cal.App.2d 665, 160 P.2d 112, as holding that defendant can be convicted under each code section, even though the crimes involved a single episode. The Rodriguez case held that the jury's verdicts acquitting defendant of rape and convicting him of violating section 702 did not constitute inconsistent verdicts. The decision was based upon Penal Code section 954, which provides that "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." Accordingly, section 954 provides that verdicts may be sustained, even if they are inconsistent in fact. People v. Codina, 30 Cal.2d 356, 181 P.2d 881; People v. Amick, 20 Cal.2d 247, 252, 125 P.2d 25; People v. Dreyer, 71 Cal.App.2d 181, 193, 162 P.2d 468. In the Rodriguez case, however, this court stated that the verdicts were not inconsistent in fact, for even though "acts constituting statutory rape or attempted rape may also constitute a violation of section 702, *since those acts by their very nature would contribute to the delinquency of the minor,* the converse is not true." Rodriguez v. Superior Court, supra, 27 Cal.2d at page 502, 165 P.2d at page 2. Italics added. Far from authorizing a conviction under both sections 702 and 261(1) for the same act, therefore, the Rodriguez case plainly recognized that a section 702 offense was an included offense.

In People v. Bevans, supra, the defendant was charged with violations of sections 288 and 702 and convicted of both. The defendant contended that the single act complained of served as the basis for both offenses. The court found that a separate act served as the basis for each offense (Supra, 19 Cal.App.2d at pages 290, 291, 65 P.2d 92), but also declared that the offense defined in section 702 is not included in the offense defined in section 288. (Supra, 19 Cal.App.2d at page 290, 65 P.2d 92.) People v. Lett, supra, was similar to the Bevans case. There, too, the court found separate acts for each offense but repeated the dictum of the Bevans case that the offense defined in section 702 is not an included offense. (Supra, 69 Cal.App.2d at page 667, 160 P.2d 112.) These two cases are therefore disapproved insofar as they state that section 288 could be violated without necessarily violating section 702.

[11] Although the offense of contributing to the delinquency of a minor is necessarily included in the offenses defined in sections 261(1) and 288 of the Penal Code, defendant could be convicted of all three offenses if separate acts served as the basis of each count. Indeed, defendant can be convicted more than once under the same statute, so long as he is prosecuted for separate acts. The doctrine of included offenses is applicable only when the same act is relied upon for more than one conviction. It was therefore necessary to determine whether the acts that served as the basis of the count charging a violation of section 702 were the same as those

charged in the other counts. Since the trial court refused to allow proof of the identity of the acts, the jury was precluded from deciding the issue. We cannot say, given the present state of the record,[3] that the acts described in the first information are the same as those described in the amended information that is the subject of the present prosecution.

[12, 13] If offenses are necessarily included, the question whether the acts are the same is a question for the jury, unless as a matter of law the acts are not divisible. People v. Stephens, 79 Cal. 428, 432, 21 P. 856, 4 L.R.A. 845. The divisibility of acts in cases involving sex offenses is not easily susceptible of exact definition. The cases show no uniformity in this field, and there are many instances of artificial distinctions. The rule can be set down for the guidance of the trial court in the present case, however, that if the touching of the prosecutrix's body charged in the first information was essentially such touching as would be considered a part of the rape itself, it could not serve as a basis for a separate conviction. If, on the other hand, it was clearly not a part of the rape, but a part of a separate course of conduct, it could be held a separate offense. This rule follows from the doctrine that no person shall be convicted of both an included and a greater offense; otherwise that doctrine might be subverted by a technical fragmentation of acts having no realistic basis in common experience.

[14] The trial court erred, therefore, in refusing to permit defendant to prove his previous conviction of contributing to the delinquency of a minor. Since statutory rape, and lewd and lascivious conduct, cannot be committed without necessarily contributing to the delinquency of a minor, defendant had the right to prove that the same acts were involved in each charge. If he proves that the acts were the same, the present prosecution must be dismissed.

Can Defendant be Convicted of both Lewd and Lascivious Conduct and Statutory Rape?

Defendant contends also that the crime of lewd and lascivious conduct "includes" the crime of statutory rape. It is obvious that the necessary elements of lewd and lascivious conduct could be stated without stating the necessary elements of statutory rape. Defendant's position is based, however, not upon the rules governing necessarily included offenses, but upon the wording of section 288 and upon its legislative history.

Before 1937, section 288 provided: "Any person who shall wilfully and lewdly commit any lewd or lascivious act *other than the acts constituting other crimes provided for in part one of this code* upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison not less than one year." (Stats., 1933, p. 1028. Italics added.)

This statute made criminal certain acts not prohibited by other statutes, even though they were generally regarded as offensive. The wording of the statute proved vexing, however, for defendants convicted under section 288 often contended that the prosecution had proved, if anything, acts constituting other crimes provided for in part one of the code, e. g., rape, attempted rape or sodomy. Since those crimes were listed in part one of the code, they could not be used for convictions under section 288. The appellate courts usually held, however, that although the acts complained of might constitute other crimes, they could also be construed to be violations of section 288, since the jury might find a different intent or might believe only so much of the prosecuting witness's story as would support a conviction under section 288. In certain cases, the appellate courts found separate acts sufficient to charge defendant with a violation of section 288. Nevertheless it was clear from the statute that if the acts complained of constituted other crimes provided for in part one of the code, those acts could not be punished under section 288. Accordingly, this defense was repeatedly urged on appeal.[4]

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[3] The first information is before this court by stipulation of the parties. The section 702 count merely states that defendant, on November 1, 1945, "did willfully, unlawfully and lewdly touch the bare flesh near the private parts of * * * [prosecutrix] who was then and there a female child under the age of twenty one years * * *."

As a consequence of the wording of section 288 before 1937, rape and attempted rape, among other offenses, committed upon the body of a 13-year old child, carried a lesser penalty than the mere touching, with the specified intent, of the body of the child. See, People v. Barnett, 99 Cal.App. 409, 413, 278 P. 885. This incongruity presumably resulted from the wish of the Legislature to avoid two convictions for the same act.

In 1937 the Legislature amended section 288 to read: "Any person who shall wilfully and lewdly commit any lewd or lascivious act *including any of the acts constituting other crimes provided for in part one of this code* upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison *for a term of from one year to life.*" (Stats., 1937, p. 1562. Italics added.)

Under the amended section, lewd and lascivious conduct, with its increased penalty, may be charged on the basis of acts that also constitute other crimes provided for in part one of the code. The prosecution is no longer required to meet the defenses considered above, nor is it necessary to divide acts that are normally viewed as indivisible. This court has not considered until now, however, the question whether a defendant may be punished for the same act under both section 288 and another section of part one of the Penal Code. We have concluded that the amended section does not authorize such double punishment for the same act or acts.

Section 654 of the Penal Code provides that "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *" Under section 288, the crime of rape, for example, has been expressly made punishable in different ways and by different provisions of the code.

[15, 16] Section 288 now specifically includes acts constituting other crimes and permits a greater penalty for those acts, if they are committed with the specified intent, upon a child under 14 years of age. The intent could normally be inferred from the very nature of the acts now under consideration. Had the Legislature wished to punish defendant once for statutory rape and once for lewd and lascivious conduct, for the same act, it could have done so in plain language. Instead, the crime of statutory rape is included within section 288 by that section's own terms, and the rape forms the basis for the prosecution under section 288. There is no indication on the face of the amended statute that the policy contained in the old statute forbidding double punishment has been changed. The mischief caused by the old language cannot arise under the amendment.

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[4] People v. Hunt, 17 Cal.App.2d 284, 61 P.2d 1208; People v. Adams, 7 Cal.App.2d 743, 47 P.2d 320; People v. Epperson, 7 Cal.App.2d 125, 45 P.2d 359; People v. Piburn, 138 Cal.App. 56, 31 P.2d 470; People v. Jameson, 136 Cal.App. 10, 27 P.2d 935; People v. Jori, 99 Cal.App. 280, 278 P. 250; People v. Meyer, 94 Cal.App. 696, 271 P. 751; People v. McAfee, 82 Cal.App. 389, 255 P. 839; People v. Ferrari, 80 Cal.App. 182, 251 P. 692; People v. Parker, 74 Cal.App. 540, 241 P. 401; People v. Bronson, 69 Cal.App. 83, 230 P. 213; People v. Lind, 68 Cal.App. 575, 229 P. 990; People v. Rossi, 37 Cal.App. 778, 174 P. 916; People v. Warriner, 37 Cal.App. 107, 173 P. 489; People v. Love, 29 Cal.App. 521, 157 P. 9; People v. Davis, 6 Cal.App. 229, 91 P. 810; People v. Ah Lung, 2 Cal.App. 278, 83 P. 296; People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939.

Now statutory rape committed upon the body of a child under 14 years of age can be punished as a lewd and lascivious act. It cannot, however, be punished twice, as statutory rape and as lewd and lascivious conduct. Doubts as to the meaning of the amended section are resolved against double punishment for the same act. See, People v. Ralph, 24 Cal.2d 575, 581, 150 P.2d 401.

Respondent relies upon People v. Stangler, 18 Cal.2d 688, 117 P.2d 321, as announcing a rule different from the one stated herein. In that case defendant was charged with violations of sections 261 and 288. He was found guilty of rape, but not of lewd and lascivious conduct. People v. Stangler, therefore, like Rodriguez v. Superior Court, supra, was concerned with inconsistent verdicts. This court held that the offenses are not *identical,* stating that "This test [identical offenses] is not available to him [defendant], because the two counts involved stated separate offenses, the one, statutory rape * * * and the other, lewd and lascivious conduct committed against children § 288. The fact that section 288 as it now reads also includes 'any of the acts constituting other crimes provided for in part one of this code', *which includes section 261,* does not militate against this conclusion, for, under that provision, the defendant *may be found guilty under either section.*" 18 Cal.2d at pages 695, 696, 117 P.2d at page 324. Italics added. The court then stated that section 954 of the Penal Code provides that a verdict of acquittal of one or more counts shall not be deemed to be an acquittal of any other count. It is therefore apparent that nothing in People v. Stangler authorizes a conviction under both sections 261 and 288; instead, insofar as that problem was considered, the convictions were referred to as alternative ones.

The foregoing interpretation of section 288 gives effect to the purpose of the statute without hampering the administration of criminal justice. The prosecution may charge both crimes in the same information. The jury must be instructed, however, that, as in the case of necessarily included offenses, there can be only one verdict of guilty.

[17] In the present case there is no question that the act relied upon to support the prosecution under section 261(1) is the same act as that forming the basis of the prosecution under section 288. The prosecutrix testified that on the day in question defendant raped her. Except for the rape itself, the only act of which she accused defendant was the forcible removal of her underclothing immediately preceding the rape. To hold that the removal of the prosecutrix's underclothing constitutes an act separate from the rape, however, would be artificial in the present context and would permit double punishment not authorized or contemplated by section 288.

The judgment and the order denying a new trial are reversed, and the defendant is remanded for a new trial in conformity with this opinion.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 605

HUTH v. KATZ.

S. F. 17300.

Supreme Court of California, in Bank.
Sept. 23, 1947.

1. Deeds 🔑56(2)

A valid delivery of a deed depends upon whether grantor intended that it should be presently operative, and a manual transfer is not conclusive evidence of such intention.

2. Deeds 🔑198
Mortgages 🔑270

In determining whether deceased vendor intended deed and assignment of note secured by a deed of trust to operate as a present transfer of property described therein, trial court could consider that deed and assignment was found in decedent's safe deposit box to which he alone had access, that decedent has continued to live on property, collect rentals and have principal and interest of note credited to his account after alleged delivery of deed and assignment to donee.

3. Evidence ⚷594

Although certain witnesses are unimpeached, trial court is not required to believe their testimony to be true and accurate in every particular.

4. Witnesses ⚷311, 315, 316, 363(1)

In passing on the credibility of witnesses and weight to be given their testimony, trier of fact is entitled to consider their interest in result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence.

5. Courts ⚷99(1)

Comments of trial judge on the evidence in favor of plaintiff in quiet title action did not restrict his power to declare his final decision in favor of defendant by filing findings of fact and conclusions of law.

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Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action to quiet title by Callie Huth, formerly Callie Wagner, against Phil C. Katz, as administrator of the estate of George Wagner, deceased. Judgment for defendant and plaintiff appeals.

Affirmed.

Prior opinion, 175 P.2d 598.

R. L. Husted, of San Francisco, for appellant.

Henry F. Boyen, Frank J. Fontes and Robert E. Hatch, all of San Francisco, for respondent.

GIBSON, Chief Justice.

George Wagner died intestate October 7, 1943, leaving a daughter and some nephews and nieces surviving him. When his safe deposit box was opened after his death, it contained two instruments dated June 29, 1943, by which decedent purported to transfer most of the property he owned to plaintiff, who does not claim to be related to him. One of the documents was an unrecorded gift deed to a house and lot on York Street in San Francisco where decedent was living at the time of his death; the other was an assignment of a promissory note secured by a deed of trust. Plaintiff instituted this action to quiet title to the property described in the two instruments, and she has appealed from a judgment against her.

The sole question is the sufficiency of the evidence, and in our opinion it supports the finding and conclusion of the trial court that there was no valid delivery of the deed and assignment to plaintiff and that decedent did not intend that any interest in the property should pass during his lifetime.

The evidence relied on by plaintiff to establish a delivery of the documents consists mainly of her testimony and that of F. R. Webb, a real estate agent who prepared the deed and assignment for decedent at his request.

Plaintiff testified that she had known decedent since she was nine years old, when her mother became housekeeper for his brother John. She lived with her mother in John's home and was known as "Callie Wagner" until she was married in 1932. Plaintiff called John "father," and decedent sometimes referred to her as his "niece." Plaintiff saw decedent frequently, and for several years she went to his home twice a week to clean his house and do his washing and ironing. About a year before his death decedent told her that he intended to transfer his property to her and that Mr. Webb would "draw up the papers for it." On or about June 29, 1943, plaintiff went with decedent to Webb's office, where she met Webb for the first time. According to plaintiff, Webb handed the deed and the assignment to decedent, who in turn handed them to plaintiff saying, "They are all yours, Kid, they belong to you now."

Webb testified that he had known decedent for about 25 years and had handled some business transactions for him. In June, 1943, decedent called at Webb's office and requested him to prepare the necessary papers to transfer the York Street property and a certain note and trust deed to "Callie Wagner," whom he referred to as his "niece." Webb prepared the deed and assignment, and a few days later the instruments were signed and acknowledged by decedent in the presence of a notary public. When decedent informed Webb that he desired to make the transfer, Webb told him "that there must be delivery," and after the instruments were signed decedent said to Webb "I want delivery." The papers were left with Webb at his office, and a few days later, decedent returned with plaintiff. Webb testified that decedent gave the deed and assignment to plaintiff and said "Now it is all yours." The transaction took place in the presence of Webb and one F. A. Bloettler, both of whom signed under the notation "Witness to delivery" on the face of the deed.

Plaintiff testified that she took the deed and assignment home, but that about three weeks later she became alarmed because of a small fire in her home and decided that it was unsafe to keep the documents there. Decedent told her that she could put them in his safe deposit box, and she accompanied him to the bank where she placed them in the box. He alone had access to this box, but, according to plaintiff, decedent told her she might have the documents whenever she wanted them.

At the time the deed and assignment were signed decedent was living at the real property in question and was renting a part of it. He continued to live there and collect the rentals until his death. The maker of the promissory note was not informed that it had been assigned to plaintiff, and payments of principal and interest were made after the purported assignment, as before, to decedent's account at his bank.

Decedent made his living collecting and selling junk and supported himself almost entirely from the income from that business and the rented property. The value of the estate does not clearly appear from the record, but apparently the only real property decedent owned other than that covered by the documents in question was a lot which apparently had little value and had been sold for taxes. At the time of decedent's death he had $255 in cash and a savings account of $1,605.38 He was in good health in June, 1943, and was between 60 and 65 years of age when he died unexpectedly in the following October.

[1-2] A valid delivery of a deed depends upon whether the grantor intended that it should be presently operative, and a manual transfer is not conclusive evidence of such intention. Hotaling v. Hotaling, 193 Cal. 368, 382, 383, 224 P. 455, 56 A.L.R. 734; Dinneen v. Younger, 57 Cal. App.2d 200, 204, 205, 134 P.2d 323; see Longley v. Brooks, 13 Cal.2d 754, 761, 92 P.2d 394. When the question at issue is whether or not there has been a valid delivery, the possession of the deed by the grantor and his exercise of dominion and control of the property after manual transfer of the deed are facts which may be considered in determining whether he intended presently to pass title. See Longley v. Brooks, 13 Cal.2d 754, 761, 762, 92 P.2d 394; Williams v. Kidd, 170 Cal. 631, 643, 644, 151 P. 1, Ann.Cas.1916E 703; Dinneen v. Younger, 57 Cal.App.2d 200, 204–207, 134 P.2d 323. In the present case the fact that the deed and assignment were found in decedent's safe-deposit box to which he alone had access, and the further facts that decedent continued to live on the York Street property, collect the rentals, and have the principal and interest of the note credited to his account, were matters which the trial court could consider in determining whether decedent intended the deed and assignment to operate as a present transfer of the property described therein.

[3, 4] Plaintiff argues, however, that in addition to a manual delivery there was testimony that decedent made statements indicating an intent to pass title to plaintiff at that time, and it is asserted that the trial court was bound to accept such testimony as true because the witnesses plaintiff and Webb were unimpeached. The trial court, however, was not required to believe that their testimony was true and accurate in every particular. In passing on the credibility of witnesses and the weight to be given their testimony, the trier of fact is entitled to consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence. Hamilton v. Abadjian, 30 Cal.2d 49, 179 P.2d 804; Tingey v. E. F. Houghton Co., 30 Cal. 2d 97, 179 P.2d 807; Hicks v. Reis, 21

Cal.2d 654, 659, 660, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. In weighing the testimony here the trial court no doubt took into consideration not only the conduct of decedent indicating there was no intention that title should pass to plaintiff during his lifetime, but also the conduct of plaintiff, including the facts that she neither sought nor received reimbursement for the occupancy of the York Street property by decedent after the purported transfer, made no effort to collect the rentals or the payments of principal and interest on the note as they became due and asserted no right thereto before the death of decedent. In this connection it may be noted that although Webb testified that decedent handed the deed and assignment to plaintiff saying "Now it is all yours," the record shows that payments on the note were thereafter made through Webb who took them to the bank and had them credited to decedent's account.

[5] It is finally contended that certain remarks made by the trial judge before the case was submitted indicated that he believed the testimony of plaintiff and Webb as to what occurred when the manual transfer was made, and therefore that the judgment must be reversed. At the close of the trial, the judge in commenting informally on the evidence said he believed Webb was a man of high principles who would not do anything he knew to be irregular, and that he did not think plaintiff was a calculating woman or that she had persuaded decedent "to make these transfers against his will or inclination." He expressed a doubt, however, as to "whether or not at the time [decedent] made this transfer he had the intention of divesting himself of this property absolutely," saying "there is no doubt [decedent] retained control of the property, because he collected the rents afterward and the payments on the note continued to be credited to his account in the bank." These remarks are not inconsistent with the judgment and, furthermore, comments on the evidence made by a judge can in no way restrict his power to declare his final decision by filing findings of fact and conclusions of law. Strudthoff v. Yates, 28 Cal.2d 602, 615, 616, 170 P.2d 873; Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, SCHAUER, TRAYNOR, and SPENCE, JJ., concur.

81 Cal.App.2d 580

PEOPLE v. FORD.

Cr. 2472.

District Court of Appeal, First District, Division 2, California.
Sept. 25, 1947.

1. Rape 🔑51(4)

Evidence supported conviction of rape by force and violence.

2. Rape 🔑14

To establish rape by force and violence, utmost resistance by prosecutrix is unnecessary, but resistance required depends on circumstances, such as parties' relative strength, uselessness of resistance, and degree of force manifested, and need only be such as to make prosecutrix' nonconsent and actual resistance reasonably manifest.

3. Criminal law 🔑564(8)

In prosecution for rape, police officer's testimony that place pointed out to him by defendant as that where defendant's automobile was stopped before commission of offense was within 400 feet of San Francisco county line established venue in such county. Pen.Code, § 782.

4. Criminal law 🔑1167(1)
Indictment and information 🔑175

Proof of commission of rape within 400 feet from line of county of venue was not a variance from information charging commission of crime at such county, nor prejudicial to defendant, who did not raise such question in trial court, as information could have been amended to plead place of offense in conformity to proof. Pen.Code, § 782.

Criminal law 🔑369(2)

In prosecution for rape by assisting another to commit such crime, evidence that defendant after such other left automobile in which parties were riding following crime, drove to unfrequented spot, attempted to compel prosecutrix to commit sodomy, and then accomplished sexual act with her, was admissible as concerning part of continuous unbroken course of conduct so intimately connected with crime charged that it was proper to bring it all before jury. Pen. Code, § 288a.

6. Witnesses 🔑359

In prosecution for rape, certified copy of superior court's minutes, showing that person described by defendant's name pleaded guilty of burglary on previous occasion, was admissible to impeach defendant while on witness stand as against contention that there was no proof that defendant was such person, in absence of such claim in trial court or objection to introduction of record on such ground.

7. Criminal law 🔑27

Second-degree burglary, punishable by imprisonment in county jail or state prison in trial judge's discretion, remains a felony until defendant is sentenced to term in county jail. Pen.Code, § 461, subd. 2.

8. Witnesses 🔑359

In prosecution for rape, certified copy of superior court's minutes, showing that defendant previously pleaded guilty of burglary and was sentenced for second-degree burglary and granted probation, was properly admitted to impeach defendant while on witness stand, though probation period had expired. Code Civ.Proc. § 2051; Pen. Code, § 461, subd. 2.

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Appeal from Superior Court, City and County of San Francisco; Wm. F. Traverso, Judge.

Francis Ford was convicted of rape by force and he appeals.

Affirmed.

Archer Zamloch, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Dave K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant Ford and one Glover were jointly charged with rape by force and violence and were both convicted by a jury.

[1, 2] It is claimed that the evidence did not establish the necessary element of resistance by the complaining witness. The complaining witness met appellant in a tavern in San Francisco. Appellant about midnight agreed to drive the complaining witness to her home. These two and Glover got into appellant's automobile and instead of driving toward the complaining witness' home appellant drove across the San Francisco county line and into some sparsely settled hills in San Mateo County. On the way Glover with no apparent provocation brutally struck the complaining witness about the face and mouth several times and seized her purse from her. The car was stopped in the hills and appellant put his arms around the complaining witness' torso and held her down while Glover accomplished two successive acts of copulation. She pleaded with them to desist, but after the brutal beating that she had received "I was scared. I was afraid to move. I did not know whether to try and get out or to sit there or what to do." The evidence amply supports the verdict. "The courts no longer follow the primitive rule that there must be resistance to the utmost." People v. McIlvain, 55 Cal.App.2d 322, 329, 130 P.2d 131, 135. "The resistance required in each case depends upon the circumstances of that case, such as the relative strength of the parties, the uselessness of resistance, the degree of force manifested and other factors. The resistance of the prosecutrix need only be such as to make nonconsent and actual resistance reasonably manifest." People v. Burnette, 39 Cal.App.2d 215, 224, 102 P.2d 799, 804; People v. Lay, 66 Cal.App.2d 889, 892, 153 P.2d 379; People v. Pollock, 25 Cal. App.2d 440, 443, 77 P.2d 885; People v. Norrington, 55 Cal.App. 103, 109, 202 P. 932. The court properly refused a proposed instruction based on the theory of the neces-

sity of resistance to the utmost and the instruction actually given on that subject fairly stated the applicable law.

[3, 4] The venue in the City and County of San Francisco was established against appellant by the testimony of a police officer that appellant pointed out to him the place in the hills where his car was stopped and that this point is within four hundred feet of the San Francisco county line. Pen. Code, § 782. It is suggested that there is a variance between pleading and proof since the information charges the commission of the crime at the City and County of San Francisco. We think there is nothing in the point (see People v. Salorse, 62 Cal. 139, 143, 144), but if there were appellant suffered no prejudice. The reliance of the prosecution on Pen.Code § 782 was made plain to appellant's counsel in the trial court. He did not there raise the question of variance and if he had the information could have been readily amended to plead the place of the offense in conformity to the proof. People v. Arnest, 133 Cal.App. 114, 23 P.2d 812.

[5] It was not error to admit evidence that, after driving back to San Francisco where Glover left the car, appellant drove to an unfrequented spot, attempted by force to compel the complaining witness to commit upon his person the act denounced by Pen.Code, § 288a, and then accomplished with her a normal sexual act. This was part of a continuous and unbroken course of conduct so intimately connected with the crime charged that it was proper to bring it all before the jury. 8 Cal.Jur., Criminal Law, sec. 175, p. 72.

[6-8] Appellant took the witness stand and, by way of impeachment, the prosecution introduced a certified copy of the minutes of the superior court showing that Francis Ford pleaded guilty to burglary in 1942, the offense was fixed at the second degree and the defendant granted probation for three years. The claim that there was no proof that the Francis Ford in that proceeding was the same person as appellant borders on the frivolous. Entirely apart from the presumption that arises from identity of name, no claim was even hinted in the trial court that the two were not the same person and no objection was urged to the introduction of the record on that ground. It was claimed in the trial court and is argued here that since burglary in the second degree may be punished by imprisonment in the county jail or in a state prison in the discretion of the judge imposing the sentence (Pen.Code, § 461, subd. 2), it is not a felony unless the defendant is sentenced to the state prison. The exact converse is true and it remains a felony unless and until the defendant is sentenced to a term in the county jail. People v. Williams, 27 Cal.2d 220, 228, 229, 163 P.2d 692. The fact that the period of probation fixed by the court's order had expired is likewise immaterial. People v. James, 40 Cal.App.2d 740, 746, 105 P.2d 947. The record was properly admitted as impeaching evidence under Code Civ.Proc. § 2051.

We have examined the instructions given and those requested and refused and we find no prejudicial error suffered by appellant in the giving or refusal of any instruction.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

81 Cal.App.2d 595

In re PAUL'S ESTATE.

TURNER v. CHILDS et al.

Civ. 13430.

District Court of Appeal, First District,
Division 2, California.
Sept. 26, 1947.

Hearing Denied Nov. 24, 1947.

Wills 🔑302(8)

Evidence that holographic will was found in decedent's purse by three women who were present about the time of death, that it was read by them and returned to the purse which was then delivered to a sister of deceased, that will provided for distribution of deceased's estate, that it was dated shortly before death of deceased, although exact date could not be recalled, and that will could not be found after a diligent search, authorized admission of will as a lost will. Probate Code, § 350.

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Proceeding in the matter of the estate of Maude Lydia Paul, deceased, on the petition of Aaron Turner for the probate of a lost will, contested by John L. Childs, administrator, and others. From an order admitting the lost will to probate, contestants appeal.

Affirmed.

G. H. Van Harvey, of San Francisco, and Morris E. Bruner and Breed, Robinson & Stewart, all of Oakland, for appellants.

John Felton Turner, of Oakland, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order admitting a lost will to probate. Two witnesses testified that, after the death of deceased, they and one other party saw and read the will which bequeathed all the property to Hazel Rhoten. The will was written, dated and signed wholly by decedent. It read substantially as follows: "In case of my death I leave all my property and money to my niece, Hazel Rhoten, in Oregon." The evidence is that the will was found in decedent's purse by three women who were present about the time of death. It was read by them and returned to the purse, which was then delivered to a sister of deceased.

The exact date of the will could not be recalled, but the witnesses testified that it was dated as some day in February, 1945, shortly before the death which occurred March 2, 1945. Another witness fully established that the will could not be found after diligent search.

Proponent's proof meets all the requirements of section 350 of the Probate Code and the findings of the trial court can not be disturbed.

Order affirmed.

GOODELL and DOOLING, JJ., concur.

81 Cal.App.2d 526

WILTERDINK v. WILTERDINK.

No. 13449.

District Court of Appeal, First District, Division 1, California.
Sept. 19, 1947.

1. Divorce ⚷161

Where defendant husband had arranged with an attorney for the filing of a divorce action by defendant's wife, a property settlement was made, and defendant knew that default would be entered against him, his motion to set aside default on ground of mistake, inadvertence, surprise, and excusable neglect was properly denied. Code Civ. Proc. § 473.

2. Divorce ⚷161

Even in divorce cases, where the rule of liberality in setting aside default is enjoined upon the courts, there must be some showing of facts which excuse the default. Code Civ.Proc. § 473.

3. Army and navy ⚷34

The failure to appoint an attorney for defendant husband, a navy veteran who had made application for retirement, did not require the setting aside of default in divorce action, where defendant had arranged for the bringing of the divorce action, had made a property settlement with wife, and it was apparent that appointment of attorney would have made no change in the proceedings or decree entered. Code Civ.Proc. § 473; Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

4. Army and navy ⚷34

In action against a serviceman for divorce, where plaintiff's affidavit that defendant was not in military service was false, but could have been the result of a misunderstanding of the true situation due to defendant's application for retirement, and defendant was not prejudiced by such affidavit, the failure to appoint an attorney for him did not require the setting aside of default. Code Civ.Proc. § 473; Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

5. Divorce ⚷161

On motion to set aside default in divorce case, trial court properly refused to permit defendant to impeach or refute the testimony of corroborating witness at the divorce hearing, since such testimony would only be admissible in the event the default were set aside. Code Civ.Proc. § 473.

6. Judgment ⚷151

Only lack of jurisdiction that appears on the face of the judgment role can be attacked without being included in grounds of a motion to set aside default. Code Civ. Proc. § 473.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Amy L. Wilterdink against William H. Wilterdink for divorce, wherein a default was entered against defendant and interlocutory decree of divorce granted to plaintiff. From an order refusing to grant defendant's motion to set aside the default and decree, defendant appeals.

Affirmed.

Lawrence A. Cowen, of San Rafael, for appellant.

Lloyd J. Cosgrove and Cosgrove, Molinari & Tinney, all of San Francisco, for respondent.

BRAY, Justice.

The trial court refused to grant defendant's motion to set aside his default and the interlocutory decree of divorce. The motion was made on two grounds: first, under section 473 of the Code of Civil Procedure, defendant's alleged mistake, inadvertence, surprise and excusable neglect; secondly, alleged fraud in that defendant was in the naval service and no attorney was appointed to represent him under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. 50 U.S.C.A.Appendix, § 501 et seq.

With one exception, there is practically no dispute as to the facts. These parties had been married for about 33 years. Defendant's life career has been that of a navy officer, although while still in the Navy he was admitted to the California Bar in 1919 and practiced law about two years in Solano County. He also acted as an attorney at Puget Sound in 1928 or 1929. On January 2, 1941, he was taken prisoner by the Japanese in Shanghai, China, and remained such prisoner until August 31, 1945. His experiences caused a mental and physical disability, as a result of which he was a patient at a naval hospital from September, 1945, to June, 1946, and which eventually resulted in his retirement from the Navy. On his return home a condition resulted in which, to use his own words, "we were finding * * * [no happiness] as we drifted on together." The parties discussed the situation and practically agreed that the wife should apply for a divorce. Defendant, on May 27, 1946, made out a "Memorandum of Assets," a proposed 50/50 division of those assets, and also an additional list of stocks and bonds to be likewise equally divided. The parties then consulted Attorney Cosgrove. They visited his office on three or four occasions, defendant stating that he would not employ an attorney. It was agreed that plaintiff should file suit for divorce and that defendant would not contest it, but would let it go by default.

The action was filed on June 25 and that same day a property settlement agreement was signed by both parties in Attorney Cosgrove's office. Certain figures in the agreement were written in by the defendant. Defendant was then and there served with a copy of summons and complaint. Attorney Cosgrove told defendant that, contrary to defendant's claim as to the practice in Solano County, it was not necessary in San Francisco for the defendant to be represented by an attorney. Defendant then gave Cosgrove an address in New Jersey requesting that as soon as the interlocutory decree was obtained, the attorney so advise defendant by wire. On July 13, defendant wrote plaintiff a letter which indicates that plaintiff had sent him a newspaper clipping concerning the filing of the divorce action. This letter stated, among other matters, "So, don't hold up the proceedings any longer but ask Lloyd Cosgrove to have the case heard soon as he can, and let's have the unfortunate mess behind us. Don't you really think—in view of all the preparations and the amicable arrangements we've agreed upon—that it will ultimately turn out the best thing for us to do? The more I've pondered over the situation these past weeks the more I'm convinced. * * * Your day in court will not be difficult for I'm sure Lloyd will handle the situation with ease and every possible courtesy to you, and so will the Court. *The more I think about it, the more pleased I am with his handling of the case.*" (Emphasis added.) Before leaving, defendant arranged for the transfer of their assets in accordance with the division in the agreement. The next day defendant left for the east. He returned to California on August 25. His notice of motion in this matter was filed on November 1.

On July 31, the day she obtained her interlocutory decree, plaintiff filed a moratorium affidavit in which she swears "that she knows of her own knowledge that the said defendant is not engaged at the date hereof in the military service or naval service or as a member of the armed forces of the United States of America * * *." The only disputed fact in the case is whether defendant stated in the attorney's office during the negotiation period that he was then retired from the Navy. Attorney Cosgrove filed an affidavit in which he claims that defendant so stated. Defendant denies it. However, defendant had appeared the week previously in San Diego before the Retirement Board and they had recommended his retirement for physical disability. In his visits to the attorney's office he wore civilian clothes, with the possible exception of one visit when he is not sure whether he wore his uniform. He admits that he did state that he had been recommended for retirement and that he hoped his terminal pay would extend to November 1. It was not until August that the Navy definitely decided to place defendant on the retired list, such retirement to take effect as of November 1.

Upon the filing of the moratorium affidavit, the default of defendant was taken, and after testimony by plaintiff and her witness, an interlocutory decree of divorce was granted. This decree approved the property settlement agreement and ordered the payment of support as provided therein.

[1] So far as the claim that the default was taken through mistake, inadvertence, surprise and excusable neglect of defendant is concerned, there is not one iota of evidence to support it. In his affidavit of merit accompanying the notice of motion there is nothing to support such a claim. The only ground asserted is the failure of the court to appoint an attorney for him. As shown in the foregoing statement of facts, defendant knew that his default was to be taken and that there would be no attorney to represent him. Defendant apparently was eager to have the divorce granted. He accepted service of summons and complaint, and as a lawyer he knew the effect of such service; he requested to be wired as soon as the decree was obtained. (This the attorney did.) Eighteen days after he left the attorney's office he wrote his wife, "* * * don't hold up the proceedings any longer but ask Lloyd Cosgrove to have the case heard as soon as he can, and let's have the unfortunate mess behind us." It would have been a travesty on justice had the trial court set aside the default on this ground.

Defendant concedes "that in the absence of a clear showing of abuse of discretion an appellate court will not disturb the order" and "that the burden of showing such abuse of discretion is on the appellant." Hambrick v. Hambrick, 77 Cal.App.2d 372, 377, 175 P.2d 269, 271. He then refers to the rule that liberality in granting relief under section 473 is particularly enjoined upon the courts where the application is to set aside a default judgment in a divorce action. Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020; Smith v. Smith, 64 Cal.App.2d 415, 148 P.2d 868; Hambrick v. Hambrick, supra, 77 Cal.App.2d 372, 175 P.2d 269.

[2] Based on those cases, defendant contends, in effect, that a defendant in a divorce case who desires his default set aside is entitled to such relief without making any showing other than his desire. This, of course, is not the law. Even in divorce cases, there must be some showing of facts which excuse the default. The reason for a different rule in divorce cases

than in other cases is given in Smith v. Smith, supra, 64 Cal.App.2d 415, at page 419, 148 P.2d 868, at page 870: "This rule is based upon the ground that the state is interested in preserving the integrity of the family relation, which cannot be destroyed merely by the consent of the parties." In view of that reason, it is interesting to note that in this case, it is not the divorce with which the defendant is most concerned, but the court's order putting into effect the provision of the property settlement agreement requiring him to pay plaintiff the sum of $200 per month alimony, in spite of defendant's reference to it in his letter to plaintiff as the *"amicable arrangements we've agreed upon."* (Emphasis added.)

It seems hardly necessary to call attention to the fact that in the cases last referred to there were facts shown to the court which justified setting aside the defaults. Here, no facts are given. The affidavit does set forth defendant's imprisonment by the Japanese and that by reason thereof he has suffered "mental and physical disability," and is to be retired by the Navy, but it is nowhere claimed that he did not know the effects of his action in arranging with Attorney Cosgrove to get the divorce heard as soon as possible, nor that his mental faculties were impaired to the extent that he did not know that his default was to be taken, nor that he did not know the contents of the agreement which he spent considerable time in working out, nor that he did not understand what Attorney Cosgrove meant when they discussed the question of whether the defendant desired an attorney to represent him at the hearing. It is evident that this is a case in which the defendant was fully satisfied with all that had taken place, until in November he discovered that his agreement to pay his wife the alimony was becoming a bit onerous.

The answer to the facts of this case and the rule set forth in the cases cited by defendant is contained in the following extract from the opinion in Elms v. Elms, 72 Cal.App.2d 508, at page 513, 164 P.2d 936, at page 939: "While it is the judicial policy liberally to construe section 473 to the end that trials on the merits may be had, we find nothing in defendant's affidavit to warrant an order vacating the annulment decree. To do so would be to grant a new trial at the capricious demand of a defendant who was either grossly negligent or had changed his mind after the judgment. One may not be relieved from his default unless he makes a showing that he has acted in good faith and demonstrates that his excusable neglect was the actual cause of his failure to attend the trial. Neither one's change of mind nor his inexcusable negligence is ground for vacating a judgment. To warrant relief under section 473 a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances."

[3] The second ground of motion is no more tenable than the first. It is based upon the falsity of the moratorium affidavit and the failure of the court to appoint, under the Soldiers' and Sailors' Civil Relief Act, an attorney to represent defendant at the default hearing. Just what such an attorney would have accomplished does not appear. The court granted the divorce (which it is evident from defendant's actions, his statements to Attorney Cosgrove, and his letter to plaintiff, defendant wanted done), and strictly followed the terms of the property settlement agreement which defendant had negotiated and signed. Had the court appointed an attorney and had the attorney communicated with defendant, it is readily apparent that there would have been no change in the proceedings or decree. Defendant undoubtedly would have urged him, as he did plaintiff, not to "hold up the proceedings."

It is true that the moratorium affidavit falsely stated that defendant was not in the armed forces. However, if defendant did not state that he was actually retired, as Attorney Cosgrove said he did, it is understandable that both plaintiff and her attorney could very well have misunderstood the situation. Defendant had just returned from being examined by the Retirement Board at San Diego, which was recommending his retirement, and told them that much at least; he was wearing civilian clothes; he talked about his retirement pay, and how long he hoped his terminal pay might continue.

Defendant's contention resolves itself into the proposition that the failure of the court to appoint an attorney to represent him necessarily requires a setting aside of the default. This is not the law.

In the recent case of Allen v. Allen, 30 Cal.2d 433, 182 P.2d 551, 552, the Supreme Court very clearly decides the effect of the Soldiers' and Sailors' Civil Relief Act as follows: "Section 200(1) of the Act, 54 Stat. 1180, 50 U.S.C.A.Appendix, § 520(1), provides that if there is a default of appearance by the defendant in any proceeding, plaintiff shall file an affidavit showing that the defendant is not in the military service. If such an affidavit cannot be filed, plaintiff must file an affidavit showing that defendant is in the military service or that plaintiff is unable to determine whether or not defendant is in such service. If an affidavit cannot be made showing that defendant is not in the service, the court shall not order the entry of judgment without appointing an attorney to represent defendant and protect his interests. In the present case, no such affidavits were filed by plaintiff, although the court was informed by Fisher that defendant was in the military service. There is no doubt that the trial court erred in failing to appoint an attorney to represent the defaulting serviceman. * * * The error of the trial court in failing to appoint an attorney to represent defendant does not, however, render its order void. Section 200 of the Act, requiring the appointment of a representative for the protection of the serviceman before entry of judgment, also contains a provision authorizing a trial court to vacate or set aside its judgment in any proceeding where it appears that the serviceman was prejudiced by reason of his military service in making his defense: 'If any judgment shall be rendered *in any action or proceeding governed by this section* against any person in military service during the period of such service or within thirty days thereafter, *and it appears that such person was prejudiced by reason of his military service in making his defense thereto,* such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. * * *' * * * The foregoing provision prescribes the procedure to be followed by a serviceman whose defense has been prejudiced by reason of his military service. This provision would be mere surplusage had Congress intended to condemn as void those judgments and orders entered contrary to the directions of other provisions of section 200. Accordingly, it is held that proceedings contrary to section 200 are valid until properly attacked. [Citing cases.]" (First emphasis the court's; second added.)

To properly attack such proceedings the serviceman must show that by reason of his military service he was prejudiced in making his defense. In this case, defendant's military service had nothing to do with his failure to make a defense. His failure so to do was deliberate and planned. As an attorney he knew the effect of a default, and he wanted it that way. He had been recommended for retirement, and was practically out of the military service. According to his letter, he was spending most of his time while in the east visiting and having a good time. He came to San Francisco on August 25, after he knew the divorce had been obtained, and gave no indication that he had changed his mind about being completely satisfied with all that had occurred. It was not until two months later that he suddenly decided to attack the proceeding.

[4] If, as the court held in the Allen case, supra, 30 Cal.2d 433, 182 P.2d 551, the failure to file any affidavit, or of the court to appoint an attorney, even where it was informed that the defendant was in the military service, does not make the judgment void, and throws the burden on a defendant who wants the judgment set aside to prove how his military service prejudiced him in making a defense, then it logically follows that the filing of an affidavit false in fact as to the military sta-

tus of the defendant does not make the judgment void. Particularly is that so, where the circumstances as here are such that the untrue statement could well have been the result of a misunderstanding of the true situation, and where the defendant was in no wise prejudiced by it.

In McMahon v. McMahon, 70 Cal.App. 2d 126, 160 P.2d 892, the refusal of the court in a divorce case to set aside the judgment was upheld where the defendant in the military service had signed a stipulation waiving his rights under the Soldiers' and Sailors' Civil Relief Act, where his rights under that act and the purpose of his waiver were fully explained to him by the attorney for his plaintiff wife.

In Miller v. Miller, 26 Cal.2d 119, 156 P. 2d 931, in determining that there had been no abuse of discretion in denying defendant, who was in the military service, a continuance under the above act, on a motion brought against him to set aside a final decree of divorce on the grounds of his alleged fraud in obtaining it, the court discussed at length the purpose of the act. It stated that the relief provided by the act is only to be granted where the military service materially affects the conduct of a defendant's defense; that the rights under the act are not absolute but dependent in each case upon the judge's determination "whether the service man's rights would be adversely affected by the fact of his service. Johnson v. Johnson, 59 Cal.App. 2d 375, 383, 139 P.2d 33." 26 Cal.2d at page 124, 156 P.2d at page 933. See also McArthur v. Shaffer, 59 Cal.App.2d 724, 139 P.2d 959.

In his affidavit defendant does not claim that he expected an attorney to be appointed for him. His sole statement in this behalf is that he "believed that it was not necessary for him to make an appearance and file an answer to said complaint by reason of the Act of Congress which provides for a moratorium for persons in" the armed forces. Nor was it necessary. The divorce was obtained just as he knew it would be obtained. If this portion of his affidavit means that he believed that his case would be delayed by moratorium, it is definitely contrary to the truth as indicated by his letter, his testimony on the stand at the hearing of the motion, and the statement of his counsel on argument in this court that defendant never desired nor expected a stay of the proceedings.

[5] Defendant complains of the refusal of the court at the hearing of the motion to permit defendant to impeach or refute the testimony of the corroborating witness at the divorce hearing. Defendant offered to prove by his own testimony that the corroborating witness knew none of the facts to which she testified. Defendant has cited no case to support his contention that the court erred in this behalf. The notice of motion contained no ground upon which such testimony would be admissible. Such testimony would only be admissible in the event the default were set aside.

[6] Apparently for the first time, in his closing brief, defendant makes the contention that "on a deeper probe of the record it will become evident to the court that the default judgment thus entered was void for the reason that the jurisdictional element of residence was not proved at the divorce hearing." There are two answers to this: first, that were it true, the motion was not based on any such ground. It is only lack of jurisdiction that appears on the face of the judgment roll that can be attacked without being included in the grounds of a motion. 14 Cal.Jur. pp. 1047, 1050. And secondly, the contention is based on technical constructions given certain isolated questions asked the corroborating witness and entirely ignoring another "omnibus" question and answer which fully covered the jurisdictional requirements.

As the trial court in nowise abused its discretion, the order appealed from is affirmed.

PETERS, P. J., and FINLEY, Justice pro tem., concur.

TAHA v. FINEGOLD et al.

Civ. 13419.

District Court of Appeal, First District, Division 1, California.
Sept. 18, 1947.

As Modified on Denial of Rehearing Oct. 18, 1947.

Hearing Denied Nov. 13, 1947.

1. Automobiles ⚷217(5)

Whether a pedestrian after looking in direction from which danger is to be anticipated from approaching automobiles on street pedestrian is about to cross is required to look again depends upon whether an ordinarily reasonable and prudent person would look again under the circumstances.

2. Trial ⚷296(7)

In action for injuries when defendant's truck struck plaintiff pedestrian while plaintiff was crossing street at intersection, instruction requiring pedestrian to exercise reasonable and ordinary care to anticipate presence of vehicles having an equal right with pedestrian to be there did not invite jury to disregard statutory rights of pedestrian in a marked or unmarked crosswalk over vehicular traffic on the street when read in connection with other instructions.

3. Trial ⚷295(6)

In action for injuries when defendant's truck struck plaintiff pedestrian while plaintiff was crossing street at intersection, one instruction was not required to contain all of the duties of both parties provided the reciprocal duties were sufficiently covered in the instructions as a whole.

4. Automobiles ⚷217(2)

A pedestrian within a crosswalk is required at all times to use ordinary care.

5. Appeal and error ⚷216(2)

Plaintiff could not object on appeal to the failure of trial court to give further instructions on duties of defendant when plaintiff failed to offer such instructions.

6. Appeal and error ⚷243

Plaintiff's failure to object to failure of trial court to give further instructions on duties of defendant to exercise ordinary and reasonable care for safety of others while driving truck along street did not preclude plaintiff from objecting to constant repetition of instructions concerning duty of plaintiff pedestrian crossing street at intersection in watching for approaching automobiles from direction danger should be anticipated.

7. Automobiles ⚷160(4), 206

Neither a pedestrian nor a motorist who has right of way at intersection can exercise right of way in arbitrary manner.

8. Trial ⚷244(2)

Instructions which are framed solely for the purpose of and which simply have the effect of emphasizing some particular portion of the evidence are not to be commended.

9. Appeal and error ⚷1064(1)
Trial ⚷244(4)

In action for injuries when defendant's truck struck plaintiff pedestrian while plaintiff was crossing street at intersection, instructions as a whole constituted reversible error where formula instructions were given for defendant but not for plaintiff, instructions impressed upon jury only plaintiff's duty to look and not truck driver's correlative duty to look, and pedestrian's duties were vastly over-emphasized.

10. Trial ⚷194(16)

Plaintiff's requested instructions concerning negligence per se which would have taken from jury whether, assuming plaintiff to have been in crosswalk when hit by defendant's truck, a reasonable person exercising reasonable care because of the night, the rain, and the dark clothes of plaintiff, might not have seen plaintiff and hence violation of plaintiff's right of way might have been excusable, was properly refused.

11. Automobiles ⚷245(37, 38, 72)

In action for injuries when defendant's truck struck plaintiff pedestrian while plaintiff was crossing street at intersection, whether plaintiff should have looked again after first looking and seeing no vehicle in sight, whether plaintiff was in crosswalk or out of crosswalk, whether defendant's truck lights were lit or not, were for jury. Vehicle Code, § 500(a).

Appeal from Superior Court, San Mateo County; Clark Clement, Judge.

Action by Abraham Taha against Leon Finegold, Evo Benedetti and Narcissus Benedetti, doing business under the firm name and style of Benny's Market, a copartnership, for injuries received when plaintiff was struck by a truck belonging to defendant partnership and driven by defendant Leon Finegold. From an adverse judgment, plaintiff appeals.

Judgment reversed.

Gladstein, Andersen, Resner & Sawyer, Herbert Resner and Ewing Sibbett, all of San Francisco, for appellant.

Hoge, Pelton, & Gunther and Franklin C. Latcham all of San Francisco, for respondents.

BRAY, Justice.

On December 28, 1945, plaintiff was struck by a truck belonging to the defendant partnership and driven by defendant Finegold. At about 6:50 a. m., plaintiff, a longshoreman, reported to the longshore hiring hall on Clay Street a few doors west of the Embarcadero in San Francisco, for the purpose of securing his work assignment for the day. He was told to report for work at 8 a. m. at Pier 44, which is located to the south of the Ferry Building, within walking distance of the hall. Plaintiff proceeded to the intersection of Clay Street and the Embarcadero. It was dark and raining, whether just drizzling or raining "like a cloudburst" is disputed. Plaintiff was wearing black rubber pants, black rain cape and a black hat. He testified that before crossing the intersection he looked around and saw no cars. He then started across the Embarcadero towards the Ferry Building, and when about three-quarters of the way across was struck by the truck, which was going in a northerly direction. Whether plaintiff was within or without the unmarked crosswalk is disputed. Plaintiff did not see the truck which was painted white, until it was nine or nine and a half feet from him. Whether the lights of the truck were burning is also in dispute. Plaintiff was hit by the left front fender and headlight of the truck. Defendant Finegold testified that he was proceeding in a line of traffic, there being another truck twenty feet ahead of him and another behind; that his headlights were in good condition and were on, and that he did not see plaintiff until the truck struck him. That there was other traffic on the street at the time is denied by plaintiff.

In this action for damages for personal injuries received in the accident, the jury rendered a verdict for defendants. Plaintiff does not attack the sufficiency of the evidence to support the verdict, but contends that the court erred (1) in giving certain instructions offered by defendants, and (2) in refusing to give certain instructions offered by plaintiff.

The first two instructions complained of contain the following language, the italicized portions being the portions objected to by plaintiff, and the capitalized portions being, as claimed by respondents, the saving factors. "* * * the duty of a pedestrian to be vigilant and alert, and looking for approaching traffic, at Such Times and Places as an Ordinarily Prudent Person Acting Under Like Circumstances Would Direct His Attention, *is a continuing duty and such duty is not necessarily met by a pedestrian,* whether in a pedestrian crosswalk or otherwise, *by merely looking once and then looking away,* Unless an Ordinarily Prudent Person Acting Under Like Circumstances Would so Conduct Himself." "In order to avoid a charge of negligence, *a pedestrian is under the duty of keeping a proper lookout for vehicles travelling upon the highway* and Conducting Himself in Such a Manner as an Ordinarily Prudent Person Acting Under Like Circumstances Would Conduct Himself in an Endeavor to Avoid Being Injured."

Plaintiff contends that inasmuch as he testified that after looking to the right as he started across the street and seeing no vehicles, he did not look again in that direction until the truck was nine to ten feet from him, the giving of such instructions amounted to directing the verdict. Plaintiff thereby takes the italicized language away from its context, and completely ignores the fact that it is qualified by and dependent on other portions of the sentence in each instance (the capitalized portions hereinbefore set forth).

[1] These additional portions were not contained in the instructions condemned in Goodwin v. Foley, 75 Cal.App.2d 195, 170 P.2d 503, 505. In that case the instruction, after stating that the pedestrian must look in the direction from which danger is to be anticipated, stated: "This is a continuing duty and was not met, if you so find from the evidence in this case, by looking once and then looking away." That is not a true test. The test is, would an ordinarily reasonable and prudent person, under the circumstances, not look again, and that test is included in the instructions as given in this case. In Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631, 632, the court used the language, "This is a continuing duty, and is not met by looking once and then looking away." It was held that this constituted an invasion of the province of the jury, and was not cured by the second part of the instruction, which five lines later stated, "If you believe from the evidence in this case that the plaintiff, in attempting to cross the street, did so without exercising that degree of care which would have been exercised by a person of ordinary prudence, *under the instructions* that I have just given you," and that such failure proximately contributed to the accident, plaintiff could not recover. (Emphasis added.) The reason this second paragraph does not cure the situation is given at page 16 of 1 Cal.2d, at Page 633 of 32 P.2d, where the court says: "Although it was by this paragraph left to the jury to find whether plaintiff had attempted to cross the street without using the degree of care which would have been exercised by an ordinarily prudent person, they were told to do so 'under the instructions I have just given you,' which set up continued observance as a definite and absolute standard of duty, upon the basis of an assumption that she had voluntarily placed herself in a position of probable danger, thus fixing for the jury a measure of ordinary care without requiring them to first find, as a condition of its application, that the plaintiff had exposed herself to a continuing danger."

In our case the instructions differ from the one condemned in the Salomon case and make the continuing duty of looking one that exists only if a prudent person under the same circumstances would continue to look.

While we have grave doubts that these instructions, standing alone, are erroneous, a different situation results when they are considered with the many repetitious instructions in the case. The effect of them all is to give the impression that emphasis was being placed upon the fact that the plaintiff looked only once in a certain direction, and an underemphasis upon the necessity of the jury determining whether a reasonable person, under the circumstances, would have looked only once.

[2] In one of the above-mentioned instructions there is the following language: "A pedestrian is bound to exercise reasonable and ordinary care to anticipate the presence of vehicles having an *equal* right with such pedestrian to be there." (Emphasis added by plaintiff.) Plaintiff contends that this wording invites the jury to disregard the statutory rights of a pedestrian in a marked or unmarked crosswalk over vehicular traffic on the street. However, the instruction does not have that effect. This instruction must be read in connection with all the others, including those on the rights of a pedestrian in a crosswalk, and the respective rights of truck and pedestrian to the use of the street.

Plaintiff objects to certain other instructions, and states that they "while not as unqualified in their admonition to the jury as the first two quoted herein, nevertheless instruct the jury, in effect, that if they conclude that Taha did not keep a continuous lookout for approaching traffic as he crossed the street, the verdict should be against him." Except for the constant repetition of the same thought, as hereinafter discussed, they are correct statements of the law. Whenever anything is stated as to the pedestrian's duty it is qualified by the measure of what a reasonable person would do under the circumstances.

[3] Plaintiff complains of two other instructions, which he admits correctly state the duty of a pedestrian to exercise reasonable and ordinary care for his own safety, but claims they fail to set forth the reciprocal duties of a motorist to exercise ordinary and reasonable care for the safety of others while proceeding along a highway, even though such motorist has the right of way. These instructions, standing alone, do not sufficiently cover the duties of the motorist, but they must be considered in connection with all of the instructions in the case, and in other instructions the court did set forth to some extent the duties of the motorist. It is not necessary that one instruction contain all of the duties of both parties, provided, of course, the reciprocal duties are sufficiently covered in the instructions as a whole.

[4] Plaintiff also contends that these instructions give the jury the impression that the same standard of care is required of a pedestrian whether he is inside of or outside of a marked or unmarked crosswalk. The instructions are not open to that objection. The *standard of care* is the same whether a pedestrian is within or without a crosswalk. The pedestrian must, as stated in the instruction, use ordinary care. While a pedestrian within a crosswalk has certain rights, he is nevertheless required at all times to use ordinary care, and that is all these instructions state in that behalf. O'Brien v. Schellberg, 59 Cal.App.2d 764, 140 P.2d 159. However, like most of the instructions in the case, when taken together with the others, they overemphasize the duties of the pedestrian and as pointed out later the "in other words" portion is hardly fair.

[5, 6] An examination of all the instructions given shows a serious situation, and justifies the objections of plaintiff. The court gave twenty-five of the twenty-nine instructions offered by defendants. Sixteen of these, in considerable length and detail, charge the jury concerning the obligations and duties of plaintiff. In only three of them is there any reference to the corresponding duties and obligations of the defendant truck driver. Plaintiff did not offer many instructions, and of those offered the court refused only two. While plaintiff cannot object to the failure of the court to give further instructions on the duties of defendant when he failed to offer such instructions (Howard v. National Ice Cream Co., 115 Cal.App. 639, 2 P.2d 211), this fact does not preclude the plaintiff from objecting to the constant repetition of instructions concerning the duty of the plaintiff. Some of these sixteen instructions were almost duplicates; others expressed the same principle in but slightly different language. The whole result was an unnecessary and obvious emphasis upon the duties of the pedestrian and an extremely light stress on the duties of the truck driver. Aside from the instructions on damages and those defining legal doctrines and terms, the only charges clearly favorable to plaintiff were those containing the provisions of section 560(a), Vehicle Code, and the requirement of the motorist to be vigilant and keep his vehicle under control. There are three others in which, though emphasis is placed on the duties of the pedestrian, the reciprocal duties of the motorist are mentioned. In all the remaining instructions the court repetitiously hammered away at the duties of the pedestrian.

The instructions offered by the plaintiff and given by the court were mere statements of principles of law. In contrast, in many of the instructions offered by defendants and given by the court, after stating the particular principle of law, the instructions then go on as "formula" instructions, eleven ending up, "you will render your verdict in favor of the defendants," or, "plaintiff will not be entitled to recover."

Formula instructions should not be given. As said in Tice v. Pacific Electric Ry. Co., 36 Cal.App.2d 66, 71, 96 P.2d 1022, 1024, 97 P.2d 844, formula instructions "are not calculated best to serve most successfully administration of justice. Their final disappearance will improve the conduct of court trials." While the giving of formula instructions is not in itself prejudicial error, the giving of them here added to the other circumstances of the case, combined to deny the plaintiff a fair trial.

[7, 8] One of the instructions starts out to again instruct the jury concerning the

duty of the pedestrian at an intersection, and then refers to the duty of both the motorist and the pedestrian to use ordinary care, continues to the effect that neither the pedestrian nor the motorist, if either has the right of way, can exercise such right of way in an arbitrary manner, and, although it is referring to both motorist and pedestrian, it ends up, *"In other words the pedestrian* cannot arbitrarily assume that he has the right of way * * * and for such reason alone fail to exercise" caution. (Emphasis added.) While this is all a true statement of the law, it does not appear why "In other words" should refer only to the pedestrian when the court has been discussing the duties of both pedestrian and motorist. Standing alone this instruction might not be harmful, but it is one of the many instances in which the court was over-emphasizing the duty of the pedestrian. "Instructions which are framed solely for the purpose of, and which simply have the effect of emphasizing some particular portion of the evidence, are not to be commended." Treadwell v. Nickel, 194 Cal. 243, 262, 228 P. 25, 33.

It is significant that while neither of the parties to the accident saw the other until, in the case of the driver, the accident had happened, and in the case of the pedestrian, the truck was almost upon him, the duty to look and even to continue to look was time after time placed upon the pedestrian and only once upon the driver, and then only in general words, that it was his duty "to be vigilant." While the failure to give more instructions concerning the duty of the driver is chargeable directly to the failure of plaintiff to offer them, still that failure does not juistify the giving of so many on the same subject for the other side.

In California the giving of repetitious instructions has been condemned in a number of cases, but in none of them has the error been held to be reversible. Rose v. Tandowsky, 80 Cal.App.2d 927, 183 P.2d 347; Robertson v. Brown, 37 Cal.App.2d 189, 99 P.2d 288; Wagy v. Brave, 133 Cal.App. 413, 24 P.2d 209; Bickford v. Mauser, 53 Cal.App.2d 680, 128 P.2d 79; Barckdall v. Simons Brick Co., 21 Cal.App. 685, 132 P. 846; Grillich v. Weinshenk, 64 Cal.App. 474, 222 P. 160; Andrews v. Runyon, 65 Cal. 629, 4 P. 669. It is not the mere repetition here that is controlling. It is the duty of the trial court to fairly instruct, and while repetition alone does not make the charge unfair, where repetition exists to the extent here, coupled with the other factors, it does make the charge unfair. Moreover, it is the cumulation of a number of circumstances, of which repetition is one—the giving of formula instructions for one party when none are given for the other, the circumstances that although each party had the same duty to look, it is only the pedestrian's duty to look that is impressed upon the jury; the vast amount of over-emphasis of the pedestrian's duties—that causes the unfairness in this case. No one of these circumstances, standing alone, would be sufficiently prejudicial, but taking them all together, it is apparent that the jury would be likely to get the impression that the court was telling them that a higher duty rested upon the plaintiff throughout than on the defendants.

[9] While in several instructions the statement that in crossing the street plaintiff did not satisfy the law by merely looking once in the direction from which defendant approached, was qualified by the yardstick of what a reasonable person would do, a reading of the instructions as a whole gives the definite feeling that the court, either intentionally or unintentionally, was telling the jury that as the plaintiff admittedly looked only once, the verdict should be for the defendants. Not that the court was commenting on the evidence, but that it was telling the jury as a matter of law that plaintiff was wrong, is the only reasonable conclusion to be drawn from the constant iteration and reiteration of the duties of the plaintiff. It is a reasonable assumption that thereby there was taken from the jury one of the most important elements in the case, the question of whether or not plaintiff, as a reasonable person, was justified in not looking again to his right as he crossed the street. No such stress was placed upon the correlative duty of defendants. This very well could have been the deciding factor in the minds of the

jury. Plaintiff was thereby deprived of a fair trial.

[10] It is not necessary to discuss the two instructions concerning negligence per se requested by plaintiff and refused by the court other than to say that they were improper as they would have taken from the jury the question of whether or not, assuming plaintiff to have been in the crosswalk when hit (a disputed question), a reasonable person exercising reasonable care because of the night, the rain, and the dark clothes of plaintiff, might not have seen him, and hence the violation of the pedestrian's right of way might have been excusable. Combs v. Los Angles Railway Corp., 29 Cal.2d 606, 177 P.2d 293; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279.

[11] Defendants contend that if any error was committed in the case it is not prejudicial because plaintiff was guilty of contributory negligence as a matter of law, and therefore the jury could not have brought in any other verdict than the one which they rendered. This is based upon plaintiff's admitted failure to look after he started across the Embarcadero and because of inconsistencies in his testimony as to whether or not he was in the crosswalk and as to the truck's lights being on. However, all these matters were for the jury. Whether he should have looked again after first looking and seeing no vehicle in sight, whether he was in the crosswalk or out of it, whether the truck's lights were lit or not, were for the jury to decide. We cannot say as a matter of law that his failure to look again under the circumstances was contributory negligence. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086.

The cases cited by defendants on this point are distinguishable from our case. For example, in Gibb v. Cleave, 12 Cal.App.2d 468, 55 P.2d 938, the plaintiff saw the approaching car before he left the curb. "It is not a case of having looked to his left and then miscalculated the speed of defendants' car. He testified that he made no calculations." At page 472, of 12 Cal.App.2d, at page 940 of 55 P.2d. In Ogden v. Lee, 61 Cal.App. 493, 215 P. 122, plaintiff saw the lights of defendant's approaching car, mistook them for stationary lights, and walked out into the path of the oncoming car. In Flores v. Los Angeles Railway Corp., 15 Cal.App.2d 576, 59 P.2d 856, plaintiff, without looking, stepped on to the street car tracks directly in front of an oncoming car. In Horton v. Stoll, 3 Cal.App.2d 687, 40 P.2d 603, plaintiff crossing street away from a crosswalk "did not remember that she looked for approaching cars in the directions from which they would come, but only that she gained the impression she had plenty of time to get across the street." At p. 690 of 3 Cal.App.2d, at page 604 of 40 P.2d.

Young v. Tassop, 47 Cal.App.2d 557, 118 P.2d 371, in distinguishing its facts from those in the Flores case, supra, stated that a pedestrian crossing a street is not under a continuing duty to look to the side; he is only under a continuing duty to use ordinary care. If the question whether, under all the circumstances, he is negligent in not looking to the side is one on which there is room for an honest difference of opinion between men of average intelligence, it becomes a question of fact for the jury and not one of law. We feel that under the circumstances here that question is one upon which there can reasonably be a difference of opinion, and that the instructions of the court, as we have heretofore pointed out, may have had the effect of preventing the jury from fairly passing on this question.

The judgment is reversed.

PETERS, P. J., and FINLEY, J., pro tem., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

GUAY v. AMERICAN PRESIDENT LINES, Ltd.

Civ. 13406.

District Court of Appeal, First District, Division 1, California.

Sept. 16, 1947.

Rehearing Denied Oct. 14, 1947.

Hearing Denied Nov. 13, 1947.

1. Courts 🔑96(1)

Interpretation of federal statute by United States Supreme Court is conclusive upon District Court of Appeal.

3. Seamen 🔑29(1)

Where seamen at time of his injury was employed on merchant vessel operated by private shipping company under general agent service agreement with War Shipping Administration, shipping company could be held liable for seamen's injuries under Jones Act, notwithstanding that Government might also be held liable under suits in Admiralty Act and the Clarification Act. Jones Act, 46 U.S.C.A. § 688; Suits in Admiralty Act, § 1 et seq., 46 U.S.C.A. § 741 et seq., 50 U.S.C.A. Appendix § 1291.

2. Seamen 🔑29(1)

The Clarification Act regulating rights of seamen employed on vessels owned by the United States and operated for it by private companies under general agent service agreement was intended only to regulate seamen's rights against Government, and was not intended to affect seamen's rights under Jones Act against operating agent. Jones Act, 46 U.S.C.A. § 688, 50 U.S.C.A. Appendix § 1291.

4. Appeal and error 🔑1033(5)

An instruction that if jury found that defendant had not disclosed to plaintiff that it was acting only as agent of United States in operating vessel under general agent service agreement with War Shipping Administration and that plaintiff was unaware of agency relationship, then plaintiff was an employee of defendant within meaning of Jones Act was more favorable to defendant than it was entitled to, in view of fact that defendant, as matter of law, was plaintiff's employer regardless of knowledge of agency relationship. Jones Act, 46 U.S.C.A. § 688; Suits in Admiralty Act, § 1 et seq., 46 U.S.C.A. § 741 et seq., 50 U.S.C.A. Appendix § 1291.

5. Seamen 🔑29(5)

Evidence presented question for jury as to whether injury of seaman who was employed on vessel operated by defendant under general agent service agreement with War Shipping Administration, while assisting in unloading gasoline tank, was proximately caused by negligence of other employees of defendant, so as to render defendant liable under Jones Act. Jones Act, 46 U.S.C.A. § 688.

6. Appeal and error 🔑1010(1)

An appellate court, on factual issues, must sustain a finding based on substantial evidence.

7. Appeal and error 🔑931(1)

On appeal from judgment in plaintiff's favor, appellate court must accept evidence most favorable to plaintiff.

8. Appeal and error 🔑1064(1)

Where examination of charge demonstrated that jury was fully and fairly instructed on all basic issues of law, any minor errors that might have crept into instructions could not have been prejudicial.

9. Trial 🔑260(3)

Where jury was fully instructed on burden of proof, refusal of defendant's proffered instruction on burden of proof which contained the phrase "the law does not permit you to guess or speculate as to cause of accident in question," was not error, though quoted language correctly stated the law.

10. Trial 🔑260(8)

Where jury was fully and fairly instructed on general rules of liability for negligence, refusal of defendant's proffered instruction that defendant was not liable if injuries were result of unavoidable accident was not error, since plea of unavoidable accident was simply another way of urging that defendant was not negligent.

11. Trial 🔑260(8)

Where jury was fully and correctly instructed that defendant was only burdened with duty of ordinary care, refusal of defendant's proffered instruction that ship owners were not obliged to furnish the best, safest, and most convenient equipment or appliances was not error. Jones Act, 46 U.S.C.A. § 688.

12. Trial ⚷260(3)

Where jury was correctly told that it was burden of plaintiffs suing for personal injuries under Jones Act to prove negligence of defendant or its employees, refusal of defendant's proffered instruction that there was no presumption that defendant was negligent merely because plaintiff was injured was not error. Jones Act, 46 U.S.C.A. § 688.

13. Trial ⚷260(3)

Where jury was charged that they were exclusive judges of weight and sufficiency of evidence, instruction sufficiently covered the field, and refusal of defendant's proffered instructions which stated that it was for jury to determine whether order of chief mate to lower tank to main deck with rope was exercise or ordinary care on his part for safety of men ordered to complete that operation was not error. Jones Act, 46 U.S.C.A. § 688.

14. Trial ⚷260(8)

Where trial court fully charged jury that if injuries sustained by plaintiff seeking recovery under Jones Act were caused by plaintiff's own negligence, a verdict for defendant should be returned, refusal of defendant's proposed instructions that if plaintiff's own acts were proximate cause of injury, or if he consented to act causing his injury, verdict should be for defendant was not error. Jones Act, 46 U.S.C.A. § 688.

15. Seamen ⚷29(5)

In action under Jones Act for injuries sustained by seaman, allegation of negligently causing and permitting a gasoline tank to fall from rail and thus injuring plaintiff was broad enough to permit evidence of negligence in any particular leading up to falling of tank. Jones Act, 46 U.S.C.A. § 688.

16. Appeal and error ⚷197(1)
Pleading ⚷427

Even where issues are not specifically alleged in complaint or other pleading, if evidence is introduced on those issues without objection, such issues are properly involved, and objection may not properly be made for first time on appeal that such issues were not presented by the pleadings.

17. Appeal and error ⚷197(1)

In action under Jones Act for injuries sustained by seaman allegedly caused by gasoline tank falling from rail and striking plaintiff, where facts in reference to plaintiff's place of work, placing the tank on the rail and selection of manner of lowering the tank were fully inquired into by both parties, and defendant offered evidence in an attempt to show reasonableness of its actions in such respects, defendant could not for first time on appeal make objection that such issues were not presented by the pleadings. Jones Act, 46 U.S.C.A. § 688.

18. Appeal and error ⚷1064(1)

Instruction which was simply a correct abstract statement of general import of Jones Act under which action was brought for injuries sustained when gasoline tank fell from rail striking plaintiff when plaintiff was assisting in lowering tank did not constitute reversible error on ground that instruction told jury that it could find for plaintiff if jury found that failure to have sufficient containers to drain tank was negligence. Jones Act, 46 U.S.C.A. § 688.

19. Appeal and error ⚷1064(1)

Reference in instruction in seaman's action under Jones Act to defendant who was operating vessel owned by United States under general agent service agreement with War Shipping Administration as an "operating agent" was not prejudicial, in view of fact that plaintiff was entitled to an instruction that defendant was employer of plaintiff as a matter of law. Jones Act, 46 U.S.C.A. § 688.

20. Appeal and error ⚷1064(1)

Where jury in seaman's personal injury action under Jones Act was fully instructed that if plaintiff's injuries were sole result of his own negligence or lack of caution, or slipping on roller, it should find for defendant, defendant was not substantially harmed by trial court's designation of defendant's "sole negligence" plea as one of "contributory negligence". Jones Act, 46 U.S.C.A. § 688.

21. Negligence ⚷138(4)

Where defendant pleads "sole negligence" of plaintiff as a defense, such plea puts into issue both question of whether accident occurred solely by plaintiff's negligence, and whether accident was caused by alleged negligence of defendant and plaintiff, so that under such a plea it is proper to instruct on contributory negligence.

22. Appeal and error ⚷1066

An instruction that if jury in seaman's personal injury action under Jones Act found that defendant negligently failed to provide plaintiff with a safe place to work and with safe appliances and that such proximately caused accident, a verdict for plaintiff should be rendered was not improper on ground that issues were not pleaded by plaintiff, especially where such issues were fully litigated by parties. Jones Act, 46 U.S.C.A. § 688.

23. Seamen ⚷29(5)

Where plaintiff was entitled to instruction that for purposes of Jones Act he was as a matter of law employee of defendant who was operating vessel under general agent service agreement with War Shipping Administration, fact that plaintiff alleged in another action against Federal Government that he was employee of United States, which was also true, did not establish that he was not also an employee of defendant. Jones Act, 46 U.S.C.A. § 688; Suits in Admiralty Act, § 1 et seq., 46 U.S.C.A. § 741 et seq., 50 U.S.C.A.Appendix, § 1291.

24. Seamen ⚷29(4)
Trial ⚷145

Under Jones Act, defense of assumption of risk by employee does not exist and it is proper for trial court to so inform jury even though the defense is not pleaded. Jones Act, 46 U.S.C.A. § 688.

25. Seamen ⚷29(1)

Although seaman's remedy for maintenance is independent and cumulative with that conferred by Jones Act, and seaman has two independent and cumulative remedies for a portion of same injury, he cannot recover twice for same item of damage. Jones Act, 46 U.S.C.A. § 688.

26. Seamen ⚷29(5)

Although it would have been better practice for defendant in action under Jones Act to have pleaded payments made to plaintiff for maintenance as an offset, such evidence could be admitted under a general denial. Jones Act, 46 U.S.C.A. § 688.

27. Appeal and error ⚷1057(2)
Seamen ⚷29(5)

In seaman's personal injury action under Jones Act, where plaintiff offered evidence that he had been hospitalized after injury and that his earnings were totally cut off during that period, defendant should have been permitted to show what plaintiff "earned" through "maintenance" paid to him during that period, but such error did not require reversal where plaintiff admitted that he received such sum and agreed that judgment should be reduced by such amount. Jones Act, 46 U.S.C.A. § 688.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

In admiralty. Action under Jones Act, 46 U.S.C.A. § 688, by Harry W. Guay against American President Lines, Ltd., to recover for personal injuries. From a judgment for plaintiff, the defendant appeals.

Judgment modified, and, as so modified, affirmed.

Treadwell & Laughlin and Raymond M. Farley, all of San Francisco, for appellant.

Elmer P. Delany, Albert Michelson and Herbert Chamberlain, all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Harry W. Guay, brought this action against defendant, American President Lines, Ltd., to recover damages for personal injuries sustained as a result of the asserted negligence of defendant and its employees. The injuries occurred while plaintiff was employed as an able-bodied seaman on board the vessel "Sea Corporal."

a merchant marine ship owned by the United States and operated by the defendant under contract as "General Agent" of the United States War Shipping Administration. The action was brought under the Jones Act, 46 U.S.C.A. § 688, which statute grants to seamen the right to sue their employers in actions such as these. The cause proceeded to trial before a jury and a general verdict was rendered for plaintiff in the sum of $15,000. From the judgment entered on this verdict defendant appeals.

At the threshold of this appeal we are met with the contention that no cause of action here existed against this defendant because, so it is asserted, plaintiff was the employee of the United States War Shipping Administration and not the employee of defendant, and admittedly the employer-employee relationship must exist to warrant an action under the Jones Act. During the war the United States marshalled practically all of the vessels of our merchant marine for war service. Those vessels were acquired, owned, or requisitioned by the government and operated by various companies under several different types of contracts, and the control over such vessels placed under the jurisdiction of the Administrator of the War Shipping Administration. In some cases the War Shipping Administration built and owned the vessels, while in other cases it requisitioned the vessels and operated them under various types of charter agreements. In the present case the United States and the defendant entered into an agreement designated as "Contract WSA-224," wherein the defendant is designated as the "General Agent" of the United States to manage and conduct the business of vessels assigned to it by the United States. That contract provides, among other things, that the General Agent shall procure the master of the vessel, subject to the approval of the United States; that such master shall be an agent and employee of the United States, with full control in respect to the navigation and management of the vessel; that the General Agent shall procure the men needed to man the vessel through the customary channels used by commercial operators and on terms prevailing in the services in which the vessels are to be operated; that the officers and members of the crew shall be subject only to the orders of the master; that all persons shall be paid in the customary manner with funds provided by the United States. After providing for the compensation of the General Agent and for the reimbursement of the General Agent for certain expenditures, the agreement provides: "To the extent not recovered from insurance, the United States shall also reimburse the General Agent * * * without limitation, [for] all disbursements for or on account of wages, * * * loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury * * * required to be paid by law."

[1] The defendant argues that under such a contract Guay was not an employee of it, but was an employee of the United States, that it was a mere agent of the United States, and, as such, not liable under the Jones Act. This precise point has been decided adversely to the contentions of defendant by the United States Supreme Court in Hust v. Moore-McCormack Lines, 328 U.S. 707, 66 S.Ct. 1218, 90 L.Ed. 1534. Inasmuch as we are here concerned with a federal statute the interpretation of that court is conclusive.

In the Hust case the plaintiff was injured while performing his duties as seaman aboard a government owned ship operated by the defendant under a contract identical to the one here involved. The action, as here, was brought under the Jones Act. The complaint, as in the instant case, alleged that Hust was the employee of the agent and was injured through its negligence. The trial court found for plaintiff. The Oregon Supreme Court (176 Or. 662, 158 P.2d 275) held, in accordance with defendant's arguments made on this appeal, that, as a matter of law, Hust was an employee of the United States and not an employee of the operating agent, and concluded that an injured seaman had no cause of action under the Jones Act against the operating agent. This holding was reversed by the United States Supreme Court in a four to three decision. The majority opinion was written by Mr. Justice Rutledge and concurred in by Justices Murphy, Douglas and Black. In addition to concurring in the main opinion, Mr. Justice Douglas, joined by Mr. Justice Black, wrote a special concurring opinion in which it was urged that the operating agent was not only the "employer" of the seamen under the Jones Act, but was also the "owner pro hac vice" of the vessel. Mr. Justice Reed wrote a dissent in which Justices Frankfurter and Burton joined. The then Chief Justice had died before the arguments in the case were concluded. Mr. Justice Jackson did not participate.

The majority opinion discusses at some length the history and rationale of the Jones Act, and points out how that statute was passed for the purpose of affording seamen adequate protection in situations where such protection was theretofore deemed inadequate. The Court then stated (page 719 of 328 U.S., page 1224 of 66 S.Ct., 90 L.Ed. 1534): "Now it is argued that this favored position was altogether inverted when the Government took over control of the entire merchant marine under its war powers in 1942. For it is maintained and the Oregon Supreme Court has held, in effect, that this transfer stripped seamen of many, if not all, of their protections, including the remedy under the Jones Act, for the duration of the war and six months."

The court then discusses at some length the injustices, inconsistencies and complexities that would arise if the views of the Oregon court were adopted, and then stated (p. 722 of 328 U.S., page 1225 of 66 S.Ct.): "We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication."

After some discussion of the Suits in Admiralty Act, 46 U.S.C.A. § 741 et seq., under the terms of which seamen in the position of Hust are permitted to sue the United States under rules substantially different from those applicable in an action brought under the Jones Act, and after holding that the conferring of that right was not intended to affect rights under the Jones Act, the court continued (p. 723 of 328 U.S., page 1226 of 66 S.Ct.):

"We are told, however, that the Jones Act applies by its specific terms only in the presence of the relation of employer to employee, to give the latter a remedy for the employer's negligence; and, since the effect of the General Service Agreement was to make the seaman technically an employee of the United States, the necessary result was to remit him exclusively to the Suits in Admiralty Act for remedy to enforce the substantive right given by the Jones Act.

"The premise is not controlling. We may accept the Oregon court's conclusion that technically the agreement made Hust an employee of the United States for purposes of ultimate control in the performance of his work, although the meticulous differences in this respect between its terms and the corresponding provisions of the Maritime Commission's standard contract make it hardly more than dubious that respondent did not stand pro hac vice as employer with the Government. But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for such injuries as he incurred. This case * * * involves something more than mere application to the facts of the common-law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee.

"Here indeed is the respondent's fallacy, for it assumes the case would be controlled by the common-law rules of private agency. It is true these are applied in the normal everyday applications of the Jones Act. But in those situations this is done to determine who comes within, who without the covered class in the Act's normal operation, not to exclude that class entirely or in large part. * * * No such application of the common-law 'control' test can be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life.'

"Not always does the law proceed in disregard of that truth. There was nothing to prevent Congress or the President, acting in exercise of their authority, from shifting the technical relation of employer and employee from the general agent to the Government, for purposes relevant to ultimate wartime control of marine employees, without at the same time disrupting their normally applicable rights and remedies. On the contrary, there was every reason why the change should be made without that consequence. No presumption can be indulged that any purpose existed to take away those protections when they were needed more than ever, nor any that so great a disruption would be made for only the emergency of the war period. Nothing in the Jones Act, the Suits in Admiralty Act, or in the War Powers Act of 1941 and the Executive Orders by which the industry's transfer was accomplished compels such a conclusion."

This case is conclusive on the problem under discussion. In its reply brief defendant argues that the Hust decision is not applicable to the present case because Hust was injured on March 17, 1943, seven days before the effective date of the Clarification Act, 50 U.S.C.A.Appendix § 1291, which became effective March 24, 1943, while in the instant case plaintiff was injured in February, 1944. The Congress, in that statute, was dealing primarily with the rights of injured seamen against the Government, it being provided in quite clear language that seamen in the position of plaintiff, injured on or after October 1, 1941, were entitled to maintain an action against the Government under the Suits in Admiralty Act, supra. It is true that Mr. Justice Rutledge, in his majority opinion in the Hust case, stated (page 727 of 328 U.S., page 1228 of 66 S.Ct., 90 L.Ed. 1534): "We need not determine in this case whether prospectively the Clarification Act affected rights of the seaman against the operating agent and others, or simply made sure that his rights were enforceable against the Government. We make no suggestion in that respect. For this case on the facts, is not governed by the statute's prospective operation." But this observation was immediately followed by the statement that (page 727 of 328 U.S., page 1228 of 66 S.Ct.): "It may be noted however that, if respondent's contention were the law, the provisions of § 1, authorizing enforcement of the seaman's substantive rights for injury, maintenance and cure, etc., by the Suits in Admiralty Act remedy, would do no more than reaffirm what the latter Act had provided all along."

Later, in discussing the history and effect of the Clarification Act Mr. Justice Rutledge stated (page 733 of 328 U.S., page 1231 of 66 S.Ct.): "The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer. Whether or not this conserving intent was made effective in the prospectively operating provisions of the Act, it is made clear beyond question in the retroactive ones. Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to be either doubtful or lost."

[2] Thus, while it is true, as contended by defendant, that Mr. Justice Rutledge, in his majority opinion, was dealing with a case involving the retroactive provisions of the Clarification Act, the whole tenor of his opinion leads to the conclusion that the Clarification Act did not prospectively take away the seaman's rights against the General Agent, called by Mr. Justice Rutledge the "operating agent," under the Jones Act. All that the Clarification Act did was to regulate the seaman's rights against the Government, and it in no way, directly or impliedly, affected his rights against the operating agent. This is made crystal clear not only by the language of the statute, not only by the rationale of the Hust case, but also by all subsequent decisions we have found interpreting the Hust case. In Bennett v. Wilmore S. S. Corporation, D. C., 69 F.Supp. 427, the court held, as a matter of law, that the operating agent was liable, under the Jones Act, to a seaman injured on August 4, 1944, or more than a year after the effective

date of the Clarification Act. In DeWitt v. United States, D. C., 67 F.Supp. 61, a similar holding was made in connection with injuries incurred aboard ship on September 13, 1945, or more than two years after the effective date of the Clarification Act. The problem was discussed in Cohen v. American Petroleum Transport Corporation, 188 Misc. 465, 68 N.Y.S.2d 250, where it was held that an injured seaman, employed under a contract similar to the one here involved, and where the corporation was operating under a contract similar to that here involved, had a cause of action against the corporation under the Jones Act as well as a cause of action under the Suits in Admiralty Act. The court expressly held that the Hust case governed prospective injuries as well as those incurred prior to the effective date of the Clarification Act.

At the oral argument counsel for defendant asserted that the Hust case had, that very day, been overruled by the Supreme Court of the United States in the case of Caldarola v. Eckert, 67 S.Ct. 1569. Counsel were given the opportunity to file supplemental briefs to discuss the legal effect of that decision. An examination of that case demonstrates to a certainty that it in no way affected, overruled, questioned or limited the majority decision of the Hust case. The Hust case, as does the instant one, involved the rights of an injured seaman to sue the operating agent under the Jones Act. The Caldarola case involved the rights of a longshoreman, as a business invitee, to sue the owner or possessor of defectively maintained property. The New York Court of Appeals (Caldarola v. Moore-McCormack Lines, 295 N. Y. 463, 68 N.E.2d 444) held that a general or operating agent similar to defendant in the instant case did not own or possess the ship upon which Caldarola as a longshoreman was injured so as to render the general or operating agent liable for injuries sutained by reason of the unsafe condition of the premises. The New York Court of Appeals was of the opinion that the Hust case, determining as it did that the operating agent was the "employer" of seamen within the meaning of the Jones Act, had no application to the question as to whether the operating agent was the "owner" or "possessor" of the ship under an entirely different statute. At page 466 of 295 N.Y., at page 445 of 68 N.E.2d the New York Court of Appeals stated: "Hust, * * * unlike the present plaintiff, was a seaman. * * * Hust's suit was brought under the Jones Act * * * which gives a seaman a statutory cause of action in negligence against his employer. The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the 'General Agent'. A concurring opinion by two of the Supreme Court Justices, in the Hust case, goes much further and construes the 'General Agency Contract' as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it * * *. We find nothing in this record to prove possession or control of the ship in these defendants Eckert, * * * plaintiff has no cause of action against these defendants."

This holding was affirmed by the United States Supreme Court in a five to four opinion. The majority opinion points out that the injury to Caldarola was a maritime tort and, as such, suable in the state courts, and that the determination of the New York courts that a business invitee such as a longshoreman has no cause of action against one who does not control or possess the premises was binding on it. It was urged that the necessary effect of the Hust decision was to make the operating agent the owner "pro hac vice," of the vessel. This contention was rejected. The majority opinion states (page 1571 of 67 S.Ct.): "Hust v. Moore-McCormack Lines, supra, arose under the Jones Act. * * * We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.' The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel." Thus the majority opinion in the Caldarola case clearly reaffirmed the holding in the Hust case that an operating agent such as defendant was an "employer" within the meaning of the Jones Act, but simply refused to extend that ruling by holding that the operating agent was the "owner" of the ship under a different statute.

That this was the holding of the Caldarola case is made clear not only by the majority opinion in that case but also by the dissents. Mr. Justice Douglas wrote one dissent in which Justices Black and Murphy concurred. Justices Black and Douglas had agreed with the majority opinion in the Hust case, but had, in addition, joined in a special concurring opinion in that case holding that the operating agent was not only the "employer" of seamen under the Jones Act, but also the "owner pro hac vice" of the vessel. In their dissent in the Caldarola case these justices, now joined by Mr. Justice Murphy, who had concurred in the majority opinion in the Hust case, reaffirmed their position taken in their concurring opinion in the Hust case, and urged that the operating agent should be held to be the owner of the vessel pro hac vice and, as such, liable to a business invitee for the dangerous condition of the ship's appliances.

In a separate dissenting opinion, Mr. Justice Rutledge (author of the Hust majority opinion) agreed "with respondents' counsel and the Court that Hust v. Moore-McCormack Lines * * * does not rule this case." (page 1572 of 67 S.Ct.) He pointed out that "The Hust case involved the rights of seamen, not of longshoremen" (page 1572 of 67 S.Ct.), and that "seamen's rights are not longshoremen's rights." (page 1573 of 67 S.Ct.) He further stated that: "The question in this case therefore is not one necessarily governed by the same considerations as applied in the cases of seamen covered by the Hust decision." page 1573 of 67 S.Ct.

[3] Thus it is crystal clear from both the majority and dissenting opinions in the Caldarola case that the Supreme Court not only did not overrule, question or disapprove the holding of the Hust case, but accepted the principles therein set out in the majority opinion, and, by necessary implication, reaffirmed them. Thus, the problem is controlled by the Hust case. Under that decision plaintiff herein has a cause of action under the Jones Act against defendant.

[4] Defendant objects to the instructions given by the trial court in the instant case on the problem under discussion. The trial court instructed that if the jury found that the defendant had not disclosed to plaintiff that it, the defendant, was acting only as agent of the United States, and that plaintiff was unaware of that agency relationship, then, as a matter of law, plaintiff was an employee of the defendant within the meaning of the Jones Act. No instruction was given based on the Hust case, apparently for the reason that a petition for rehearing in that case was pending at the time of trial of the instant case. Considerable evidence was admitted on the issues of whether defendant had disclosed to plaintiff the agency relationship and whether plaintiff knew that fact, and from that evidence the jury could have found a failure to disclose, lack of knowledge on the part of plaintiff of the agency relationship, and an honest belief on the part of plaintiff induced by defendant, that defendant was the employer. Prior to the Hust case it had been held that liability under the Jones Act in cases similar to the instant one turned upon the questions of disclosure and knowledge—in other words, it was a question of fact whether defendant disclosed or plaintiff knew of the agency relationship. Lewis v. United States Nav. Co., D.C., 57 F.Supp. 652; Moss v. Alaska Packers Ass'n, 70 Cal.App.2d Supp. 857, 160 P.2d 224. The instruction challenged was undoubtedly based on the rule of these cases. But under the rule of the Hust case defendant, as a matter of law, was the employer of plaintiff as that term is used in the Jones Act. Thus the challenged instruction, while erroneous in that it submitted the issue to the jury, far from being prejudicial to defendant, was far more favorable to it than the rule of the Hust case permits. This being so, defendant cannot complain.

[5, 6] Defendant strenuously urges that the evidence is insufficient as a matter of law to sustain the implied finding of the

jury that it or its employees were negligent. An examination of the record discloses that the evidence, although conflicting, is ample and substantial to support the implied finding that the accident in which plaintiff was injured was solely and proximately caused by the negligence of defendant's employees. Defendant's real complaint is a dissatisfaction with the rule requiring an appellate court, on factual issues, to sustain a finding based on substantial evidence. The conflict of evidence rule is too well settled to require any defense in this opinion.

[7] Plaintiff was injured on February 26, 1944, while employed as an able-bodied seaman on board the "Sea Corporal," which was then docked at Brisbane, Australia. The evidence most favorable to plaintiff, which this court, as an appellate court, must accept, shows that during the morning of the above-mentioned day it was discovered that there was a leak in one of the gasoline cans or tanks used in a motor-propelled lifeboat. The chief mate, Davis by name, instructed plaintiff and three other seamen—Reynolds, Schutte and Webinger—to remove the leaking tank from the lifeboat so that it could be repaired. The tank was of metal, and designed to fit under a cross seat of the lifeboat. There is testimony that it was three to four feet long, nine to eighteen inches thick, and two to three feet wide. Its gasoline capacity was about forty gallons. Empty, it weighed about ten or twelve pounds, and with the amount of gasoline it then contained weighed between three and four hundred pounds.

The plaintiff testified that after he and the three other seamen removed the tank from the lifeboat it was placed upon the boat deck for the mate's inspection. Davis told the men to drain the gasoline into receptacles, but the only available receptacles were two open buckets. They filled these buckets which still left most of the gasoline in the tank. Mate Davis was present throughout these "draining" operations, and, when the attempts to drain the tank were thwarted by the scarcity of suitable receptacles, Davis told the four men that it was dangerous to drain the gasoline into open cans, and instructed them "to put a line around it and lower it over the front of the house to the main deck." Seaman Reynolds, a witness for plaintiff, testified that Davis told them to "Put a line around it, make a line fast around it, place it on the forward rail and lower it over the forward part of the house on the well deck." Seaman Schutte, who also testified for plaintiff, stated that Davis told them that "we would have to take it out of the boat and send it down into town to be repaired and that the best way to do it would be put a line around it and lower it over the rail forward of the amidships house." Mate Davis, who testified by deposition for defendant, admitted that he told the men to "unship it, cast it loose from the boat, and take it out and lower it away over the forward rail down to the main deck." He did not remain to see the work performed.

The tank was removed by the men from its resting place on the boat deck to the position at the rail around that deck at the spot where the mate had directed it be taken to be lowered. The main deck, to which the tank was to be lowered, was two decks below. A rope or gantline about two and one-half inches in circumference was then tied around the center of the tank and securely knotted by Reynolds. The four men then lifted the tank onto the rail which ran around the boat deck, and the other three men "steadied" the tank on the upper cylindrical metal rail while Reynolds took the free end of the line over to a handrail which encircled the deckhouse, across the six foot corridor between the deck rail and the deckhouse. Reynolds made two turns of the line around that deckhouse handrail "to secure it as it goes down." He testified that with those two turns around the handrail "you can hold an enormous weight. One man with one hand could hold a tank that way and then you slack it off as the tank goes down and feed your line out." It was Webinger's assignment, to hold the tank steady on the rail before the actual lowering began. Reynolds testified that "One man could very easily stand there and steady that. Once it was on the rail it wasn't hard to balance." The other two men—Schutte and plaintiff—were to climb over and "outboard" of the deck rail to aid in easing the tank down onto the main deck. Running around the boatdeck, and below the lower pipe of the deck rail, was a metal plating four to five inches high and one-quarter inch thick, called the "fishplate." Its utility was to prevent objects, or "swabbing" water, from falling from the boatdeck upon the main deck below. Attached to this fishplate, and between the floor of the boatdeck and the lower pipe of the deck rail, was a round roller about two feet long, referred to as a "fairlead." It was used to assist in raising and lowering lifeboats to and from the boatdeck to prevent the cutting or binding of the ropes.

Schutte climbed over the deck rail at the left end of the tank as it was poised on the rail. He took a position with one foot on the fishplate and the other foot on a ladder attached to a "king post" which stood immediately in front of the boatdeck bulkhead. Plaintiff climbed over the rail at the other or right end of the tank as it was poised on the deck rail. He testified that after he climbed over he had both of his feet on the fishplate and both of his hands on the deck rail. He further testified that "I had no sooner got over the rail than the tank slid or came towards me. What caused it, I don't know." Prior to the sliding of the tank he at no time had his hands on the tank. He put his left hand up to try to ward off the tank, but "it just kept coming and I went with it." It is undisputed that plaintiff fell to the main deck about twenty-eight feet below. The seriousness and permanency of his injuries are not disputed. Reynolds testified that there was not "any motion of the ship at all. It was a nice clear day and smooth water." He further said that the tank fell "until it caught up the slack because I hadn't gotten all the slack in and it fell until the weight caught and when I saw it going, immediately I yanked it and took in the rest of the slack and there it stayed. I would say roughly it fell about six feet." He further testified that Schutte and plaintiff had not yet laid hand to the tank before it fell, and that plaintiff's feet were resting on the fishplate at the time that the tank started to fall. It would seem obvious that if Reynolds had taken in all of the slack in the gantline, the only direction that the tank could have fallen would have been back or inboard upon the floor of the boatdeck.

It is defendant's contention that plaintiff must have carelessly stepped upon the cylindrical roller attached to the fishplate and, presumably, that it rotated causing him to lose his footing and fall to the main deck. This contention simply disregards plaintiff's testimony that prior to the time the tank fell he had both hands on the rail and both feet on the fishplate and did not have either or both feet on the fairlead.

The evidence is not entirely clear as to what Webinger was doing just prior to the accident in performing his duty of steadying the tank on the rail. He admittedly was not available as a witness at the time of trial. It is a permissible and reasonable inference that he let go of the tank for a moment and it started to fall. Reynolds testified that Webinger grabbed at the tank and tried to catch it and thus forced the tank over towards plaintiff. The other witnesses either could not or did not observe Webinger just prior to the accident. Schutte, the other seaman outside the rail, testified that he thought he had his hand on the tank just prior to its fall and that he then grabbed for it.

There was considerable other evidence, some conflicting with what has been here set forth. It is quite apparent that the jury was amply justified in impliedly finding that the accident was solely and proximately caused by the negligence of either Reynolds or Webinger, or both, in failing to perform properly their functions in the lowering operation. Reynolds admitted that he failed to take up about six feet of slack in the rope. Had the slack been taken in, the tank could have only fallen inboard and not outboard. The uncontradicted evidence was that it was a very simple and easy task for Webinger to balance and steady the tank on the rail. It is a permissible and reasonable inference that Webinger negligently failed to perform this task. It is a permissible and reasonable inference that Webinger momentarily let go of the tank and that when it started to fall grabbed for it, as likewise did Schutte, and that either, or both, thus pushed the tank towards plaintiff.

Defendant argues at length that the testimony that the tank fell horizontally towards plaintiff is contrary to the laws of nature for, so it is asserted, an object as heavy as this tank must have fallen directly downward. This argument disregards the facts of this case and the laws of physics. Admittedly the tank was not full. Obviously, if anything happened to force the gasoline to rush to the right side of the tank as it started to fall, under well-known laws of physics the tank would take the direction in which the mass of liquid was being forced. It is a permissible and reasonable inference that exactly this happened when either Webinger or Schutte, or both, grabbed for the falling tank. That the tank did not fall directly downward is amply demonstrated by the evidence. According to defendant's diagram furnished this court at oral argument, approximately a third of the fairlead roller extended below the tank as it was balanced on the rail. There is no evidence that this roller was in any way damaged in the accident; in fact, defendant's witness Everingham, the purser on the "Sea Corporal," testified that, after the accident, the fairlead was undamaged. Had this tank fallen directly downward it would inevitably have hit the fairlead a crushing blow, and it is a permissible and reasonable inference that, had this occurred, the fairlead would have been damaged. It was not, so that it must follow that the tank did not fall directly downward.

Everingham testified that he interviewed Reynolds and Schutte immediately after the accident and that both told him that plaintiff had stepped on the fairlead roller, slipped, and fell. Everingham produced statements prepared by himself at the time of the interview to this effect, but, admittedly, Reynolds and Schutte refused to sign the statements. Both Reynolds and Schutte testified at the trial that the reason that they refused to sign the statements was that such statements did not correctly set forth what they had told Everingham. Both were positive that they did not tell the purser the facts contained in the statements prepared by him. It is quite evident that the jury chose to believe Reynolds and Schutte and chose to disbelieve Everingham. The implied finding on this issue, under such circumstances, cannot be disturbed by this court.

[8] Defendant makes numerous charges of error in connection with the instructions given and refused by the trial court, contending that some seven instructions given were erroneous and that the trial court erroneously refused to give some sixteen of its proffered instructions. Most of the sixteen proposed instructions were refused because they were "given in substance elsewhere." An examination of the court's charge demonstrates that the jury was fully and fairly instructed on all of the basic issues involved, and that any minor errors that may have crept into the instructions could not possibly have been prejudicial. Under such circumstances no ground for reversal exists. Shuey v. Asbury, 5 Cal.2d 712, 55 P.2d 1160; Barlow v. Crome, 44 Cal.App.2d 356, 112 P.2d 303.

Defendant objects to the instructions given on the issue of employment, and further contends that its proffered instruction for a directed verdict should have been given for the asserted reasons that there was no evidence of negligence and because, so it is claimed, the United States was the employer of plaintiff. These points have already been determined adversely to the defendant and need not be further considered.

[9] Defendant claims that the trial court erred in refusing to give on the "given elsewhere" ground, a proffered instruction on burden of proof which, in addition to the usual language employed in such instructions, contained the phrase "the law does not permit you to guess or speculate as to the cause of the accident in question." The jury was fully instructed on the burden of proof, and, while the quoted language undoubtedly correctly states the law, it was not error to fail to mention specifically the jury's incapacity to speculate. Such limitation was necessarily implied in the instructions given.

[10] Objection is made to the trial court's failure to give a proffered instruction that defendant was not liable if the

injuries were the result of unavoidable accident. In Stein v. United Railroads, 159 Cal. 368, at page 373, 113 P. 663, 665, it was held not error to refuse to instruct on unavoidable accident, because "A juror would know that such was the rule without instruction and it would seem absurd to burden the record with a formal statement of a truth so self-evident." In Gunter v. Claggett, 65 Cal.App.2d 636, at page 642, 151 P.2d 271, 274, the court said that "* * * unavoidable accident is simply another way of urging that defendant was not negligent. The jury has found, and the finding is supported, that defendant was negligent. No prejudicial error occurred in failing to instruct on this issue." The jury was fully and fairly instructed on the general rules of liability for negligence. It has impliedly found that defendant's negligence solely and proximately caused the accident. Such finding is supported by the evidence, and the permissible inferences therefrom. Under these circumstances no error was committed in failing to instruct on unavoidable accident.

[11] Defendant complains of the court's refusal to instruct on the "covered elsewhere" ground, that "Shipowners are not obliged to furnish the best, safest, and most convenient equipment or appliances." No error was committed in failing to so instruct for the reason that the jury was fully and correctly instructed that defendant was only burdened with a duty of ordinary care.

[12] Another technical complaint is made because of the refusal of the court to give an instruction, on the "covered elsewhere" ground, to the effect that there was no presumption that defendant was negligent merely because plaintiff was injured. The jury was correctly told that it was the burden of plaintiff to prove the negligence of defendant or its employees. That sufficiently covered the issue.

[13] The next objection is to the refusal of the court to give two instructions which, in effect, stated that it was for the jury to determine whether the order of Chief Mate Davis to lower the tank to the maindeck with a rope was an exercise of ordinary care on his part for the safety of the men ordered to complete that operation. It should be noted that the jury was charged to the effect that it was within their exclusive province to determine all questions of fact, and that they were the exclusive judges of the weight and sufficiency of the evidence. Such general instructions sufficiently covered the field. The court was under no duty to pick out a particular fact and to instruct the jury on that fact.

[14] Defendant next assigns as error the refusal of the trial court to give a series of proposed instructions, on the "given elsewhere" ground, to the effect that if the accident was caused solely by the manner in which plaintiff acted in performing his part of the plan, or if plaintiff's own acts were the proximate cause of his injury, or if he consented to the act causing his injury, the verdict must be for defendant. The court fully, fairly and correctly charged the jury that if the injuries were caused by plaintiff's own negligence and in disregard of his own safety, or if they were caused by plaintiff's act in stepping on the roller, a verdict for defendant should be returned. These instructions adequately covered the issue.

[15-17] Defendant next objects to the refusal of the trial court to give four instructions all generally related. The first told the jury that the only particular in which the complaint charged that defendant was negligent was in causing or permitting the tank to topple from the rail, and that the plaintiff could recover only by showing negligence in that particular. The second was to the effect that a verdict could not go against defendant on the theory that it had not supplied plaintiff with a safe place in which to work; the third that plaintiff could not recover on the ground that defendant was negligent in placing the tank on the rail; and the fourth to the effect that plaintiff could not recover on the ground that defendant was negligent in selecting the manner by which the tank was to be lowered from the boatdeck to the maindeck. In this connection, defendant points out that in his complaint the plaintiff alleged that "the defendants negligently caused and permitted a tank containing gasoline to topple from and fall off of a rail on said boat deck

and to strike plaintiff with force and violence thereby causing plaintiff to fall." It is contended that plaintiff was limited to that specific charge of negligence. That is the general rule. But defendant's application of that rule to the facts here involved is not sound for at least two reasons. In the first place, the allegation of negligently causing and permitting the tank to fall from the rail and thus injuring plaintiff, is broad enough to permit evidence of negligence in any particular leading up to the toppling or falling of the tank. In the second place, an examination of the record discloses that the facts in reference to the place of work, placing the tank on the rail and the selection of the manner of lowering the tank were fully and completely inquired into by both parties on the trial. The defendant offered an abundance of evidence in an attempt to show the reasonableness of its actions in these respects. The law is well settled that even where issues are not specifically alleged in a complaint or other pleading, if evidence is introduced on those issues without objection, such issues are properly involved in the case. The objection may not properly be made for the first time on appeal that such issues were not presented by the pleadings. McAllister v. Union Indemnity Co., 2 Cal.2d 457, 42 P.2d 305; Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 200 P. 934; see cases collected 14 Cal.Jur. p. 974, § 62. That rule is clearly applicable to the problem under discussion.

[18] The defendant next complains of seven of the instructions given by the court at the request of plaintiff. The first of these stated the general import of the Jones Act. It informed the jury that the action was being brought under that Act, and that under that statute a seaman can sue his employer for work-incurred injuries resulting from the negligence of the employer or his employees, "or by reason of any defect or insufficiency, due to the negligence of such employer in such employer's appliances, boats or other equipment." Defendant argues that this instruction, in effect, told the jury that it could find for plaintiff if the jury found that the failure to have sufficient containers in which to drain the gasoline from the tank was negligence. It is urged that this issue was not pleaded, and there was no evidence that ships were customarily so equipped. The defendant reads into the instruction something that is not there. After reading the entire record we are convinced that the jury could not possibly have interpreted the instruction as does defendant. The instruction was obviously a preliminary one and was simply a correct abstract statement of the general import of the statute under which the action was brought. It is quite obvious from the record that the case was tried on the theory that the basic question involved was whether the defendant's employees were negligent after the tank was placed on the rail. No feasible possibility exists that under the questioned instruction the jury could have thought it could find negligence in the failure to possess sufficient containers in which to drain the gasoline.

[19] Defendant objects to an instruction that stated that merely because plaintiff was technically a government employee that did not mean that he had "lost all remedies against the operating agent, * * * the American President Lines, Ltd." Defendant challenges, in particular, the use of the words "operating agent." Inasmuch as under the Hust case plaintiff was entitled to an instruction that defendant was the employer of plaintiff as a matter of law, no possible prejudice could have resulted to defendant by the use of the challenged words. Obviously, the words, even if erroneous, which they were not, could have prejudiced defendant only if the nature of the relationship were one of fact. It is quite significant that the majority opinion in the Hust case repeatedly refers to the company in the position of defendant as the "operating agent."

[20, 21] Objection is next made that the court instructed that defendant had pleaded and contends that plaintiff's injury was the result solely of his own negligence, and that contributory negligence operated only in mitigation of damages and not as a bar—the so-called doctrine of "comparative negligence" applicable in maritime law. Defendant urges that it never pleaded contributory negligence, which implies negligence on the part of defendant, but simply

pleaded that the accident occurred solely because of the negligence of plaintiff. Defendant argues that if it established its "sole negligence" defense, that would bar plaintiff's recovery, and the jury should have been so instructed, and that it was error to instruct on contributory negligence which was not pleaded. The jury was fully instructed that if the plaintiff's injuries were the sole result of his own negligence or lack of caution, or slipping on the roller, it should find for defendant. Thus it is clear that no substantial harm could have been suffered by defendant by the court's designation of its "sole negligence" plea as one of "contributory negligence." Moreover, it would seem that when a defendant pleads "sole negligence" of plaintiff as a defense, such plea puts into issue both the question of whether the accident occurred solely by reason of the negligence of plaintiff, and whether the accident was caused by the alleged negligence of defendant and plaintiff, so that under such a plea it is proper to instruct on contributory negligence.

[22] Objection is also made to an instruction to the effect that if the jury found that defendant negligently failed to provide plaintiff with a safe place to work and with safe appliances, and that such proximately caused the accident, a verdict for plaintiff should be rendered. It contends that those issues were not pleaded by plaintiff. This point has already been passed upon adversely to defendant in that portion of this opinion discussing the refusal of the trial court to give four defendant proposed instructions which sought to take the "place of work" and "safe appliance" issues out of the case. As there pointed out, not only were the allegations of the complaint broad enough to include the issues, but such issues were fully litigated by the parties. That being so, it was proper to instruct on such issues.

[23] Defendant next objects to an instruction in which the jury was told that it need not pay any attention to the fact that plaintiff had also brought suit against the Government (in which action plaintiff had pleaded he was an "employee" of United States), because it there is recovery in this suit the plaintiff would be debarred from recovering in that suit. It is urged that the Federal pleading should have been considered by the jury as impeachment of plaintiff's testimony that he had never been told that his employer was the United States. That point would be important only if that question were at issue. But since, under the Hust case, plaintiff was entitled to an instruction that for the purposes of the Jones Act he was defendant's employee as a matter of law, the fact that he alleged in the Federal suit that he was the employee of the United States, which was also true, is totally immaterial.

[24] Defendant also objects to an instruction given by the court in which it was stated that the defense of assumption of risk by the employee was not available to the employer. It is not asserted that the instruction did not correctly state the law, but it is contended that the defense was not pleaded, was not in issue and must have confused the jury. Under the Jones Act such a defense does not exist, and, this being so, it was proper for the court to so inform the jury.

[25] The last contention of defendant is more meritorious. The complaint pleaded the injury on February 26, 1944, and, among other elements of damage, pleaded that plaintiff was then earning $350 per month, plus board and lodging, reasonably worth $75 per month, and that as a result of the accident he was unable to work from February 26, 1944, until November 14, 1944. It is then prayed that as a result of this, and other elements of damage, plaintiff was damaged in the sum of $25,000. The jury, as already pointed out, brought in a general verdict of $15,000. The jury was several times instructed that the value of plaintiff's time during his period of disablement was a proper item of damage. During the trial the defendant offered documentary evidence to prove that between May 4, 1944, and November 15, 1944, there was paid to plaintiff as maintenance the sum of $539. The evidence was excluded and the exhibits introduced only for purposes of identification. It is alleged that this was error. There can be little doubt but that this evidence should have been admitted.

The complaint pleaded loss of earnings for the period in question and the proffered proof would have demonstrated that there was not a total loss of earnings during that period. Plaintiff cannot secure double recovery for this item of damage. While it is true that the right to maintenance is statutory, and such remedy is "independent and cumulative" with that conferred by the Jones Act (Occidental Indem. Co. v. Industrial Acc. Comm., 24 Cal.2d 310, 312, 149 P.2d 841; see, also, Pacific Steamship Co. v. Peterson, 278 U.S. 130, 49 S.Ct. 75, 73 L.Ed. 220), that does not mean that double recovery may be had for the same item of damage. All that is meant is that an action under the Jones Act and an action for maintenance may be maintained separately or together. This was clearly recognized in the Occidental case, supra, where at page 323 of 24 Cal.2d at page 848 of 149 P.2d the court stated: "To avoid double recovery for the same injury and the compensable factors thereof where both remedies were sought before the statute of limitations had run, the appropriate tribunal could offset one against the other to the extent that they overlapped."

[26, 27] To hold that because the seaman has two independent and cumulative remedies for a portion of the same injury that he can recover twice for this item would violate elementary principles of logic and fairplay. The cases clearly indicate that no such right exists. John A. Roebling's Sons Co. of New York v. Erickson, 2 Cir., 261 F. 986; Haugen v. Oceanic Fisheries Co., D.C.W.D.Wash.N.D., 21 F. Supp. 572; Muise v. Abbott, 1 Cir., 160 F.2d 590; Royle v. Standard Fruit & Steamship Co., Sup., 52 N.Y.S.2d 407, affirmed 269 App.Div. 762, 54 N.Y.S.2d 778. While it is true that defendant did not plead these payments as an offset, and that it would have been better practice to have done so (Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 242 P. 709), that was not indispensable under the circumstances. It is at least reasonably arguable that such evidence can be admitted under a general denial. See cases collected 25 C.J.S., Damages, § 142, p. 780. Moreover, no objection was made on this ground, the trial court ruling that the evidence was not admissible because the plaintiff expressly waived any claim for hospital expenses or doctor bills, which were paid for by the Government, and evidently believed this excluded any damage for "maintenance" as well. Plaintiff did not ask for hospital expenses or doctor bills, but he had specifically pleaded a total loss of earning power for the period in question. He had put that issue into the case. He offered evidence that he was hospitalized during that period and had not worked. He offered evidence that his earning power was so much before the accident, and totally cut off during that period. The defendant should have been permitted to show that in fact plaintiff "earned" through "maintenance" paid to him the sum of $539.

This error does not require a reversal. Plaintiff does not contend that he was not paid the $539, but, in fact, admits that he received this sum. He not only consents, but suggests, that if it was error to exclude this evidence (which he, of course, denies) that the judgment should be reduced by the amount involved. We agree with this suggestion.

It is therefore ordered that the judgment be modified by striking therefrom the sum of $539, and the trial court is directed to enter its judgment in the amount of $14,461. As so modified the judgment is affirmed. Plaintiff to recover costs on appeal.

BRAY, J., and OGDEN, J. pro tem, concur.

30 Cal.2d 560

PEOPLE v. SANCHEZ.

Cr. 4769.

Supreme Court of California.
Sept. 10, 1947.

1. Criminal law 🔑1186(4)

Conviction of first-degree murder with death sentence must be affirmed despite many erroneous and irrelevant instructions, where evidence amply justified finding that defendant murdered victim in perpetration of robbery, jury were adequately instructed on this phase, and it did not appear that they were misled by other instructions or that errors resulted in miscarriage of justice. Const. art. 6, § 4½.

2. Criminal law 🔑822(1)

Instructions which were not model statements, but were not misleading when read in their context, were not ground for reversal of conviction.

3. Criminal law 🔑806(2)

Conviction would not be reversed because instructions on self-defense unnecessarily repeated certain principles, where the principles were not prejudicially misstated. Pen.Code, §§ 197, 198.

4. Homicide 🔑300(3), 341

An instruction that person exercising right of self-defense may not only stand his ground but may pursue his adversary until he has secured himself from danger was correct, but failure to give it was not prejudicial where defendant claimed that decedent pursued him.

5. Homicide 🔑101

A justifiable killing cannot become criminal by virtue of killer's subsequent conduct.

6. Homicide 🔑341

Refusal of instruction that, if defendant killed in defense of his life, he must be acquitted though he subsequently committed another offense, was not prejudicial where evidence and instructions made it not reasonably conceivable that jury could have believed that defendant killed in self-defense. Pen.Code, §§ 189, 198, 211.

7. Criminal law 🔑822(6)

In prosecution for murder committed in perpetration of robbery, unnecessarily repetitious instructions on premeditation were not incorrect, where it did not appear that instructions as a whole so misled jury that their conclusion of guilt was based on finding, not that murder was committed in perpetration of robbery, but that defendant "premeditated" before killing the moment he conceived the purpose to kill.

8. Criminal law 🔑1172(2)

Lengthy instruction on reasonable doubt was not ground for reversal, where first portion contained no actual misstatement of law, though unnecessarily complex in wording, and jury probably did not misinterpret ambiguous statement that "all reasonable doubts must be resolved in favor of the defendant by your verdict of not guilty". Pen.Code, § 1096.

9. Criminal law 🔑829(5)
Homicide 🔑300(3)

In prosecution for murder, instruction that defendant need not establish self-defense by evidence sufficient to satisfy jury, but is entitled to acquittal if evidence is sufficient to raise reasonable doubt, was correct, but its refusal was not error where its principle was repeatedly brought to jury's attention in other instructions.

10. Homicide 🔑309(3, 4)

Involuntary manslaughter is not involved in charge of murder as a matter of law so as to require instruction on involuntary manslaughter regardless of whether evidence raises the issue.

11. Homicide 🔑307(1)

Charge to jury in homicide case should comprise instructions on the law applicable to issues raised by the evidence, not a dissertation on all classes of homicide known to the law.

12. Criminal law 🔑813

An instruction correctly stating a principle of law which has no application to facts is erroneous.

13. Criminal law 🔑770(1), 806(1), 813

Trial judge should be diligent in refraining from burdening the jury and the record with inapplicable instructions, and in avoiding unnecessarily prolix and repetitious statements, as well as in informing jury adequately on issues actually involved.

14. Homicide ⚷340(4)

In murder prosecution, error in giving instruction on involuntary manslaughter, which was not an issue under the evidence, was not prejudicial where jury rejected testimony that defendant killed under influence of fear and found him guilty of first degree murder.

15. Criminal law ⚷925(1)

Placing in charge of jury a deputy sheriff who was active in investigation of the murder and was an important prosecution witness did not necessitate new trial in absence of showing of prejudice. Pen. Code, § 1064.

16. Criminal law ⚷1186(4)

Refusal to permit defendant in murder prosecution to impeach witness who had acted as interpreter when defendant was first interviewed by district attorney, by showing interpreter's motive for favoring prosecution, was not prejudicial where interpreter's testimony accorded with defendant's testimony. Const. art. 6, § 4½.

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Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Jose Sanchez Sanchez was convicted of first-degree murder, and he appeals.

Affirmed.

D. M. Campbell and D. M. McGahey, both of El Centro, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz and Frank Richards, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

On February 9, 1946, defendant Sanchez admittedly killed Alejandro Garcia, concealed his body, and fled from the United States. Thereafter defendant was apprehended and prosecuted. A jury found him guilty of murder of the first degree and made no recommendation as to penalty. Defendant appeals from the ensuing judgment imposing the death sentence and from an order denying his motion for new trial.

[1] It is the theory of the People that defendant murdered Garcia in the perpetration of robbery; it is the theory of defendant that he killed justifiably in self-defense or, at least, in such a frenzy of terror that the killing could be no more than murder of the second degree or voluntary manslaughter. No other explanation of, or reason for, the slaying is claimed. It is true that the charge to the jury contains many erroneous and irrelevant instructions which in other circumstances could require a reversal. However, the evidence (hereinafter related) amply justifies a finding that Garcia was murdered by defendant in the perpetration of a robbery; the jury were adequately instructed as to this phase of the case; and it does not appear that they were misled by other instructions or that errors complained of by defendant resulted in a miscarriage of justice. Therefore, the judgment must be affirmed.

Defendant and Garcia were Mexican laborers who had worked on farms in the Imperial Valley. On the evening of Friday, February 8, 1946, they told the farmer by whom they had been employed that "They wanted to lay off * * * to go to Mexicali." Each received his pay check, defendant's being for the sum of $52.70 and Garcia's for $77.80. The two men went to the cabin where they resided. This cabin contained two rooms, a kitchen and a bedroom; its single outside door opened from the kitchen. At about 4 or 5 o'clock on Saturday morning defendant killed Garcia with an axe, dragged his body to an outside toilet and concealed it beneath the toilet seat, washed some of the blood from the cabin, and fled to Mexico. Before he was killed Garcia had, besides his pay check, "a good watch," a pair of shoes and (according to defendant) a knife. When his body was discovered, about 8 or 9 o'clock on Saturday morning, none of these articles of personal property were on the body or in the cabin or its vicinity. Garcia's pockets contained only 25 cents. His body bore five deep axe cuts which apparently had been inflicted in rapid succession: one across the small of the back, which went through his belt, through another belt which held a truss, and to the bone; one into the head, from which brain tissue had spilled; one across the mouth, breaking bones and teeth; one which nearly severed the left arm above the wrist; and one which went through the left thigh to the bone. On the throat were marks (not deep cuts) which appeared to have resulted from "stabbing" or "gouging" with a knife or scissors. A pair of sheep shears was found in the cabin.

Defendant cashed his pay check in a grocery store on Saturday morning before he left this country. Garcia's pay check, endorsed "Garria" or perhaps "Garsia," was also cashed at this store. In the opinion of a handwriting expert, the endorsement thereon was written by defendant. Exemplars of defendant's handwriting made by him after his arrest similarly misspelled the name of deceased as "Garria" or as "Garsia." Paychecks made and delivered to Garcia by a former employer and cashed prior to the dates involved herein were endorsed "Alejandro Garcia"; such latter endorsements, in the opinion of the handwriting expert, were not written by defendant. Defendant on cross-examination testified as follows:

> "Q. Now, before you put — or at any time after you killed Alejandro Garcia, did you take anything from his clothes or from his body? A. No. I didn't take anything.
>
> "Q. I am showing you a check which is People's Exhibit No. 1 [the pay check Garcia received the evening before he was killed], and ask you if you had that check in your possession that morning. A. No, sir. * * *
>
> "Q. Did Garcia carry a watch? A. I don't know. I never saw it if he did."

The limited extent of these denials, and the fact that they were adduced only upon cross-examination, should be noted. Defendant did not deny that he endorsed or negotiated Garcia's paycheck nor did he claim that he formed the intent to and did take any articles of personal property from Garcia only after the latter's death.

Defendant's testimony as to the circumstances of the homicide is as follows: Prior to the day of the killing Garcia "got sore because I had to correct him for poor work * * * [F]rom that time on he did things that were not right, and I paid no attention to him." On the morning of Saturday, February 9, Garcia, contrary to his custom, arose early and prepared coffee. Defendant wakened but did not arise. "I could see he had some bad intentions. And he turned out the light, and I had a cigarette lighted, and I put it out, and then I pulled the bed clothes up over me. * * * I heard him open a knife." Defendant did not see the knife at this time or during the ensuing struggle but he knew that Garcia carried a pocket "spring knife * * * One of those that the blade jumps." Deceased leaped upon defendant and struck at his head with the knife but did not cut him. Defendant "slipped out from under him," ran out the door and attempted to fasten it "to stop him coming out, and then as I was trying to fasten the door was when he jumped on me and tried to cut me in the throat, and that was when, in guarding, I received this cut on my arm.[1] * * * Then he was pursuing me, right behind me, and I was forced to do what I could to defend myself, and the first thing I got hold of was an axe [which was lying about eighteen feet from the door of the cabin] * * * and then I struck him a blow, and at that time he — was when he tried to cut me in the stomach, and from the right I struck him another one. I don't remember any more about it than that. And then he turned half around * * * and he stumbled over there by the door of the house.[2] And then I stood there not knowing what to do, whether to give notice or advise the authorities, or whether to beat it. Then I thought I would put him in the hole, because I would be punished. And therefore then I hauled him over to where the hole was, in order to allow myself a chance to get away. Then I threw him in the hole and I went back into the house and I got the wash basin and took it over to * * * [the] stove, and washed my arm. Then when I got through with the arm I took the basin of water and began to clean up there. I took a sweater * * * and I grabbed my handkerchief and tied it around my arm and took to the road."

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[1] A superficial cut which, according to testimony of a physician who examined defendant on July 11, 1946 (five months after the killing), could not have been more than six weeks old at the time of such examination.

[2] According to the testimony of the physician and surgeon who examined the body of Garcia, after a man received a wound such as one of those on Garcia's head or back: "He wouldn't go anywhere. He would simply drop."

The testimony of defendant (which was given through an interpreter) corresponds closely to defendant's answers to questions of the district attorney given through another interpreter shortly after defendant was apprehended.

The physical condition of the scene of the homicide on the morning Garcia was killed and after defendant had fled, was as follows: In the bedroom was a bed and also a pallet on the floor. The covers on the pallet were stained with "a considerable amount of blood" and "appeared to have been cut with some sharp object." (Although defendant was not asked directly whether he was in the bed or on the pallet when Garcia assertedly attacked him, it appears that he was in the bed. He testified that "All of the time we [defendant and Garcia] were there we slept in that same bed, because it was the only bed that was there, and it was a big bed"; that shortly before the homicide defendant arose and then "went back to bed.") In the kitchen there was blood on and under the stove. The blood spots on the stove did not "appear to be the result of an open cut that was dripping"; "they were not on top, they came down at the side and down at the bottom, as though they had been splattered up against the stove." The kitchen floor had been recently washed but a large spot of blood remained. The step leading from the cabin had been washed and swept but blood spots remained on it. It is significant that although there was blood in the cabin and on the cabin step, and "an enormous amount of blood on the door and on the floor of the toilet, and on the seat of the toilet," there was no blood at the location outside where, according to defendant, Garcia was killed; that the kitchen and the step had been scrubbed and swept whereas the ground where, according to defendant, Garcia was killed was not disturbed except for a mark "as though something had been dragged along" displacing the leaves and surface of the soil. This "drag mark" ran from the cabin step to the toilet and in it were prints of high heeled boots such as defendant customarily wore.

[2, 3] The instructions given as to self-defense are long and repetitious.[3] Defend-

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[3] Among these instructions are the following:

"In the present case, it is not denied by the defendant that he killed Alejandro Garcia, the deceased, but he claims that it was in necessary self-defense, and to *repel* a violent and dangerous attack which the deceased was then making, or was about to make upon him. The right of self-defense of a party violently assaulted by another, *to repel such attack and fully protect himself*, is a law of nature. It antedates all written enactments, and is fully recognized in the laws and regulations of all civilized people. The right is expressly recognized by our own statutes, and the conditions under which it may be asserted are clearly defined. These are, that the party was not himself the first aggressor; or if the aggressor, that he had in good faith withdrawn from the contest before the fatal blow. Second, that the slaying was necessary to prevent the infliction upon himself of a great bodily injury by the party slain.

"To justify the killing of another in self-defense, it must appear that the danger was so urgent and pressing, that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was necessary, and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further struggle before the mortal blow was given.

"A bare fear of the commission of the offense, to prevent which a homicide may lawfully be committed, is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable man, and the party killing must have acted under the influence of such fears alone. It is not necessary, however, to justify such killing, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person in defendant's position to believe that he was in immediate danger of great bodily injury. Upon such appear-ant contends that they "seriously limit defendant's right to defend his life and person." Some of the instructions singled out for attack are not undue limitations, but rather approved definitions, of the extent of the right of self-defense. Others, while not model statements, are not misleading when read in their context. Although there was no occasion to state more than once certain principles as to the law of self-defense those principles are not prejudicially misstated.

[4] Defendant complains that the charge as to self-defense does not include a correct instruction requested by him, or any instruction, embodying the principle that "A person in the exercise of his right of self-defense not only has a right to stand his ground and defend himself when attacked *but he may pursue his adversary* until he has secured himself from danger." (Italics added.) Such an instruction, it has been held, "clearly states the law on the subject." (People v. Hatchett (1942), 56 Cal.App.2d 20, 22, 132 P.2d 51, 52.) It has been held that the substance of the requested instruction relative to the right to pursue an adversary as well as stand one's ground is not adequately covered by instructions (given in the instant case) that in exercise of the right of self-defense one may repel force by force and may act upon apparent necessity (People v. Orosco (1925), 73 Cal.App. 580, 598, 239 P. 82). But here, if defendant's testimony is accepted at its face value, the failure to give the requested instruction, if error at all, is not prejudicial, for the defendant did not claim that he pursued the decedent or even that he stood his ground; on the contrary, defendant testified that he fled and that decedent pursued him and that, during his effort to escape, he killed Garcia while acting under the influence of terror induced by Garcia's unprovoked attack. If defendant's testimony had caused the jury to have a reasonable doubt as to defendant's state of mind or purpose at the time of the

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ances, a party may act with safety; nor will he be held accountable, though it should afterwards appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril.

"The rule in such cases is this: What would a reasonable person—a person of ordinary caution, judgment and observation—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and acting upon such appearances. The defendant is not necessarily justified, because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the question is, 'Would a reasonable man, under all the circumstances, be justified in such belief?' If so, the defendant will be so justified. If this was defendant's position, it was his right to *repel the aggression*, and fully protect himself from such apparent danger. * * *

"If you believe that the deceased himself made the first hostile demonstration against the defendant by drawing or attempting to draw a weapon, or otherwise assaulting him in such a manner and under such circumstances as would have justified a reasonable man in defendant's situation in believing that the deceased was about to inflict upon defendant great bodily injury, the defendant was justified in acting upon these appearances and belief; and if necessary, for his own protection, and to prevent great bodily injury to himself, he killed the deceased, he was justified in so doing, and your verdict should be one of acquittal. * * *

"A person *may repel force by force* in defense of person, property, or life against one who manifestly intends or endeavors by violence or surprise to commit a known misdemeanor or felony or either or to do great bodily injury to his person and the danger which would justify the defendant in the act charged against him may be either real or apparent; and the jury are not to consider whether the defendant was in actual peril of his life or property, but only whether the indications were such as to induce a reasonable man to believe that he was in such peril of person or property; and if he so believed reasonably, and had sufficient cause so to believe and committed the act complained of under such belief, you should acquit the defendant. * * *" (Italics added.)

The court also instructed the jury in the words of sections 197 and 198 of the Penal Code.

killing, then, under the instructions which were given, they certainly could not have found him guilty of murder of the first degree as defined in the instructions, but must either have acquitted him or found him guilty only of a less serious type of homicide. It is not, on this record, a reasonable inference that the giving of the requested instruction on the right to pursue as well as to stand one's ground would have affected the jury's conclusion. Hence, even if we interpret the circumstances shown (having in mind, particularly, the five severe axe wounds) as indicating that the defendant, contrary to his own testimony, had, when attacked or at any time during the fight, instead of fleeing, stood his ground and then pursued Garcia, the error in failing to give the requested pursuit instruction could not here to held to require reversal.

[5, 6] Defendant complains of the refusal of the court to give the following instruction which he requested and which, he argues, was necessary to enlighten the jury in case they determined that defendant first killed justifiably and then decided to and did take the property of his victim: "If you believe from the evidence defendant killed in defense of his life, then notwithstanding the fact that you also find that defendant subsequently committed another offense you must acquit him." Defendant is correct in his assertion that a killing which was justifiable cannot become criminal by virtue of subsequent conduct of the killer. But there is nothing in the instructions which could give a contrary impression and the defendant did not testify, nor is there other evidence to suggest, that he formed the intent to or did take any of Garcia's property only after the latter's death. He claimed only that he killed in actual self-defense or possibly in terror induced by Garcia's asserted attack. No motivating cause for the killing other than defendant's theories or the State's theory of robbery can logically be gleaned from the evidence. The jury were told that "All murder * * * which is committed in the perpetration or attempt to perpetrate * * * robbery * * * is murder of the first degree" (Pen.Code, § 189) and that "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear" (Pen.Code, § 211). It is clear from these instructions that to constitute the killing murder of the first degree because it was committed in the perpetration of robbery, the killer must at the time of the killing, have had the purpose to rob (although not necessarily the purpose to kill), whereas, as the jury were told, in the case of a justifiable killing in self-defense defendant "must have acted under the influence of such fears [of great bodily harm] alone" (Pen.Code, § 198). In view of all the evidence and of the instructions which were given and which have been previously noticed, it is not reasonably conceivable that the jury could have believed, or had a reasonable doubt, that the defendant killed Garcia in self-defense or terror, and still have found the verdict of first degree murder. If they had had a reasonable doubt on the question of self-defense or killing in terror they must have either acquitted the defendant or found the homicide to be an offense less than first degree murder. Hence the refusal of the instruction as worded (predicated on belief that "defendant killed in defense of his life") did not prejudice defendant.

[7] Here, as in People v. Peterson (1946), 29 Cal.2d 69, 78, 79, 173 P.2d 11, 16, "The court, in instructing the jury as to what constitutes murder of the first degree (apparently inadvertently, in the light of its other instructions), erroneously included portions of disapproved former stock instructions declaring that 'There are certain kinds of murder which carry with them conclusive evidence of premeditation * * * [etc.],' and that a man 'can premeditate, that is, think before doing the act, the moment he conceives the purpose.' Each of these two former stock instructions has been often condemned. (People v. Bender (1945), 27 Cal.2d 164, 182-185, 163 P.2d 8; People v. Valentine (1946), 28 Cal.2d 121, 134, 135, 169 P.2d 1; People v. Bernard (1946), 28 Cal.2d 207, 210-212, 169 P.2d 636; People v. Honeycutt (1946), [29 Cal.2d 52], 172 P.2d 698.) In

the present case they directly conflict with other, correct instructions which the court gave on the same subjects. 'Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury. [Citations.]' (People v. Dail (1943), 22 Cal.2d 642, 653, 140 P.2d 828.)" As shown above, there is evidence that defendant murdered in the perpetration of robbery. The instructions as to that phase of the case are not incorrect although unnecessarily repetitious, and it does not appear that the instructions as a whole so misled the jury that their conclusion that defendant is guilty of first degree murder is based on a finding not that the murder was committed in the perpetration of robbery, but that defendant "premeditated" before killing the moment he conceived the purpose to kill.

[8] The jury were correctly instructed in the language of section 1096 of the Penal Code concerning presumption of innocence and the definition of reasonable doubt. Other portions of the charge as to reasonable doubt include a lengthy instruction which commences as follows: "[I]f you believe from the evidence, beyond a reasonable doubt and to a moral certainty, that the defendant * * * did, unlawfully and with deliberate, willful, intentional premeditation and with felonious intent kill the deceased * * * and that said killing was done with malice aforethought and was not justifiable under the law as I have given it to you in the preceding instructions, and you further believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty of murder of the first degree, *as defined in the preceding instructions heretofore given to you* [which include definition of murder in the perpetration of robbery], then, you would be warranted in so finding by your verdict * * *." (Italics added.) The instruction contains similar paragraphs as to murder of the second degree and manslaughter, reiterates that each element of an offense must be established beyond a reasonable doubt to justify a verdict of guilty of such offense, and concludes with the statement, "All reasonable doubts must be resolved in favor of the defendant by your verdict of not guilty." The first portion of this instruction, although it is unnecessarily complex in its wording, contains no actual misstatement of law. The last quoted sentence of the instruction, as defendant says, is at best ambiguous and should not have been given, but we cannot agree with defendant that, upon the whole record, there is any probability that the jury seized upon it and concluded, despite other, correct instructions to the contrary, that in order to acquit defendant they must decide in his favor every issue upon which they had a "reasonable doubt" or that no reasonable doubt, on any issue (as for example, the issue of punishment or that of degree of the offense) could be resolved in his favor except by a complete acquittal.

[9] Defendant contends that the court erred in failing to give an instruction, requested by him, that "In a trial for murder it is not necessary for the defendant to establish self defense by evidence sufficient to satisfy the jury that the self defense was true, but if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was justified, then he is entitled to an acquittal." This proposed instruction correctly states the law and, where the evidence warrants submitting the issue to the jury, should be given. (See People v. Kane (1946), 27 Cal.2d 693, 701, 166 P.2d 285; see also People v. Roe (1922), 189 Cal. 548, 565, 209 P. 560; People v. Albertson (1944), 23 Cal.2d 550, at page 587 of concurring opinion, 145 P.2d 7; 13 Cal.Jur. 737, § 104.) However, its principle was repeatedly brought to the attention of the jury for, as above indicated, they were told as to murder of the first degree, again as to murder of the second degree, and again as to manslaughter, that to warrant a verdict of guilty they must believe "beyond a reasonable doubt and to a moral certainty" that, among other things, the killing "was not justifiable [or was unjustifiable] under the law as I have given it to you in the preceding instructions." They were also told that they "should consider all of the instructions as a whole in arriving at"

their verdict. Under the circumstances the error in failing to give the instruction as requested was not prejudicial.

[10–14] The jury were told in the language of section 192 of the Penal Code that involuntary manslaughter "is the unlawful killing of a human being, without malice * * * in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Defendant relies upon People v. Hatchett (1944), 63 Cal.App.2d 144, 161, 146 P.2d 469, 477, where it is said that by this instruction the jury were told that "the act of shooting, if believed lawful [in self-defense], might constitute the offense of manslaughter if it was done in an unlawful manner or without due caution and circumspection. Any such theory of guilt would have been entirely unsupported by the evidence or any legitimate inferences to be drawn therefrom. The instruction clearly tended to divert the minds of the jury from the sole question whether defendant acted reasonably and in good faith in defending herself from a felonious attack and may well have operated to her prejudice." The People rely upon People v. Hashaway (1945), 67 Cal.App.2d 554, 569, 155 P.2d 101, 823; and People v. Chapman (1946), 76 Cal.App.2d 651, 173 P.2d 860. In those cases it is said that because the defendant was charged with murder, and involuntary manslaughter "as a matter of law" was "involved" in such charge, it was proper to instruct concerning involuntary manslaughter. These statements are not correct and are disapproved. The charge to the jury in a homicide case should comprise instructions on the law applicable to issues raised by the evidence, not a dissertation on all the classes of homicide known to the law. It is error to give an instruction which correctly states a principle of law which has no application to the facts of the case. (People v. Roe (1922), supra, 189 Cal. 548, 565, 209 P. 560; People v. Silver (1940), 16 Cal.2d 714, 722, 108 P.2d 4.) We agree with defendant that a trial judge should be diligent in refraining from burdening the jury and the record with inapplicable instructions and in avoiding unnecessarily prolix and repetitious statements as well as in informing the jury adequately on the law pertinent to their duties on the issues actually involved. In the present case, however, it does not appear that the giving of the subject instruction had any effect other than to add to the bulk of the charge. Since the jury rejected defendant's testimony that he killed under the influence of fear and found that the homicide was murder of the first degree, they could not have been concerned, as they might have been in the Hatchett case (where the defendant was charged with and convicted of manslaughter only [page 147 of 63 Cal.App.2d, 146 P.2d 469]), with the possibility that a killing in self-defense might be involuntary manslaughter because not done cautiously and circumspectly.

[15] Defendant next contends that the trial court erred to his prejudice when, on the last day of trial, it put Deputy Sheriff Bridwell in charge of the jury while they lunched and while they retired to consider their verdict. Bridwell was active in the investigation conducted after the body of deceased was found and was an important prosecution witness. Defendant concedes that there is no showing that Bridwell was actually prejudiced against defendant but urges that the officer "was biased against the defendant as a matter of law" and placing the jury in his charge gave "an unwarranted weight to the state's evidence." No objection was made at the time Bridwell was sworn to take charge of the jury. The People concede, as indeed they must, that it was "poor practice and poor judgment" to have placed Bridwell in charge of the jury but urge that the mere fact of such "poor practice," without timely objection thereto and without any showing of actual prejudice, is not ground for reversal. It must be recognized that the act complained of, under other circumstances, could well amount to worse than "poor practice." Where it was proved that the sheriff because of bias was disqualified to summon a jury (Pen.Code, § 1064), it was held to be prejudical error to entrust the jury to his care, over defendant's objection, when it retired

to deliberate. (People v. Fellows (1898), 122 Cal. 233, 238, 54 P. 830.) On the other hand, it has been held that it was not ground for reversal that a jury was placed in charge of an officer who was technically disqualified or even actually biased, where no timely objection was made and there was no showing of actual prejudice to defendant. (People v. Babcock (1911), 160 Cal. 537, 546, 117 P. 549; People v. Nakis (1920), 184 Cal. 105, 113, 193 P. 92; People v. Zirbes (1936), 6 Cal.2d 425, 430, 57 P.2d 1319; People v. Hamilton (1920), 49 Cal.App. 30, 38, 192 P. 467.) To the credit of Deputy Sheriff Bridwell, it is noted that a careful scrutiny of the record leads to the conclusion that he is an intelligent and ethical peace officer, fair alike to the State and to the defendant, who performed his investigative duty diligently and whose testimony shows no indication of animus or prejudice. Since it does not appear that the process of law was actually impaired, or that the cause of defendant was prejudiced by the matter in question, we are satisfied that it does not necessitate a new trial.

[16] Defendant also contends that he was prejudiced by the trial court's refusal to allow him to impeach the witness Escalera, who had acted as interpreter when defendant was first interviewed by the district attorney and who testified to the substance of the statement made by the defendant at that time. On cross-examination Escalera was asked, "What was your occupation at the time you did the interpreting?" The People's objection to the question was sustained. Defendant's counsel argued that "under the circumstances I think the jurors might imply a certain amount of prejudice, or bias in the matter." According to his briefs defendant's counsel by this question sought to show that Escalera, at the time he interpreted, was a prisoner in the county jail and had an application for parole pending before the county parole board. Such board consisted of the district attorney, the sheriff and a chief of police; Escalera had been prosecuted by the deputy district attorney who prosecuted this case, before the judge who tried this case; Escalera was paroled after he interpreted defendant's statement and was still on parole at the time he testified. These facts might, in the opinion of a jury, show a reasonable basis for an inference that the translation and the testimony of Escalera were influenced by a hope that he would be leniently treated by the officials if he aided in the conviction of defendant. (People v. Robles (1868) 34 Cal. 591, 594; People v. Pantages (1931), 212 Cal. 237, 253-259, 297 P. 890 and cases there cited.) If Escalera had testified to a statement by defendant which differed disadvantageously in any material respect from defendant's testimony at the trial, then defendant might have substantial cause to complain of refusal to permit him to impeach Escalera by showing his possible motive. (Although the transcript does not show that a specific offer of proof was made, the inference seems clear, from the context surrounding the question and objection and from the unchallenged statement in the briefs that the same judge tried Escalera, that the trial court knew what the question was designed to elicit.) But Escalera's testimony as to defendant's statement substantially and in all material respects accords with the testimony of defendant, given through another interpreter. Therefore, it does not appear how defendant's position would have been bettered by discrediting Escalera.

After examination of the entire cause we have concluded that the errors complained of by defendant have not resulted in a miscarriage of justice. (Cal.Const., art. VI, § 4 ½.) For this reason the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

81 Cal.App.2d 597

CHRISTIANA v. RATTARO.

Civ. 13453.

District Court of Appeal, First District, Division 2, California.

Sept. 26, 1947.

1. Automobiles 🔑181(2)

Intestate who was riding in defendant's truck at time he sustained fatal injuries for purpose of going to location where he could help defendant unload watermelons was not a "guest" within statute exempting automobile host from liability to guest for mere negligence. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

2. Automobiles 🔑245(24)

Evidence presented question for jury as to whether defendant was negligent in driving his truck under dangerous overhanging trees while taking a group of boys to his place of business to assist him in unloading watermelons, so as to be liable for death of one of boys who was struck on head by overhanging branch. Vehicle Code, § 403.

3. Automobiles 🔑245(74)

Capacity of eight year old boy to avoid injury from overhanging branches while riding in rear end of open truck was for jury. Vehicle Code, § 403.

4. Parent and child 🔑7(9, 13)

A parent may be guilty of contributory negligence in not giving proper supervision over child, but it is a question of fact for jury to decide whether such lack of supervision is negligence under all the circumstances.

5. Death 🔑75

Evidence supported finding that mother of eight year old boy who was killed when struck by overhead branches while riding in rear end of defendant's open truck was not guilty of contributory negligence in failing to provide continuous supervision over boy, so as to be precluded from recovering for his death. Vehicle Code, § 403.

6. Appeal and error 🔑1012(1)

A reviewing court has no authority to weigh evidence, where circumstances are sufficient to support the finding either way.

7. Appeal and error 🔑1004(1)

Where question of excessive verdict is raised, function of reviewing court is to determine whether size of verdict reflects passion or prejudice on part of jury.

8. Death 🔑99(3)

$10,448.96 to divorced mother for the death of her eight year old son was not excessive.

◆

Appeal from Superior Court, Contra Costa County; Homer W. Patterson, Judge.

Action by Julia Christiana against Louis Rattaro to recover damages for wrongful death of plaintiff's eight year old boy. From a judgment for plaintiff and from order denying motion for new trial, the defendant appeals.

Affirmed.

Huovinen & Koford, of Oakland, for appellant.

David D. Oliphant, Jr., James R. Agee and M. F. Hallmark, all of Oakland, for respondent.

NOURSE, Presiding Justice.

The mother of an eight year old boy sued for damages for his wrongful death. The jury returned a verdict for $10,448.96. The defendant appealed from the judgment and from the order denying the motion for a new trial.

The defendant was engaged in the produce business and was in the habit of allowing small boys to assist him in unloading watermelons from freight cars, compensating them with cracked melons, ice cream and occasionally small sums of money. On the day of the accident defendant was taking deceased and four other small boys to his place of business to help him unload melons. The defendant drove his truck along a street lined with trees from which an overhanging branch struck the boy on the head causing injuries from which he died. There is no contention that defendant did not know the danger of the overhanging branches of the trees, that he did not know the habit of the boys to stand in the body of the truck, and climb up on the projections on the side of the truck, that he could not have taken the smaller boys into the cab of the truck, or that he could not have driven closer to the middle of the street free from the overhanging trees.

On his appeal from the judgment the appellant urges that the trial court erred in denying his motions for a nonsuit and for a directed verdict. If the judgment is affirmed these motions fall with it. Five grounds of attack are made upon the judgment which we will take in order.

[1] 1. It is argued that deceased was a guest within the meaning of section 403 of the Vehicle Code. The point rests on a conflict of the evidence—whether the original purpose of the trip was to take the boys to the location where they could help appellant unload the melons, or whether it was a ride for fun only. The jury believed the evidence supporting the first purpose and this brings the case within the rule of McCann v. Hoffman, 9 Cal.2d 279, 286, 70 P.2d 909, and Yates v. J. H. Krumlinde & Co., 22 Cal.App.2d 387, 390, 71 P.2d 298. Particularly applicable is that portion of the McCann opinion holding that the rider became a passenger when he (9 Cal.2d at page 283, 70 P.2d at page 912) "accepted the ride at the behest of the driver to assist the latter in arriving at his destination or fulfilling the object of the journey."

[2] 2. Whether the jury was justified in finding appellant negligent. There is no need of reciting the evidence heretofore given. It was for the jury to determine whether a reasonable man would drive his open truck under the dangerous overhanging trees knowing the habit of the boys to play and climb on the sides of the truck.

[3] 3. Was the deceased guilty of negligence as a matter of law? The answer is found in Barrett v. Harman, 115 Cal. App. 283, 286, 1 P.2d 458, 459, where the court said: "There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712."

[4-6] 4. That deceased's mother was guilty of contributory negligence in not providing continuous supervision over the boy. Appellant cites De Nardi v. Palanca, 120 Cal.App. 371, 8 P.2d 220. The case is not helpful. It recognizes the accepted rule that a parent may be guilty of contributory negligence in not giving proper supervision over a child, but reiterates the rule that it is a question of fact for the jury to decide whether such lack of supervision was negligence under all the circumstances. Springer v. Sodestrom, 54 Cal. App.2d 704, 129 P.2d 499, also cited by appellant, follows the same rule. We find no authority holding that a reviewing court may weigh the evidence where, as here, the circumstances were sufficient to support a finding either way.

[7, 8] Finally it is argued that the damages awarded were excessive. The jury awarded the respondent $10,448.96. The child was eight years old at the time of his death. The mother was divorced and working for her support. Though the child may have been a financial burden to the mother at the time of his death, the value of his services in expectancy, and the loss of companionship were questions for the jury to determine. When the question of excessive verdict is raised the function of the reviewing court is to determine whether the size of the verdict reflects passion or prejudice on the part of the jury. In the early case of Wilson v. Fitch, 41 Cal. 363, 386, the Supreme Court said: "The Court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury,

and the jury must, necessarily, be left to the exercise of a wide discretion; to be restricted by the Court only when the sum awarded is so large that the verdict shocks the moral sense, and raises a presumption that it must have proceeded from passion or prejudice."

This rule has been followed without exception. See 8 Cal.Jur. p. 837; McChristian v. Popkin, 75 Cal.App.2d 249, 263, 171 P.2d 85.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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81 Cal.App.2d 684

In re WALTERS' GUARDIANSHIP.

BOBST et al. v. WILSON et al.

Civ. 15874.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1947.

Courts ⚷99(1)

A final decision of Division 1 of District Court of Appeal for Second Appellate District, granting writ of prohibition against further action by Superior Court under its order, declaring a person incompetent and appointing guardian for her estate on ground that such order was void because citation was not personally served on alleged incompetent, became law of case and binding on Division 2 of such court on appeal from order. Probate Code, § 1461.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding by Charles Bobst and another for a declaration of the incompetency of Allie Walters, sometimes known as Allie Walters Sacks, and appointment of a guardian for her estate, contested by Leonard Wilson and another, her guardians ad litem. From an order declaring her incompetent and appointing a guardian, contestants appeal.

Leonard Wilson and Arnold Leader, both of Los Angeles, for appellants.

Wilbert C. Hamilton and R. R. Sleeper, both of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order decreeing that Allie Walters, sometimes known as Allie Walters Sacks, was an incompetent person and appointing a guardian for her estate.

The undisputed facts are these:

Respondents filed a petition seeking to have Allie Walters Sacks declared an incompetent and requesting that the court appoint a guardian for her estate. A citation predicated upon the petition was duly issued but was not *personally served* on appellant Sacks.

After a hearing the probate judge found that said appellant was incompetent and appointed a guardian for her estate.

On October 17, 1946, appellants filed the present appeal from the aforementioned order. On March 31, 1947, pursuant to a petition therefor, Division 1 of this court issued an alternative writ of prohibition prohibiting the superior court from taking any further action in accordance with the order of the superior court declaring Allie Walters Sacks incompetent and appointing a guardian for her estate. On May 21, 1947, the same court filed an opinion in which it held that the order of the superior court was void for the reason that the citation issued pursuant to the petition to have appellant Sacks declared incompetent had not been *personally served* on her as required by section 1461 of the Probate Code. (Sacks v. Superior Court et al., 79 Cal.App.2d 806, et seq., 180 P.2d 922.)

On June 13, 1947, the court denied a petition for a rehearing and on July 17, 1947, a petition for a hearing was denied by the Supreme Court. On July 25, 1947, a peremptory writ of prohibition was issued directing the superior court not to take any further action conforming to the order it had before made appointing a guardian for said appellant.

In the present appeal it is claimed, as it was on the petition for the writ of prohibition, that the order appointing a guardian was void for the reason that the citation had not been *personally served* upon appellant Sacks.

Since there is a previous final decision of Division 1 of this court involving the indentical facts in the same case between the same parties holding that the order appointing the guardian was void, such rule is now the law of the case and is binding upon this court. Therefore the order from which the appeal is taken is reversed.

MOORE, P. J., and WILSON, J., concur.

In re NORCUTT.*

Cr. 2019.

District Court of Appeal, Third District, California.

Sept. 26, 1947.

Hearing Granted Oct. 23, 1947.

1. Criminal law ⚷1202(1)

Where first of two alleged prior convictions of defendant for grand theft involved theft of motorcycle, value of which was not alleged or shown, trial court was without jurisdiction to adjudge defendant an habitual criminal. Pen.Code, §§ 487, 644.

2. Habeas corpus ⚷50

The writ of habeas corpus is not available to procure release from state prison of one erroneously adjudged an habitual criminal because of two prior convictions for offenses of which one was not shown to be a felony, in absence of showing that term of imprisonment provided by law for offense charged in information to which he pleaded guilty has been satisfied. Pen.Code, § 644.

In the matter of the application of Jack Norcutt, alias Jack C. Mooney, for a writ of habeas corpus to Robert A. Heinze, Warden of the California State Prison at Folsom.

Writ discharged.

Jack Norcutt, in pro per.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Deputy Atty.Gen., for respondent.

PER CURIAM.

The record before us discloses that the information to which petitioner pleaded guilty, and under which he was adjudged to be an habitual criminal, charged him with the commission of two prior felonies in this state, to-wit: grand theft, for which he was convicted and served terms of imprisonment in a state prison.

[1, 2] Petitioner's sole contention is that said adjudication was erroneous in that the first of said prior convictions involved the theft of a motorcycle, which could not be a felony within the provisions of Section 644 of the Penal Code unless the value was shown to exceed the sum of $200 (Section 487, Penal Code), and as the record is barren of either allegation or other showing of the value of the motorcycle, the trial court was without jurisdiction to adjudge him an habitual criminal.

We are entirely in accord with such contention as a general statement of the law in relation to this phase of the Habitual Criminal Act. In re Williams, 76 Cal. App.2d 161, 172 P.2d 558; In re Connell, 68 Cal.App.2d 360, 156 P.2d 483; People v. McChesney, 39 Cal.App.2d 36, 41, 102 P.2d 455; People v. Lohr, 28 Cal.App.2d 397, 82 P.2d 615; People v. Morrison, 26 Cal. App.2d 616, 80 P.2d 94. But although it may be said that petitioner previously has not been twice convicted of felonies enumerated in Section 644 of the Penal Code and that therefore he is entitled to be accorded the benefits as well as the penalties of the law applicable to one who has suffered one, not two, prior convictions, nevertheless it is equally well established that until it appears that the term of imprisonment, as provided by law for the current offense, has been satisfied, the writ is not available.

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* Subsequent opinion 192 P.2d 453.

In re Morck, 180 Cal. 384, 181 P. 657; In re Williams, supra; In re Miller, 133 Cal. App. 228, 23 P.2d 1034.

The writ is discharged.

81 Cal.App.2d 555

SWAN v. RIVERBANK CANNING CO.

Civ. 7417.

District Court of Appeal, Third District, California.

Sept. 23, 1947.

1. Appeal and error 🔑113(1)

An order denying proper motion under statute to set aside judgment as taken through mistake, inadvertence, surprise or excusable neglect, is appealable. Code Civ.Proc. § 473.

2. Appeal and error 🔑110

An order denying defendant's motion to set aside judgment against him and permit him to file valid motion for new trial on ground that his motion for new trial was filed before signing of trial court's findings and judgment because of his counsel's mistake, inadvertence, surprise and excusable neglect in misconstruing statutory provisions, was not, an order denying motion under statute to set aside judgment taken through mistake, inadvertence, etc., but in nature of order denying new trial, and hence not appealable. Code Civ.Proc. §§ 473, 659, 963.

3. Appeal and error 🔑782

An appeal from order denying defendant's motion to set aside judgment against him and permit him to file valid motion for new trial on ground that his motion for new trial was filed before signing of findings and judgment through his counsel's mistake, inadvertence, surprise and excusable neglect, should be dismissed, where later motion was filed and heard while appeal from such judgment was pending. Code Civ.Proc. §§ 473, 659.

4. Appeal and error 🔑439

Generally, appeal deprives trial court of jurisdiction until determination of appeal and filing of appellate court's remittitur in trial court, which cannot vacate or set aside judgment appealed from while its jurisdiction is thus suspended. Code Civ.Proc. § 473.

5. Appeal and error 🔑20

Where defendant did not file abandonment of appeal from judgment for plaintiff in trial court until after filing and hearing of motion to set aside judgment, trial court acquired no jurisdiction of motion, and appeal from its order denying motion conferred no jurisdiction on District Court of Appeal to decide motion on merits. Code Civ.Proc. § 473; Rules on Appeal, rule 19(a).

6. Judgment 🔑364

A corporate defendant was not entitled to vacation of judgment against it because of its counsel's misconstruction of statutory provisions and erroneous assumption that his motion for new trial, filed before signing of findings and conclusions of law, was filed at proper time, and such court did not abuse its discretion in denying defendant's motion to set aside judgment because of such alleged mistakes of fact and law. Code Civ.Proc. §§ 473, 659.

◆

Appeal from Superior Court, Solano County.

Action by Felix T. Swan against the Riverbank Canning Company, a corporation. Judgment for plaintiff, and, from an order denying defendant's motion to set aside the judgment, defendant appeals. On plaintiff's motion to dismiss the appeal.

Appeal dismissed.

F. M. Brack, of Modesto, for appellant.

A. G. Bailey, of Woodland, for respondent.

ADAMS, Presiding Justice.

In this case judgment against defendant was filed and entered August 23, 1946. Prior to the signing and filing of the findings of fact and conclusions of law, defendant filed a notice of intention to move for a new trial, and on October 26, 1946, it filed notice of appeal. On January 4, 1947, respondent filed in this court a notice of motion to dismiss the said appeal on the ground that it was not taken within the time allowed by law and Rule 2 of the Rules on Appeal. No opposition to said motion was made by appellant, and when the motion came on for hearing on February 7, 1947, it failed to appear, whereupon the motion was granted, and the appeal dismissed. On April 9th the remittitur was filed in the trial court.

In the meantime, and on February 6th, defendant had filed in the trial court a so-called application for relief under Code Civ.Proc., section 473, setting forth as grounds therefor that at the time the judgment was entered, defendant was under the mistaken belief that there was pending and undetermined a good and valid motion for a new trial, but that in truth and fact there was at said time no good or valid motion for a new trial pending; that the motion for a new trial was filed before the findings were signed and that said error occurred by reason of defendant's mistake, inadvertence, surprise and excusable neglect. The application was supported by an affidavit of defendant's counsel in which he averred that he had misconstrued the provisions of section 659 of the Code of Civil Procedure, and had assumed that his motion for a new trial had been filed at the proper time, and that not until the motion to dismiss the appeal was served upon him did he examine the record to ascertain the date of the signing and filing of the findings; that since that time he had examined the authorities and had come to the conclusion that the appeal was ineffective "by reason of said mistakes of fact and mistakes of law of affiant"; and that in justice to defendant, the court "should relieve it from affiant's mistakes by setting aside its judgment in the above-entitled case, permitting defendant to file its valid motion for a new trial, and thereafter taking such proceedings as may be required or allowed by law." No copy of any answer, different judgment, or other pleading proposed to be filed accompanied the application.

Hearing on this application was had in the trial court on February 17, 1947. On March 17th that court denied same, its order reciting that after the filing of defendant's motion for a new trial, and prior to the signing and filing of findings and judgment, the court had advised defendant's attorney that it believed that the motion for a new trial had been filed prematurely, but that said attorney had stated he was satisfied that it had been timely. From that order this appeal was taken, and plaintiff has moved to dismiss the appeal, on the ground that the order from which it was taken is not an appealable order, that the superior court had no jurisdiction to determine the order appealed from, and, consequently, this court has no jurisdiction to entertain the appeal.

Opposition to such motion has been filed by appellant which contends that the order appealed from is appealable as a "special order made after final judgment," within the provisions of Code Civ.Proc., sec. 963. And in reply to the contention of plaintiff that the trial court had no jurisdiction because of the pendency of the appeal from the judgment, it asserts that it abandoned the former appeal. While it appears from the record that such an abandonment was filed in the trial court, it was not filed until February 21, 1947, *after* its motion to set aside the judgment had been filed in the trial court on February 6th and heard on February 17th.

[1, 2] That an order denying a proper motion under section 473 of the Code of Civil Procedure is appealable, seems to be settled. See Winslow v. Harold G. Ferguson Corporation, 25 Cal.2d 274, 282, 153 P. 2d 714; Funk v. Campbell, 15 Cal.2d 250, 251, 100 P.2d 762; In re Yoder, 199 Cal. 699, 702, 251 P. 205; Huffaker v. Decker, 77 Cal.App.2d 383, 386, 175 P.2d 254. But in this case the question arises whether appellant's motion, purportedly made under section 473, was, in fact, such a motion. Admittedly said motion was made for the sole purpose of giving defendant a second opportunity to file a motion for a new trial. It is not averred that the *judgment* was taken against defendant because of any inadvertence, mistake, etc., but that, because

of what its counsel's mistaken idea of the law and the state of the record, its original motion for a new trial was abortive. Defendant did not ask that a new or different judgment be entered, but merely that the judgment already entered be set aside and then re-entered, in order to permit appellant to do indirectly what it could not do directly, that is, file a second motion for a new trial. Therefore, the order denying the motion was not, strictly speaking, an order denying a motion under section 473, supra, to relieve a party from a judgment taken against it through mistake, inadvertence, surprise or excusable neglect, but was in the nature of an order denying a new trial which is not an appealable order. See Capuccio v. Caire, 189 Cal. 514, 523, 209 P. 367; Funk v. Campbell, supra; Hall v. Imperial Water Co., No. 5, 200 Cal. 77, 80, 251 P. 912; Taft v. Security-First National Bank, 139 Cal.App. 228, 33 P.2d 683.

[3, 4] We are also of the opinion that the appeal should be dismissed for the reason that when appellant's motion was filed and when it was heard in the trial court the original appeal from the judgment was still pending in this court. Generally speaking, the effect of an appeal is to deprive a trial court of jurisdiction until the appeal has been determined and the remittitur from the appellate court has been filed in the trial court; and such court cannot, while its jurisdiction is so suspending, vacate or set aside the judgment. Kinard v. Jordan, 175 Cal. 13, 15, 16, 164 P. 894; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 347, 139 P. 805; Linstead v. Superior Court, 17 Cal.App.2d 9, 12, 61 P.2d 355; Bracey v. Gray, 71 Cal.App.2d 206, 208, 162 P.2d 314; 2 Cal.Jur. 415, 417.

[5] Although the right of an appellant to abandon his appeal at any time before the filing of the record in the appellate court is provided for in Rule 19(a) of the Rules on Appeal, which filing operates to "dismiss the appeal and to restore the jurisdiction of the superior court," in this case such jurisdiction had not been thus restored at the time the motion was filed on February 6th and when it was heard on February 17th. Therefore, the trial court acquired no jurisdiction of that motion, and an appeal from its order confers no jurisdiction upon this court to decide same on its merits. 2 Am.Jur. 851, sec. 11.

[6] It may be said, however, in closing, that in our opinion the appeal from the order denying relief under section 473, supra, is without merit since appellant made no case for relief; and no abuse of discretion on the part of the trial court appears. See Garroway v. Jennings, 189 Cal. 97, 99, 207 P. 554; Salazar v. Steelman, 22 Cal.App.2d 402, 408, 71 P.2d 79; Kammerer v. Marino, 66 Cal.App. 720, 724, 226 P. 980; Neale v. Morrow, 174 Cal. 49, 51, 161 P. 1165; Willett v. Schmeister Mfg. Co., 80 Cal.App. 337, 339, 340, 251 P. 932.

The appeal is dismissed.

THOMPSON and PEEK, JJ., concur.

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81 Cal.App.2d 570

HOOPER v. BARRANTI (BARRANTI, Intervener) (two cases).

Civ. 13376.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1947.

Rehearing Denied Oct. 24, 1947.

1. Appeal and error 🔑294(1)

After judgment, a review of a question of fact can be had only upon motion for new trial.

2. Appeal and error 🔑635(4)

Where record disclosed no motion for new trial, purported appeal of defendant and intervener from order denying their motion to reopen case for further testimony was dismissed.

3. Appeal and error 🔑144

Where defendant's answer asked for no affirmative relief and he did not answer complaint in intervention, defendant ceased to be a party to the action upon dismissal thereof by plaintiff and was not before trial court as to issues raised by the complaint in intervention, and hence his attempted appeal from judgment entered therein could be dismissed.

4. Contracts ⚿136

Generally, a void contract, a contract against public policy, or against mandate of a statute, may not be made foundation of any action, either in law or in equity.

5. Partnership ⚿26

Members of a partnership based on an illegal contract of partnership have no remedy against each other for contribution or appointment in respect of partnership dealings and transactions.

6. Contracts ⚿138(1)

The test whether demand connected with an illegal transaction is capable of being enforced is whether plaintiff requires aid of the illegal transaction to establish his case, and, if plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him whatever his claim in justice may be upon defendant.

7. Partnership ⚿26

Where partnership agreement was illegal as contemplating the conduct of on-sale retail liquor tavern business under license issued in name of only one of the partners, partner seeking dissolution of partnership and an accounting of assets required aid of the illegal agreement to establish his case, and court would not assist him. Gen. Laws, Act 3796, §§ 2, 7, 10.

8. Partnership ⚿22

Where written agreement of association in conducting an on-sale retail liquor tavern business which had been previously operated by one of the parties expressly stated that partnership was contemplated relation and contained the usual provisions of partnership agreements, agreement was one for "partnership", although it did not expressly refer to sharing of possible losses. Civ. Code, § 2419.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

9. Partnership ⚿108

Until affairs of a copartnership are wound up and settled, claim of one partner is merely equitable. Civ. Code, § 2419.

10. Partnership ⚿344

Generally, a personal judgment cannot be entered against a partner in suit for an accounting and settlement until all partnership assets have been converted into money, debts paid, and final balance ascertained. Civ. Code, § 2432.

11. Partnership ⚿340

An exception to general rule requiring sale of assets upon dissolution of partnership is recognized where there are no debts and a division in kind may be fairly and equitably made, but such exception does not obviate necessity of an accounting and complete winding up of affairs of partnership as prerequisite to right of partner to receive his share of partnership assets upon dissolution. Civ.Code, § 2432.

12. Partnership ⚿313

Assignee of a partner is entitled only to those remedies for settlement of partnership affairs that existed in favor of his assignor.

13. Partnership ⚿26

Where partner could not maintain action to receive his share of partnership assets upon dissolution because he could not establish his right to assets without aid of partnership agreement which was illegal from its inception and would not be enforced, assignee of such partner was in no better position that was his assignor. Civ. Code, §§ 2419, 2432.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Fred E. Hooper against Joseph P. Barranti to declare dissolution of a partnership and for an accounting, wherein Ignatius Barranti filed complaint in intervention setting forth his assignment and asserting ownership in one-half of the assets of the business including on-sale retail liquor license. Upon death of plaintiff, Fred A. Hooper, special administrator of the estate fo Fred E. Hooper, deceased, was substituted in his stead. From judgment entered except those portions thereof which decreed invalidity of partnership agreement insofar as it pertained to liquor license, the plaintiff appeals, and the defendant and intervener join in an appeal from those last-mentioned portions of judgment which are excepted from plaintiff's appeal.

Judgement affirmed in part and in part reversed.

Eugene H. O'Donnell and Ralph Bancroft, both of San Francisco, for appellants.

Roy A. Sharff, Ivan C. Sperbeck, John Shortridge and Jack K. Berman, all of San Francisco, for respondents.

OGDEN, Justice pro tem.

Fred E. Hooper was the sole owner and operator of an on-sale retail liquor tavern business under a license issued in his name. He entered into a verbal agreement, confirmed shortly thereafter by a written agreement, of association with Joseph P. Barranti whereby they agreed to become equal partners in the operation of the business. Barranti agreed to pay to Hooper the sum of $1,500 for a one-half interest in the business at the rate of $100 per month. It was agreed that the on-sale liquor license, under which the business had been operated by Hooper and under which it was to be operated by the partnership, should remain in the name of Hooper until the payments were completed, at which time it was to be transferred to the names of both partners. The assets of the business, consisting of all fixtures, furnishings and stock in trade, were, under the terms of the agreement, to become partnership assets immediately, but the on-sale liquor license was not to become a partnership asset until the $1,500 was paid in full. It was further agreed that the active conduct of the business was to be undertaken by Barranti.

The business was conducted under the management of Barranti for shortly over one year when Hooper gave notice of rescission on the ground that Barranti was not a citizen of the United States. Shortly thereafter, Hooper forcibly ejected Barranti from the premises and excluded him from further participation in the business. Barranti, who admittedly was and is not a citizen, later assigned his interest in the business and in anything that might accrue to him under the agreement to his brother, Ignatius Barranti, who was a citizen of the United States. The latter's offer to participate further in the business was likewise refused by Hooper although he accepted from him the final payments due under the agreement.

Hooper brought an action to declare the dissolution of the partnership and for an accounting. Ignatius Barranti filed a complaint in intervention setting forth his assignment and asserting ownership in one-half of the assets of the business, including the on-sale license. Hooper thereupon dismissed his action to declare a dissolution, and for an accounting, and demurred generally to and answered the complaint in intervention, alleging by way of defense the illegality of the agreement. Upon the issues raised by these pleadings the cause proceeded to trial. It was stipulated that there were no outstanding debts of the business and an accounting of any profits resulting from its continued operation by Hooper was waived.

The trial court made written findings of fact and conclusions of law to the effect that the agreement was one of partnership; that the partnership was dissolved by reason of the exclusion of Joseph Barranti from the business. It found the assets of the partnership to be the fixtures, furnishings and stock in trade as of the date of dissolution, certain moneys in a joint bank account and the liquor license standing in the name of Hooper. Judgment was rendered that Ignatius Barranti, by virtue of his assignment, is the owner of and entitled to an undivided one-half interest in those assets, excepting the liquor license. The court refused to determine any issue between the parties pertaining to the liquor license on the ground that the agreement was void as contrary to public policy in so far as it pertained thereto.

During the course of the trial Fred E. Hooper died and Fred A. Hooper, the administrator of his estate, was substituted in his stead. He appeals from the judgment except those portions thereof which decree the invalidity of the agreement in so far as it pertains to the liquor license.

Both Joseph and Ignatius Barranti join in an appeal from those last mentioned portions of the judgment which are excepted from the appeal of Hooper.

[1, 2] They also purport to appeal from an order denying their motion, made after the rendition of judgment, to re-open the case for further testimony. This they have apparently, and rightly so, abandoned for no mention thereof is made in their briefs. It is elementary that after judgment, a review of a question of fact can be had only upon motion for new trial. (20 Cal.Jur. 13.) The record discloses no such motion. The purported appeal from the order denying the motion to re-open is dismissed.

[3] The appeal of Joseph Barranti from the judgment is also dismissed. He ceased to be a party to the original action for dissolution and accounting upon the dismissal thereof by Hooper. His answer thereto asked for no affirmative relief and he did not answer the complaint in intervention of Ignatius Barranti. He is not before the court as to the issues raised thereby.

The principal question involved in these appeals, the determination of which must finally dispose of this litigation, is whether the agreement of partnership and the conduct of the parties pursuant to it requires the court to refuse any relief because of illegality of its purpose and effect.

[4, 5] The general rule is that a void contract, a contract against public policy or against the mandate of a statute, may not be made the foundation of any action, either in law or in equity. In re Groome, 94 Cal. 69, 29 P. 487; Chateau v. Singla, 114 Cal. 91, 45 P. 1015, 33 L.R.A. 750, 55 Am.St.Rep. 63; Moore v Moore, 130 Cal. 110, 62 P. 294, 80 Am.St.Rep. 78. As stated in Lindley on Partnership, Ninth Ed., p. 141: "The most important consequence, however, of illegality in a contract of partnership is, that the members of the partnership have no remedy against each other for contribution or appointment in respect of the partnership dealings and transactions. However ungracious and morally reprehensible it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defense to a claim by that other, for an account and payment of his share of the profits made thereby, such a defense must be allowed to prevail in a court of justice. Were it not so, those who —ex hypothesi—have been guilty of a breach of the law, would obtain the aid of the law in enforcing demands arising out of that very breach; and not only would all laws be infringed with impunity, but, what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them."

The validity of the agreement is attacked by Hooper principally because it contemplates the transfer of the on-sale license to a partnership, ineligible, under section 12 of the Alcoholic Beverage Control Act (Statutes 1935, p. 1123, as amended, Deering's General Laws, Vol. 2, Act 3796) to receive it due to the non-citizenship of Barranti. The latter contends that the agreement is valid in this respect because it merely provided for the transfer of the license at a future time, when, it was contemplated by both parties, Barranti would have obtained his citizenship.

There appears, however, on the face of the agreement itself, a more serious fault. It contemplated (and the parties pursuant to it executed that contemplation) the conducting by a partnership of an on-sale retail liquor business at least for a period of fifteen months without a license therefor. The license held by Hooper was issued to him as an individual and did not license him as a partner, nor the partnership, to conduct the business. Section 7 of the Alcoholic Beverage Control Act provides that each license shall be issued to a specific person, and in section 2 of the act the term "person" is defined to include a copartnership. Section 10 requires that in the case of a partnership the application for license must be signed by each of the partners.

Denning v. Taber, 70 Cal.App.2d 253, 160 P.2d 900, although applying an exception to the general rule applicable to illegal contracts, recognized that a saloon business, conducted by a partnership under a license issued in the name of one partner only, was illegally conducted so as ordinarily to require the court to refuse, upon the ground of public policy, to determine issues between the partners regarding the division of, or the title to the assets of the business.

Wise v. Radis, 74 Cal.App. 765, 242 P. 90, involved an agreement between two real estate brokers pursuant to which they worked together as brokers in negotiating the purchase and sale of real properties and were to divide equally all profits and losses made or incurred by them in each deal. Radis refused to divide a commission received as a result of their joint efforts. No broker's license was applied for or issued in the name of the partnership and at the time of the transaction out of which the commission was paid Wise had allowed his license to lapse. Although not deciding whether a copartnership license was necessary under the facts of that case, it was held that no relief could be afforded, the court saying (74 Cal.App. at page 778, 242 P. at page 95): "* * * whether the partnership contract be regarded as illegal from the beginning because of the failure of the joint adventurers to take out a partnership license, or whether it became illegal * * * by reason of respondent's failure to maintain his status as a duly licensed real estate broker, in either case the action must be regarded as one to enforce an illegal contract."

To the same effect is the case of Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 109 P.2d 650, holding that an unlicensed person could not enforce a contract between himself and a licensed broker to divide commissions on insurance business.

The rule was but recently applied, and with more harshness than here, in Loving & Evans v. Blick, —— Cal.App.2d ——, 177 P.2d 981. In that case recovery was denied to a partnership engaged in the contracting business for work performed in the remodeling and repair of appellant's premises because it held no partnership license, but operated under a license issued in the name of one partner only.

[6] The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant. Moore v. Moore, supra; Wise v. Radis, supra; Loving & Evans v. Blick, supra.

In Denning v. Taber, supra, the court applied what it referred to as a well-recognized exception to the general rule, but which perhaps more accurately stated was merely the application of the above test. It states the so-called exception as follows (70 Cal.App.2d at page 257, 160 P.2d at page 902): "When a business, which has been illegally conducted for lack of license, as distinguished from an unlawful and forbidden enterprise, has been completely terminated and one of the parties subsequently expressly agrees to divide in a specified manner the assets in his possession, courts will entertain suits for accounting, in assumpsit, or based on an implied trust, to recover the property belonging to the claimant." The case of Wise v. Radis, supra, was distinguished because it did not involve a termination of the business by voluntary action, or a subsequent agreement to divide the proceeds, and emphasis was placed upon the fact that the plaintiff there was not in pari delicto.

Denning v. Taber, supra, is distinguishable from the case before us in the same respects that were there pointed out as differing from Wise v. Radis, supra. In the Denning case the license was secured by the defendant in his own and not the partnership name by his fraud and in violation of their agreement. Because of differences arising out of that fact the parties voluntarily terminated the partnership and the defendant expressly agreed with the plaintiff to divide the assets thereof equally with him. The basis of the decision was that the right of the plaintiff for an accounting of the assets did not necessarily involve the legality of the saloon business, but depended upon the oral agreement to divide the property after the voluntary termination of the business without the aid of court.

The parties here were in pari delicto. The partner Barranti testified that the reason why the agreement delayed the time for the transfer of the license to the partnership was because it could not lawfully be transferred sooner. That he may have been, in good faith, of the opinion that he would within the fifteen month period attain his citizenship because married to a citizen, does not alter the fact that he knew that at all times the partnership was conducting the business, and that neither it, nor he individually, was qualified to receive or had received a license therefor. The partnership here was not terminated by mutual consent nor was there any subsequent agreement to account for or divide the assets.

[7] We can not escape the conclusion that this case is one where, in order to establish his claim, Barranti must rely upon the illegal transaction and agreement and ask for its enforcement. It cannot be considered one merely to establish title to property acquired under a fully executed, though illegal, contract within the rule of such cases as Wayman Inv. Co. v. Wessinger, 13 Cal.App. 108, 108 P. 1022, and Wagner v. Worrell, 76 Cal.App.2d 172, 172 P.2d 751. This being so, the court can not aid him, but must leave him as he was.

[8] There is no merit in the contention of Barranti that the agreement was not one of partnership but rather one merely for the sale and purchase of one-half of the assets of the business and the employment of Joseph Barranti as manager. The conclusion of the trial court that the agreement and the relation of the parties thereto were that of partnership is amply and the only one that could be supported by the record. The written agreement expressly states that such is the contemplated relation and contains the usual and typical provisions of agreements of partnership relating to accounting for and division of net profits and procedures upon voluntary dissolution. Although it does not expressly refer to a sharing of possible losses, a reading of the entire document clearly discloses that intent.

[9] The assets formerly owned by Hooper alone were, under the agreement, to become assets, not of the individual partners in undivided interests, but rather assets of the partnership. The ownership of Barranti was only by virtue of and through his interest in the partnership and was that of a tenant in partnership. Civil Code, § 2419. The measure of his beneficial interest in those assets was the balance coming to him after payment of the partnership debts, if any, and the settlement of the accounts with his partner. Until the affairs of a co-partnership are wound up and settled, the claim of one partner is, strictly speaking, merely equitable as it can be enforced only through an equitable action for an accounting. 20 Cal.Jur., sec. 35, pp. 717, 718.

[10, 11] The general rule is that a personal judgment cannot be entered against a partner in a suit for accounting and settlement until all the partnership assets have been converted into money, the debts paid and a final balance ascertained. 20 Cal. Jur. 847 and the many authorities cited therein. The Uniform Partnership Act provides, in section 2432 of the Civil Code, for the payment *in cash* of the net amount owing to the partners upon dissolution. There has been recognized an exception to the general rule requiring a sale of the assets, where there are no debts and a division in kind may be fairly and equitably made. Harper v. Lamping, 33 Cal. 641; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; Martin v. Burris, 57 Cal.App. 739, 208 P. 174; Watterson v. Knapp, 35 Cal.App.2d 283, 95 P.2d 154; Swarthout v. Gentry, 62 Cal.App2d 68, 144 P.2d 38. This exception however, does not, even where applicable, obviate the necessity of an accounting and complete winding up of the affairs of a partnership as a prerequisite to the right of a partner to receive his share of the partnership assets upon dissolution.

[12, 13] The partner Barranti could therefore assert no claim or right to receive any of the assets of the partnership except through the partnership and an accounting of its affairs. His ownership of those assets being that of a tenant in partnership it can not be established without the aid of the partnership agreement. That agreement being illegal from its inception,

he is without that aid. This must apply with equal force to all of the assets, including whatever interest the partnership may have had in the license standing in the name of Hooper. It is not necessary therefore to here consider what that interest might have been except for the illegality of the partnership agreement. The authorities relied upon by the appellant Barranti which uphold the validity of contracts to perform acts in the future when legal to do them are not in point.

The appellant Barranti as the assignee of his brother's interest in the partnership can be in no better position than was his assignor. The assignee of a partner is entitled only to those remedies for the settlement of the partnership affairs that existed in favor of his assignor. Miller v. Brigham, 50 Cal. 615. The fact that he is a citizen is immaterial.

The judgment, in so far as it refuses to determine ownership of the on-sale license issued in the name of Hooper is affirmed. All other portions of the judgment are reversed, Fred A. Hooper to recover costs on appeal.

We concur:

PETERS, P. J., and BRAY, J., concur.

On Petition for Rehearing

PER CURIAM.

On this Petition for Rehearing petitioner contends, among other things, that this Court has granted affirmative relief to the Estate of Hooper, at least as to the bank account. The opinion does not have that effect. The opinion notes that the bank account is "a joint bank account". The legal effect of the reversal is to leave the parties in exactly the position where they were before suit was filed. As to the bank account, if it was a joint account before suit was filed, it remains a joint bank account now.

The petition for a rehearing is denied.

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81 Cal.App.2d 549

GRENINGER v. FISCHER et al.

Civ. 13407.

District Court of Appeal, First District,
Division 1, California.
Sept. 23, 1947.

1. Appeal and error 🔑236(2)

Under Code, whether trial court abused discretion in sustaining demurrer without leave to amend may be urged on appeal, notwithstanding absence of request to amend. Code Civ.Proc. § 472c.

2. Pleading 🔑225(2)

Under Code, sustaining demurrer without leave to amend is abuse of discretion, where complaint is not subject to general demurrer, even though complaint may be subject to special demurrer and that no request to amend is necessary. Code Civ.Proc. § 472c.

3. Physicians and surgeons 🔑18(4)

A complaint alleging that physicians negligently failed to exercise reasonable and ordinary care in their treatment of plaintiff's injuries and did not exercise degree of learning and skill of knowledge ordinarily possessed by physicians of good standing practicing in the locality, that physicians failed to correctly diagnose injuries or to select proper method of treatment or to take proper precautions to prevent infections, as result of which plaintiff was damaged in amount of $25,000, was sufficient as against general demurrer.

4. Physicians and surgeons 🔑18(4)

A patient's complaint in malpractice action against physicians must allege a legal duty, breach thereof, proximate causation, and resulting damage.

5. Physicians and surgeons 🔑18(4)

In malpractice cases, negligence may be pleaded in general terms.

6. Physicians and surgeons 🔑18(4)

In malpractice case, it is sufficient as against general demurrer to aver that certain treatment was negligently administered by defendant to plaintiff's damage, without alleging in what respects the treatment may have been deficient.

7. Limitation of actions 🔑95(1)

The one-year statute of limitations, as distinguished from three-year statute based on allegations of fraudulent concealment, does not start to run against patient's malpractice cause of action against physician until date of discovery or date when by exercise of reasonable care patient should have discovered wrongful act or date of termination of relationship of physician and patient. Code Civ.Proc. § 340, subd. 3.

8. Limitation of actions ⚷179(2)

A malpractice complaint which was filed June 13, 1946, and which alleged that plaintiff's injuries requiring medical care occurred on February 11, 1945, and that plaintiff relied on physicians' statement that all possible care and treatment was being given injuries until "on or about" June 15, 1945, was filed within one year of discovery, and hence was sufficient so far as one-year statute of limitations was concerned, notwithstanding use of quoted words. Code Civ.Proc. § 340, subd. 3.

9. Limitation of actions ⚷180(2)

Before a complaint is subject to demurrer based on statute of limitations, it must appear from face of complaint that cause is barred, not merely that cause may be barred. Code Civ.Proc. § 340, subd. 3,

10. Estoppel ⚷53

A waiver of a right cannot be established without a clear showing of an intent to relinquish such right, and doubtful cases will be decided against a waiver.

11. Pleading ⚷339

Plaintiff's failure to appear to argue against defendant's demurrer to complaint did not constitute waiver of cause of action.

12. Pleading ⚷216(1)

On general demurrer, court must rule on sufficiency of pleading, and cannot do so by indulging in inference that plaintiff abandoned cause of action by failing to appear to argue against defendant's demurrer to complaint.

13. Appeal and error ⚷1203(1)
Pleading ⚷225(2)

Where patient's complaint in malpractice action against physicians stated cause of action good as against general demurrers or charge that statute of limitations had run, trial court's refusal of leave to amend was abuse of discretion even if special demurrers were well taken, and upon reconsideration of special demurrers trial court could require clarification of any uncertainties appearing in complaint. Code Civ.Proc. § 340, subd. 3; § 472c.

◆

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Action by Elizabeth Greninger against Ray Fischer and O. P. Stowe, licensed physicians, to recover for injuries resulting from alleged negligent treatment and diagnosis of plaintiff's illness by defendants. From a judgment for defendants, the plaintiff appeals.

Reversed.

Melvin M. Belli and Van H. Pinney, both of San Francisco, for appellant.

Johnson & Ricksen, of Oakland, for respondent Fischer.

Appelbaum & Mitchell and John Jewett Earle, all of Oakland, for respondent Stowe.

PETERS, Presiding Justice.

Plaintiff brought this action against defendants, licensed physicians, to recover for injuries resulting from the alleged negligent treatment and diagnosis of her illness by defendants. Defendants separately demurred, generally and specially. The trial court sustained the demurrers without leave to amend, and judgment for defendants was entered. Plaintiff appeals.

[1, 2] The record does not indicate that plaintiff requested leave to amend. Prior to 1939 such failure would have been fatal to plaintiff's appeal, but since § 472c was added to the Code of Civil Procedure in that year, it is now the law that when a demurrer is sustained without leave to amend the question of whether the trial court abused its discretion in making the order may be urged on appeal even though no request to amend has been made. It has consistently been held under this section that, where a complaint is not subject to general demurrer, it is an abuse of discretion to sustain a demurrer without leave to amend even though the complaint may be subject to special demurrer and that no request to amend is necessary. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R.

1358; Maguire v. Hibernia Savings & Loan Soc. 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062; Hancock Oil Co. v. Hopkins, 24 Cal.2d 497, 150 P.2d 463; Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747.

[3] Tested by this standard there is no doubt that the complaint, while not a model of pleading, amply states a cause of action sufficient to withstand a general demurrer. It alleges that on or about February 11, 1945, plaintiff sustained certain injuries; that defendants undertook to treat plaintiff for those injuries; that "defendants carelessly and negligently failed and neglected to exercise reasonable and ordinary care and diligence in the treatment of plaintiff's injury as aforesaid, and failed and neglected to exercise a degree of learning and skill of knowledge ordinarily possessed by physicians of good standing practicing in the said County of Alameda where defendants undertook the treatment of plaintiff. That said defendants were unskilled in that they failed to correctly diagnose the nature of the injury to said plaintiff, that they were unskilled in that they failed to select a proper method of treatment of said injury and they were further unskilled in their care of said injury in that they failed to take proper precautions to prevent infection from setting in at the site of said injury. That by reason of said carelessness and negligence and want of skill of defendants, and as a proximate result thereof plaintiff suffered the damages hereinafter set forth." Damages in the amount of $25,000 are then properly alleged.

[4-6] It is quite obvious that these allegations set forth a legal duty, breach thereof, proximate causation and resulting damage. That is all that is required. In this state negligence may be pleaded in general terms, and that is as true of malpractice cases as it is of other types of negligence cases. Moreover, in a malpractice case, it is sufficient, at least as far as a general demurrer is concerned, to aver that certain treatment was negligently administered by defendant to plaintiff's damage without alleging in what respects the treatment may have been deficient. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1; Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1; Criss v. Angelus Hospital Ass'n., 13 Cal.App.2d 412, 56 P.2d 1274; Abos v. Martyn, 31 Cal.App.2d 705, 88 P.2d 797; Smith v. Beauchamp, 71 Cal.App.2d 250, 162 P.2d 662; see notes 33 Cal.L.Rev. 248, 264; 35 Cal.L.Rev. 267, 269. Defendants, without the citation of a single authority, urge that the complaint is "replete with conclusions, inferences and non sequiturs, but lacking in any allegation of necessary facts." (Res.Brief, P. 6.) In many of the above-cited cases the complaints there involved were much more sketchy and less detailed than the instant one. Those cases demonstrate to a certainty that the present complaint states a cause of action.

Defendants urge, again without citation of a single authority, that the complaint shows on its face that the cause of action is barred by the one-year limitation contained in § 340, subd. 3, Code of Civil Procedure, a point raised in the demurrers. The complaint was filed June 13, 1946. The injury requiring medical care occurred on February 11, 1945. The professional services of defendants commenced "immediately thereafter." The complaint alleges: "That until on or about the 15th day of June, 1945 plaintiff had full faith in the skill and veracity of defendants, and each of them, and believed and relied upon statements made by said defendants to plaintiff that all possible care and treatment was being rendered to plaintiff's injury, and that said injury would be finally cured; that by reason of plaintiff's reliance upon the statements so made by defendants plaintiff was induced to refrain from seeking or securing medical advice and treatment from other physicians and surgeons until on or about June 15, 1945."

[7-9] Prior to 1936 the courts of this state applied a very strict rule in malpractice cases in reference to the statute of limitations. In that year the Supreme Court clarified and liberalized the applicable rules in the case of Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908, As a result of that case, and the cases following it (Trombley v. Kolts, 29 Cal.App.2d 699, 85 P.2d 541; Petrucci v. Heidenreich, 43 Cal.App.2d 561, 111 P.2d 421; Ehlen v. Burrows, 51 Cal.App.2d 141, 124 P.2d 82; Faith v. Erhart, 52 Cal.App.2d 228, 126 P.2d

151) the rule is now settled that in those cases where the one-year statute is applicable (and not the three-year statute based on allegations of fraudulent concealment) the statute does not start to run until the date of the discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act, or the date of the termination of the relationship of physician and patient. The allegations here demonstrate that the action was filed within one year of discovery.

Defendants do not directly challenge the application of the rules announced in these cases to the allegations here involved, but argue, again without citation of authority, that the date of discovery is alleged to be "on or about June 15, 1945," and contend that such allegation is insufficient in that "on or about" may have been June 12th or 13th as well as June 15th. The contention lacks merit. Before a complaint is subject to a demurrer based on the statute of limitations it must appear from the face of the complaint that the cause is barred, not merely that it may be barred. Antioch College v. Barnhart, 49 Cal.App.2d 171, 121 P.2d 521. This being so, the pleading is sufficient so far as the statute of limitations is concerned.

[10] The orders of the court below in sustaining the demurrers recite that "no one appearing as counsel for plaintiff." Based on this finding defendants, again without the citation of a single authority, urge that when plaintiff failed to appear, the trial court, within its discretion, could infer that plaintiff had abandoned or waived his cause of action. To state the contention is to refute it. A waiver of a right cannot be established without a clear showing of an intent to relinquish such right, and doubtful cases will be decided against a waiver. Craig v. White, 187 Cal. 489, 202 P. 648; Aronson v. Frankfort etc. Inc. Co., 9 Cal.App. 473, 99 P. 537; see cases collected 25 Cal.Jur. p. 932, § 7.

Although we have found no case involving the legal effect of a plaintiff failing to appear to support his pleading there are several cases discussing the legal effect of a defendant failing to appear to argue in support of his demurrer. In Richards v. Travelers' Ins. Co., 80 Cal. 505, 506, 22 P. 939, 940, the court stated: "We know of no reason for holding that a party who submits a demurrer without argument thereby waives any objection raised by the demurrer. The objection is taken by the demurrer, and not by the argument; and it points out to the court and the opposite party every objection to the complaint that is raised by such a demurrer. It is the duty of the opposite party to look to his pleading, and see that it is sufficient to withstand such a demurrer; and it is equally the duty of the court to examine the pleading, and determine as to its sufficiency, whether the demurrer is argued or not."

The same principle was announced in Philip v. Durkee, 108 Cal. 300, at page 303, 41 P. 407, at page 408, where the court stated: "It has been often held that there is nothing in the proposition that the court overruled the demurrer because the defendant failed to appear and present it. A demurrer raises an issue of law. To overrule the demurrer is to decide that issue. On appeal, if there was prejudicial error in the ruling, the case may be reversed for that reason. Even a rule of the superior court that a demurrer would be overruled for want of presentation would make no difference. The Code allows such issue to be made, and, unless the demurrer is waived, or gotten rid of in some lawful mode, the court must decide the questions raised."

[11, 12] It would appear too clear to require further argument that if the failure of a defendant to appear in support of his own demurrer is not a waiver, even if a court rule so provides, the failure of a plaintiff to appear to argue against the demurrer cannot and should not, per se, be interpreted as a waiver of the cause of action. It is the duty of the court to rule on the sufficiency of the pleading and this cannot be done by indulging in inferences of a waiver.

[13] The complaint states a cause of action good as against the general demurrers or the charge that the statute of limitations had run. To refuse leave to amend was an abuse of discretion even if the special demurrers were well taken. Upon a reconsideration of the special demurrers the court may require the clarification of any uncertainties that may appear in the com-

plaint. Washer v. Bank of America, 21 Cal.2d 822, 136 P.2d 297, 155 A.L.R. 1338; Hancock Oil Co. v. Hopkins, 24 Cal.2d 497, 150 P.2d 463.

The judgment is reversed.

BRAY, J., and FINLEY, Justice pro tem., concur.

81 Cal.App.2d 592

COPLEY v. EADE.

Civ. 13375.

District Court of Appeal, First District, Division 2, California.

Sept. 26, 1947.

1. Boundaries 🔑40(3)

In quiet title action, whether a fence between adjoining lands had become the boundary line by acquiescence or implied agreement, although the fence was not on boundary line as shown by survey was a question of fact.

2. Boundaries 🔑37(5)

In quiet title action, evidence sustained finding that boundary line between adjoining lands was as shown by survey and that a fence had not become the boundary line by acquiescence or implied agreement.

3. Boundaries 🔑48(1)

The essence of the doctrine of a boundary being fixed by acquiescence is the implied agreement between the parties that a fence or other structure represents the true boundary and that the acquiescences of the parties, or their failure to object, supports an inference of such agreement, and the doctrine is a mixture of implied agreement and estoppel.

4. Boundaries 🔑48(2)

To give rise to an inference that parties have impliedly agreed that a fence or other structure represents the true boundary, the fence or monument must have been accepted or acquiesced in as a boundary line and not as a barrier.

5. Boundaries 🔑37(5)

In quiet title action, plaintiff had burden of proving by a preponderance of the evidence allegations that a fence between adjoining lands had become the boundary line by acquiescence or implied agreement.

6. Boundaries 🔑33

Long acquiescence in a boundary fence line is presumptive evidence of an agreement that the fence was constructed on what the parties thought was the true line and constituted an agreed boundary line, arising out of an uncertainty.

Appeal from Superior Court, Monterey County; H. G. Jorgenson, Judge.

Action by Chester A. Copley against H. T. Eade to quiet title to realty, and to enjoin construction of a fence. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Rosendale, Thomas & Muller, of Salinas, for appellant.

James A. Walker, of Salinas, for respondent.

NOURSE, Presiding Justice.

Plaintiff is the record title owner of the South one-half and defendant is the record title owner of the north one-half of Section three of Township 20 South in Monterey County. According to the official plat the south one-half contains 320 acres while the north one-half contains but 304 acres. An old cattle fence had been maintained for many years running across the section which the plaintiff claims to represent the dividing line between the two holdings. Surveys having been made it was disclosed that, if the fence were accepted as the dividing line, plaintiff would hold more than 320 acres and defendant would have but 254.8 acres. Plaintiff commenced this action to quiet title and to enjoin the construction of a new fence on the line of the new surveys. Defendant had judgment fixing the boundry line in accordance with the survey and finding that each was the owner of the acreage corresponding to the record title and the official assessments for tax purposes.

[1, 2] Appellant's contention is not that the old fence followed the true half section line according to any survey, but that the fence became the boundary line by acquiescence or implied agreement. This presents a plain question of fact. There is no evidence of agreement or acquiescence other than the conceded fact that the parties pastured their stock up to the fence from a time as early as 1910. Contra is the evidence that both parties, and their predecessors, treated the fence as a cattle guard only, that both parties, and their predecessors, recognized and publicly stated that they were in doubt as to the true boundary line, and both agreed that a survey ought to be made to determine the boundary between their respective holdings.

[3] The essence of the doctrine of a boundary being fixed by acquiescence is the implied agreement between the parties that a fence or other structure represents the true boundary and that the acquiescence of the parties, or their failure to object, supports an inference of such agreement. Essentially the doctrine is a mixture of implied agreement and estoppel. See Board of Trustees v. Miller, 54 Cal.App. 102, 105, 201 P. 952; Vowinckel v. N. Clark § Sons, 217 Cal. 258, 260, 18 P.2d 58; Roberts v. Brae, 5 Cal.2d 356, 359, 54 P.2d 698; 8 Am. Jur. pp. 802, 806.

[4] But it is settled law that, to give rise to such an inference, the fence or monument must have been accepted or acquiesed in "as a boundary line," and not "as a barrier." Roberts v. Brae, supra, 5 Cal.2d at page 360, 54 P.2d at page 700; Phelan v. Drescher, 92 Cal.App. 393, 397, 268 P. 465.

During the trial the able trial judge made a personal inspection of the fence and the premises surrounding it. At the conclusion of the trial he filed an opinion which clearly states the reasons for the subsequent judgment. We quote in part:

[5] "Now, there are certain fundamental principles that must be kept in mind. The plaintiff in this cause has the burden of proof and must prove his case by the preponderance of the evidence, so that his evidence, when weighed with the defendant's evidence, has the more convincing force and from which it results that the greater probability is in the plaintiff's favor. If the evidence is equally balanced the decision must go to the defendant.

"After considering all the evidence, the Court finds that the true boundary line between the land of the respective parties is as established by and as stated by Mr. Boling on the witness stand.

"There is no question but that the fence was allowed to remain in its present position for over 34 years after the defendant acquired the north half of the Section. On the witness stand he testified to conversations with plaintiff's predecessor in interest, which if true, were admissions against interest and of itself would establish that the fence was known by the parties not to be on the true line and was built and maintained where it was by the plaintiff and his predecessor in interest at the place on the line and for the reasons stated by the defendant in his brief. As the defendant was a party in interest and the person making the alleged statements was dead, the Court viewed his testimony with great caution, but after viewing the fence, its location and direction, and the manner in which the defendant testified, the Court can not say that it was not true. On the other hand, the Court feels that the greater probability is that it is true, and it is corroborated by the direction of the fence, its deviations and the contour of the ground over which it is built. It clearly appears that if it had been constructed along the true line, it would have been constructed in parts over very difficult terrain on which to construct a fence. That is particularly true of the westerly end of the fence. The land is rough grazing land in the hills and some pretty high and rugged hills at that. It was of little value at the time the fence was constructed and is not of great value even now. In fact, the Court feels it is hardly worth more than the value of the attorneys' fees reasonably earned by the counsel in this case.

[6] "There is no question but that the long acquiescence in a boundary fence line

is presumptive evidence of an agreement that the fence was constructed on what the parties thought was the true line and constituted an agreed boundary line, arising out of an uncertainty, but the Court can not say that presumption was not overcome by the evidence of Eade and the physical facts."

The case was fairly tried and no claim of error is made on the appeal. It presents the single question whether the evidence supports the findings. On this question the facts and the conflicts have been recited and there is no need of repetition. They bring the case squarely within the citation from Roberts v. Brae, supra.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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81 Cal.App.2d 588

Ex parte SCHUNKE.

Cr. 2023.

District Court of Appeal, Third District, California.

Sept. 25, 1947.

1. Criminal law 🔑1202(1)

A conviction of a violation of the Dyer Act is not one of these enumerated in the California habitual criminal statute, and therefore may not be used as a ground for an adjudication of habitual criminality. National Motor Vehicle Theft Act, 18 U.S.C.A. § 408; Pen.Code, § 644.

2. Criminal law 🔑1202(1)

Where petitioner was convicted in North Dakota of the offense of burglary in the third degree, which was the same as the offense of burglary under existing California statute, and the California habitual criminal statute included the crime of burglary at time of petitioner's subsequent conviction of robbery, the North Dakota conviction was properly considered in adjudging petitioner an habitual criminal. Comp. Laws N.D. 1913, § 9872; Pen.Code, §§ 459, 644.

3. Habeas corpus 🔑4

Alleged insufficiency of evidence to support conviction as an habitual criminal and alleged misconduct of prosecuting attorney, which were matters considered on appeal from conviction, could not be considered again in habeas corpus proceeding seeking release from custody under sentence imposed. Pen.Code, § 644.

4. Habeas corpus 🔑4

The writ of habeas corpus may not be employed as a substitute for an appeal.

5. Constitutional law 🔑250, 270
Criminal law 🔑1201

The habitual criminal statute is not unconstitutional as denial of due process or equal protection of law. Pen.Code, § 644.

6. Criminal law 🔑1202(1)

Where the adjudication that petitioner was an habitual criminal was based upon two prior convictions, both of which were for offenses defined by the habitual criminal statute, and for both of which petitioner served terms of imprisonment in a state prison, he was entitled to be accorded the benefits applicable to persons who have suffered but two prior convictions, although not presently entitled to discharge or to release on parole. Pen.Code, § 644.

Habeas corpus proceeding by Verne John Schunke against Robert A. Heinze, Warden of the California State Prison at Folsom, seeking petitioner's release from the custody of respondent.

Writ discharged and petitioner remanded to custody.

Verne John Schunke, in pro.per.

Fred N. Howser, Atty. Gen., and Doris Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

This petitioner, in June, 1941, was convicted of the crime of robbery of the first degree. He was charged with and admitted four prior convictions, to wit, a violation of the Dyer Act, 18 U.S.C.A. § 408, in Utah in 1929, burglary committed in North Dakota in 1932, and robbery, first degree, and burglary, first degree, committed in California in December, 1934. He was adjudged an habitual criminal and sentenced to imprisonment for life. From that judgment of conviction he appealed, and the judgment and an order denying a new trial were affirmed. People v. Schunke, 47 Cal.App. 2d 542, 118 P.2d 314.

In his petition before this court he alleges that he was wrongfully adjudged to be an habitual criminal because (a) a violation of the Dyer Act is not one of the offenses enumerated in section 644 of the Penal Code of this state, (b) the offense committed in North Dakota, which was designated third degree burglary, would not have constituted a felony if committed in this state and there is actually no such crime defined by the statutes of North Dakota, and (c) that the alleged third and fourth prior convictions in California in 1934 (robbery and burglary) constituted but one offense for which he served but one term. He also alleges that the evidence adduced at the trial of the primary offense with which he was charged in 1941 was insufficient to support the verdict and that the prosecuting attorney made prejudicial remarks to the jury which resulted in defendant's conviction.

[1] We granted the writ solely because of the allegations of the petition regarding the prior conviction of a violation of the Dyer Act, and the conviction of burglary committed in North Dakota. Regarding the former, it was held in People v. Lohr, 28 Cal.App.2d 397, 82 P.2d 615, that the offense is substantially the same as that denounced in section 503 of the Vehicle Code, is not one of these enumerated in section 644 of the Penal Code, and therefore may not be used as a ground for an adjudication of habitual criminality. Also see In re McVickers, 29 Cal.2d 264, 278, 176 P.2d 40.

[2] Regarding the offense committed in North Dakota, while it is true, as asserted by petitioner, that the statutes of North Dakota do not now define the offense of third degree burglary, such was not the case in 1932 when petitioner was convicted in that state. See section 9872 of the Compiled Laws of North Dakota, 1913, Vol. II, Anno., Chapter 59.

We have been furnished with a copy of the charge made against petitioner in North Dakota which recites that on or about the 12th day of July, 1931, at Fargo, North Dakota, the defendant "did commit the crime of Burglary in the Third Degree committed as follows, to wit: that at said time and place the said defendant did wilfully, unlawfully and feloniously in the nighttime break and enter that certain dwelling house located at 1109 Seventh Avenue South in the City of Fargo, County of Cass and State of North Dakota, with intent to commit the crime of larceny therein."

At the time of the commission of said offense and petitioner's conviction therefor, section 459 of the California Penal Code provided, as it still does, that every person who enters any house, room, tenement, etc., with intent to commit grand or petit larceny or any felony is guilty of burglary; and section 644, supra, then, and at the time of petitioner's conviction of the primary offense in 1941, included the crime of burglary. It is therefore apparent that the conviction in North Dakota was properly considered by the trial court in adjudging petitioner an habitual criminal. In re Wolfson, 30 Cal.2d 20, 180 P.2d 326; In re McVickers, supra; In re Harincar, 29 Cal. 2d 403, 176 P.2d 58.

As for petitioner's contention that his prior conviction for robbery and burglary in California in 1934 should be considered as but one conviction for which he served but one term, the record of his trial for the primary offense in 1941 shows that they were so considered by the trial court, which stated that it was basing its adjudication that defendant was an habitual criminal upon but *two* prior convictions, to wit, the conviction in North Dakota in 1932, and the conviction in California in 1934, it being specifically stated that the first prior conviction (under the Dyer Act) was being omitted as not being an offense enumerated in section 644, supra.

[3, 4] As for petitioner's allegations in his petition that he was denied a fair trial, that the evidence was insufficient to support the verdict and that the prosecuting attorney was guilty of misconduct which resulted in the verdict, the record shows that at the time of his trial and on his appeal he was represented by counsel, that the insufficiency of the evidence and the alleged misconduct of the district attorney were urged on such appeal but that his conviction was affirmed. Asserted errors considered on that appeal may not be considered again in this proceeding. While, as appears from the opinion of the Supreme Court in Re McVickers, supra, 29 Cal.2d at pages 273, 276, 176 P.2d at pages 46, 47, the traditional limitations of the scope of review by way of habeas corpus proceedings have been considerably extended, they have not been enlarged to permit review of matters which have already been passed upon by a reviewing court on direct appeal from the judgment, nor even to those which were properly so reviewable. Such writ may not be employed as a substitute for an appeal. In re Byrnes, 26 Cal.2d 824, 827, 161 P.2d 376; In re Bell, 19 Cal.2d 488, 492, 122 P.2d 22; In re Connor, 16 Cal.2d 701, 705, 706, 108 P.2d 10, and cases therein cited.

[5] Petitioner also urges that section 644 of the Penal Code is unconstitutional, but such contention is without merit. In re Rosencrantz, 205 Cal. 534, 271 P. 902; People v. Floth, 8 Cal.App.2d 600, 47 P.2d 817; People v. Richardson, 74 Cal.App.2d 528, 542, 544, 169 P.2d 44.

[6] It appearing that the adjudication that petitioner is an habitual criminal was based upon but two prior convictions, both of which were for offenses defined by section 644, supra, and for both of which he served terms of imprisonment in a state prison, he is, of course, entitled to be accorded the benefits applicable to persons who have suffered but two prior convictions, but he is not presently entitled to discharge or to release on parole. Therefore, the writ is discharged and petitioner is remanded to custody.

THOMPSON and PEEK, JJ., concur.

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81 Cal.App.2d 584

Application of DORSEY.

Cr. 2000.

District Court of Appeal, Third District, California.

Sept. 25, 1947.

1. Criminal law ⚷997

Assignments on petition for writ of coram nobis which were in nature of alleged errors of law or procedure were waived by failure to move to set aside the information, or for new trial, and by failing to appeal from judgment of conviction, since such writ may not be used as substitute for motion for new trial or appeal. Pen.Code, § 995.

2. Criminal law ⚷997

The use of writ of coram nobis is limited to those cases in which the statutory right to appeal or to move for new trial will afford no remedy. Pen.Code, § 995.

3. Criminal law ⚷997

The writ of coram nobis lies when a defendant has been fraudulently coerced or persuaded to plead guilty, or is deprived of right to trial by extrinsic fraud, deceit, duress, persuasion, or misrepresentation, when no statutory remedy for the wrong exists, or when statutory remedy is inadequate. Pen.Code, § 995.

4. Criminal law ⚷245

Alleged defective proceedings upon preliminary hearing were waived by failure to move to set aside the information. Pen. Code, § 995.

5. Larceny ⚷56

In prosecution for petit theft of two shirts stolen from a store, testimony of eyewitness that he saw accused take two shirts from counter and conceal them under his coat as he fled from the store was sufficient to establish the corpus delicti. Pen. Code, § 666, subd. 3.

6. Criminal law ⚷686(1)

Reopening case before it had been submitted to jury to permit witness to correct his previous testimony that he did not observe accused wearing a coat when he was first brought to jail after his arrest was not an abuse of discretion, where no objection was made by accused to such procedure and another officer positively testified that accused was wearing a coat when he was arrested.

7. Witnesses ⟹337(5)

The prosecution could impeach accused's credibility by specifically asking him on cross-examination if he had not been previously convicted of felonies mentioned in information, notwithstanding accused admitted upon his plea the prior convictions alleged in information. Pen.Code, § 1025.

8. Criminal law ⟹1202(4)
Witnesses ⟹337(5)

A defendant who takes the stand in his own behalf waives protection of statute precluding reference to alleged prior convictions, since he thereby places his credibility in issue and he may be impeached by evidence that he has been formerly convicted of felonies. Pen.Code, § 1025; Code Civ. Proc. § 2051.

9. Criminal law ⟹871(2)

A verdict was not invalid because it was signed by foreman as "Mrs. Jack Wherry", where she also signed it as "Mrs. Virginia J. Wherry" and there was no question of identity of foreman of jury which rendered the verdict.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Proceeding in the matter of the application of Alfred Joe Dorsey for a petition for a writ of coram nobis. From an order discharging the writ, the petitioner appeals.

Affirmed.

John L. Brannely, of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Benjamin Knight, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The petitioner has appealed from an order of the Superior Court of Stanislaus County discharging the writ of coram nobis.

On the hearing of the petition for a writ of coram nobis, the defendant appeared with counsel and evidence was adduced. The transcript of evidence of that hearing is before this court. It appears that the defendant was charged by an information filed in said court on September 20, 1945, with petit theft of two shirts stolen from the store of Montgomery Ward & Company in Modesto, and three prior convictions, two of which were felonies. On arraignment the defendant appeared with counsel and pleaded not guilty to the principal offense, but admitted conviction of the prior offenses charged. No demurrer was filed or motion made to set aside the information. The cause was tried with a jury which rendered a verdict of guilty as charged. The court determined that the defendant "is not an Habitual Criminal," but sentenced him, under Section 666, subdivision 3, of the Penal Code, to imprisonment in the State Prison at San Quentin for the term prescribed by law. No appeal from that judgment was taken. The petition for a writ of coram nobis was filed on October 4, 1946, and denied, after hearing, as previously stated. From that order this appeal was taken.

The petitioner contends that he was entitled to a reversal of the judgment of conviction for the reasons that: (1) The preliminary hearing was irregular, and he was committed without probable cause; (2) upon trial the prosecution failed to adequately prove the corpus delicti, to-wit, that the two shirts alleged to have been stolen were taken by the defendant from the store and concealed under his coat; (3) after the evidence was closed and both parties rested, but before the jury was charged or the cause submitted, upon motion the prosecution was permitted to recall a witness for the purpose of correcting his testimony; (4) after the defendant had admitted his prior convictions upon his plea, but had taken the witness stand at the trial in his own behalf, the district attorney was permitted to impeach his credibility by asking him, with respect to each alleged prior conviction if he had not been so convicted; and (5) the verdict was improperly signed "Mrs. Virginia J. Wherry, Mrs. Jack Wherry, Foreman." No other grounds for granting the writ of coram nobis were assigned. No extrinsic, or other fraud, misrepresentation, duress or coercion were alleged, and none appeared at the hearing of the proceeding on coram nobis.

[1] All of the foregoing assignments are in the nature of alleged errors of law or procedure, which were waived by failure to move to set aside the information under Section 995 of the Penal Code, motion for a new trial or appeal from the judgment of conviction. The writ of coram nobis may not be used as a substitute for a motion for new trial or an appeal. People v. Hightower, 75 Cal.App.2d 298, 170 P.2d 490; People v. Egan, 73 Cal.App.2d 894, 900, 167 P.2d 766; People v. Lewis, 64 Cal.App.2d 564, 149 P.2d 27; People v. McConnell, 20 Cal.App.2d 196, 66 P.2d 720; People v. Lawyer, 11 Cal.App.2d 718, 54 P.2d 747; People v. Calhoun, 9 Cal.App.2d 97, 48 P.2d 754.

[2, 3] It is said in People v. Superior Court, 28 Cal.App.2d 442, 82 P.2d 718, that the use of the writ of coram nobis in this state is limited to those cases in which the statutory right to appeal, or to move for a new trial, will afford no remedy. In People v. Butterfield, 37 Cal.App.2d 140, 99 P.2d 310, it is said that coram nobis lies when a defendant has been fraudulently coerced or persuaded to plead guilty, or is deprived of the right of trial by extrinsic fraud, deceit, duress, persuasion or misrepresentation, when no statutory remedy for the wrong exists, or when the statutory remedy is inadequate.

[4] In the present case the alleged defective proceedings upon preliminary hearing were waived by failure to move, under Section 995 of the Penal Code, to set aside the information. People v. Harris, 219 Cal. 727, 28 P.2d 906; People v. Bawden, 90 Cal. 195, 200, 27 P. 204; In re Heinze, 116 Cal.App. 286, 2 P.2d 561; People v. Middleton, 103 Cal.App. 135, 283 P. 976; In re Northcott, 71 Cal.App. 281, 235 P. 458. In the Harris case, supra [219 Cal. 727, 28 P.2d 908], quoting with approval from the Northcott case, it is said:

"'Said judgment (that of conviction) is not related to, nor is it dependent upon, the order of the committing magistrate holding the defendant to answer for trial; its foundation being in the evidence adduced at the trial and the verdict of the jury, and not in the proceedings occurring before the committing magistrate.'"

[5-9] Moreover, we find no error in the challenged proceedings of the trial. There was adequate evidence of the corpus delicti. An eyewitness testified that he saw the defendant take two shirts from the counter and conceal them under his coat as he fled from the store. The court did not err in reopening the case before it had been submitted to the jury to permit a witness to correct his previous testimony that he did not observe the defendant wearing a coat when he was first brought to the jail after his arrest. No objection was made at the trial by the defendant to that procedure. Another officer positively testified that the defendant was wearing a coat when he was arrested. Permission to reopen the case, at the request of the witness, to permit him to correct his testimony, was within the sound discretion of the trial judge. There was no abuse of discretion in that regard. People v. Berryman, 6 Cal.2d 331, 338, 57 P.2d 136; 23 C.J.S., Criminal Law, § 1056, subsec. b, p. 465. In spite of the fact that the defendant admitted upon his plea the prior convictions alleged in the information, the prosecution had a right to impeach his credibility by specifically asking him on cross-examination if he had not been so previously convicted of the felonies mentioned. There was no objection by the defendant at the trial to those impeachment questions. It is the established rule in California that when a defendant takes the stand in his own behalf, he waives the protection of Section 1025 of the Penal Code precluding reference to alleged prior convictions, since he thereby places his credibility in issue, and he may be impeached, under Section 2051 of the Code of Civil Procedure, by evidence that he has been formerly convicted of the felonies. People v. David, 12 Cal.2d 639, 646, 86 P.2d 811; People v. Silva, 2 Cal.App.2d 616, 38 P.2d 481; People v. Tinnin, 136 Cal.App. 301, 319, 28 P.2d 951; People v. Fontes, 110 Cal.App. 141, 293 P. 835; People v. Johnston, 114 Cal.App. 241, 244, 299 P. 805. The verdict was not invalid because it was signed by the foreman of the jury as "Mrs. Jack Wherry." She also signed it as "Mrs.

Virginia J. Wherry." There is no question of the identity of the foreman of the jury which rendered the verdict.

The order made in the coram nobis proceeding, discharging the writ, is affirmed.

ADAMS, P. J., and PEEK, J., concur.

81 Cal.App.2d 559

BLISS et al. v. DE LONG et al.

Civ. 3459.

District Court of Appeal, Fourth District, California.

Sept. 23, 1947.

1. Appeal and error 🔑151(2)

Default judgment was properly entered against defendants who were served with summons and complaint in action to foreclose real estate mortgage but failed to appear or answer, and hence they were not aggrieved parties entitled to appeal from order amending judgment nunc pro tunc so as to show default by other defendants, since defendants thus served and in default would be bound by original judgment even if the entire order amending judgment nunc pro tunc should be declared void as to them.

2. Judgment 🔑323

While trial court may at any time, with or without notice, amend a judgment where record discloses clerical misprisions or that judgment was not correctly given, where resort must be had to evidence aliunde to establish error, notice must be given of motion to amend judgment to parties affected thereby and where judgment is amended in matter of substance so as to grant relief different from that granted when it was rendered, it is void as against a party having no notice of application to amend.

3. Judgment 🔑489

An order amending a judgment nunc pro tunc is void and can be attacked at any time, if record discloses lack of jurisdiction to make such order.

4. Appeal and error 🔑151(1)

If court refuses to vacate on motion an order entered without jurisdiction amending a judgment nunc pro tunc, the party aggrieved may appeal and have the order reviewed and reversed.

5. Judgment 🔑326

A "clerical error" for which judgment may be amended nunc pro tunc includes an error made by judge or court.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error".

6. Mortgages 🔑495

Judgment foreclosing real estate mortgage could not be amended nunc pro tunc several years later so as to set aside dismissal of action as to defendant who was not served with notice of trial and whose answer was on file claiming an interest in the realty superior to that of mortgagees without notice to such defendant, since judgment thus amended would foreclose her interest in realty without a trial and deprive her of right to appeal therefrom.

* * *

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Ralph S. Bliss and wife against Frank W. De Long and others to foreclose a real estate mortgage. T. W. Burnam and another were later substituted as plaintiffs. From an order denying their motion to vacate an order amending a judgment of foreclosure nunc pro tunc, Frank W. De Long, Estelle D. De Long, and Hilda M. Gray appeal.

Order reversed as to Hilda M. Gray with direction.

John J. Craig, of Los Angeles, for appellants.

Bewley, Knoop & Nixon, of Whittier, for respondents.

GRIFFIN, Acting Presiding Justice.

This action was commenced in February, 1930, by Ralph S. Bliss and wife, as plaintiffs, to foreclose a mortgage on real property. In September, 1926, defendants Frank W. De Long and Estelle D. De Long executed and delivered to plaintiffs a promissory note for $3,000, secured by a mortgage. They defaulted in payment of principal and interest. In addition to these defendants, other defendants were sued by fictitious names. Summons and complaint were duly served on the De Longs and they defaulted. Defendants Norman Farra and Hilda M. Gray, sued by fictitious names, were likewise served. Defendant Gray filed an answer in propria persona and claimed some interest in the property. Norman Farra did not appear and his default was entered. The default matter was heard on February 27, 1931. There is no record showing that defendant Gray was ever served with notice of trial. The minutes of the court of February 27, 1931, show that "This cause coming on regularly at this time for trial * * * and no one appearing on behalf of defendants, default as to defendants De Long is hereby ordered entered. On motion of plaintiffs cause ordered dismissed as to fictitious defendants *not served with summon* * * * Court finds that there is due plaintiffs from defendants" De Long the amount prayed for.

On March 4, 1931, the trial judge signed and the clerk entered a decree of foreclosure reciting that summons and complaint had been duly served on all defendants including Hilda M. Gray; that the time within which they or either of them may appear has expired; that default of each has been duly entered; and "that said action has been duly dismissed as to defendants Norman Farra and Hilda M. Gray". The judgment then provides for the sale of the property under foreclosure proceedings by a commissioner and for a deficiency judgment against the De Longs. That judgment became final. Over 14 years later, on April 2, 1945, an order was entered in that same case entitled "Order Amending Judgment Nunc Pro Tunc," reciting: "It appearing to the court that the judgment heretofore entered by the clerk in the above entitled action, by reason of inadvertence of the court, does not correctly state the judgment of the court; It is ordered that said judgment and the record thereof be amended, nunc pro tunc, in the following respects: Paragraph First of said Decree is hereby amended to read as follows," reciting that the De Longs and other defendants were duly served with complaint and summons; that Hilda M. Gray "appeared and answered" but "did not appear at the trial"; that the time within which the De Longs and Norman Farra had to appear had expired and all except Hilda M. Gray have made default. The court then ordered that the original judgment entered March 4, 1931, be corrected accordingly, nunc pro tunc. The nunc pro tunc order was made, apparently, without notice to any of the defendants. More than one year thereafter, on May 17, 1946, the De Longs and Hilda M. Gray filed a notice of motion for an order vacating said nunc pro tunc order, based on the files of said action and an affidavit of their attorney in which it is recited that no notice was ever given defendants of any motion to amend, or of the intention of the court to enter such a nunc pro tunc order amending the previous judgment. It is also shown that the first notice they had that said order had been entered was on March 1st, 1946. The minutes of the court's proceedings of February 27, 1931, were read in evidence on June 21, 1946. By consent, T. W. Burnam and Aletha K. Burnam were substituted as plaintiffs and respondents. On July 3, 1946, the trial judge denied defendants' motion to set aside the previous order. The De Longs and Hilda M. Gray have appealed from the order.

[1] From an observation of the proceedings the De Longs were not aggrieved parties. The default judgment against them was proper in form and substance and became final. The nunc pro tunc order did not change the original judgment as to the rights of those defendants, nor did it affect them. Even if the whole order should be declared to be null and void as to them, they are still bound by the original judgment. Title Insurance & Trust Co. v. King Land & Improvement Co., 162 Cal. 44, 46, 120 P. 1066.

The defendant Norman Farra has not appeared in this proceeding and is not a party to this appeal. We shall therefore consider the merits of this appeal from the order insofar as it may affect the appellant Hilda M. Gray.

Respondents endeavor to uphold the action of the trial court in amending the previous judgment, without notice, upon the grounds: (1) That the errors contained in the judgment as originally entered were clerical, and that courts have inherent power to correct clerical errors either on their own motion or on motion of a third party and with or without notice; (2) that parties in default are not entitled to notice of subsequent proceedings in the action; (3) that a motion to vacate an order or judgment more than one year after the order is made or judgment entered is regarded as a collateral attack on such order or judgment and must be denied unless the order or judgment is void on its face; and (4) that an order or judgment is not void on its face unless the invalidity affirmatively appears on the face of the proceedings in the case.

We are not impressed with the argument that the change in the judgment as to Hilda M. Gray is not a substantial change but only a clerical error and one which the court may correct at any time, without notice.

[2] In Scamman v. Bonslett, 118 Cal. 93, 50 P. 272, 62 Am.St.Rep. 226, quoting from the syllabus, it is said that:

"Although a court may at any time, with or without notice, amend a judgment, where the record discloses that the judgment of the court was not correctly given, or where clerical misprisions have occurred, of which the record affords the evidence, yet, when an inspection of the record does not show the error, and resort must be had to evidence aliunde, notice must be given of a motion to amend the judgment to the parties affected thereby; and where an amendment is made to a judgment *in matter of substance,* whereby it is made to grant relief different from that granted when it was rendered, it is absolutely void as against a party having no notice of the application to amend it." (Italics ours.)

A quotation from Freeman on Judgments (Section 72) is therein contained to the same effect. See, also, Herd v. Tuohy, 133 Cal. 55, 65 P. 139.

[3, 4] In Texas Co. v. Bank of America etc. Ass'n, 5 Cal.2d 35, at page 41, 53 P.2d 127, it was held that if the record discloses that the court had no jurisdiction to make the order, then it is void and can be attacked at any time, citing cases. In Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591, it was held that if the court refuses to vacate such an order on motion, it being an order made after judgment, the party aggrieved may appeal and have the order reviewed and reversed.

[5] In Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508, the general rule in reference to clerical errors is discussed, and it was there held that if it appears on the face of the record that a clerical error has been committed and carried into the decree the court has authority and power to correct such error, and the meaning of the term "clerical error" has been extended to include an error that may have been made by the judge or the court. However, we find no case which holds that if such change in the judgment affects the substantial rights of the parties and that it was made without notice, and that by such change the parties may be deprived of their right of appeal, such court has authority to make the change effectively nunc pro tunc.

[6] The question then presented here is: Was the amendment to the original judgment, in the form of nunc pro tunc, such an amendment as would affect the substantial rights of the parties, without notice, and which may also affect their right to appeal? We think so. The original judgment dismissed the action as to Hilda M. Gray. At that time she had her answer on file claiming an interest in a parcel of such property by virtue of a deed from the De Longs. She alleged that her claim was not inferior to that of plaintiffs. That judgment does not recite that she was ever served with notice of trial. The second paragraph of the original decree, not amended in any form by the nunc pro tunc order, provided for a foreclosure proceeding by the commissioner and then specifically provided: "That the *defendants* and all persons claiming, or to claim, from or under them, and all persons having a lien subsequent to said mortgage * * * and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of pendency of this action

* * * be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, * * * from and after the delivery of said commissioner's deed."

The effect of the nunc pro tunc order, therefore, is to set aside the dismissal of the action as to the defendant Hilda M. Gray, to reinstate her answer, and to make her a party defendant again as of the date of the first judgment. By the last clause of the original judgment she is foreclosed from claiming any parcel of the property, or any right, title or interest therein. By making this order nunc pro tunc it would, in effect, bar her from her right to a trial on the issues presented by her answer, and her right to an appeal from such a judgment. Spencer v. Troutt, 133 Cal. 605, 65 P. 1083, and kindred cases, preclude such an order being entered nunc pro tunc and without notice.

As to Hilda M. Gray, the order is reversed and the trial court, as to her, is directed to set aside the nunc pro tunc judgment.

MARKS, J., concurs.

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81 Cal.App.2d 601

LOUIE v. HAGSTROM'S FOOD STORES, Inc.

Civ. 13422.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1947.

Rehearing Denied Oct. 30, 1947.

Hearing Denied Nov. 24, 1947.

1. Appeal and error 🔑930(1), 934(1)

On appeal from judgment entered upon a verdict in favor of plaintiff and from order denying defendant's motion for judgment notwithstanding the verdict, appellate court must accept the evidence most favorable to plaintiff.

2. Negligence 🔑32(1)

The owner or occupier of business premises is not an insurer of the safety of business invitees, but owes to such invitees a duty to exercise reasonable care in keeping the premises reasonably safe for them.

3. Negligence 🔑48

The liability of owner or occupier of business premises for injuries suffered by a business invitee due to defective condition of premises depends upon actual or constructive knowledge of dangerous condition or ability by exercise of ordinary care to discover the condition, which, if known to owner or occupier, he should realize involves an unreasonable risk to invitees.

4. Negligence 🔑134(7)

That defective condition of business premises existed long enough so that by use of reasonable care it should have been discovered and remedied may be proved by circumstantial as well as by direct evidence.

5. Negligence 🔑136(16)

Whether under all the circumstances defective condition of premises causing injury to business invitee existed long enough so that a reasonable man exercising reasonable care would have discovered it is generally a question of fact for jury.

6. Negligence 🔑48

Operator of a grocery and vegetable store is required in exercise of ordinary care to exercise a more vigilant outlook than operator of some other type of business where danger of things falling to the floor is not so obvious.

7. Negligence 🔑134(7)

Circumstantial evidence sustained implied finding that Karo syrup from broken jar had been on floor at entrance to grocery and vegetable store a sufficient time so that proprietor in exercise of reasonable care should have discovered and remedied the dangerous condition before customer was injured thereby.

8. Negligence 🔑136(27)

That customer leaving self-service grocery and vegetable store did not look at the floor did not constitute "contributory negligence" as a matter of law, so as to preclude recovery against proprietor for injury suffered when customer slipped on puddle of syrup on floor at entrance.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

9. Negligence ⚷136(26)

Contributory negligence is a question of fact for jury, unless the facts are such that reasonable men can draw but one inference and that an inference that points unerringly to negligence of plaintiff contributing to injury.

10. Appeal and error ⚷204(2)

Defendant, having made no objection in trial court to introduction of evidence as to loss of earnings by reason of personal injuries sued for and having cross-examined plaintiff at length on the issue, could not object in appellate court to the admission of such evidence.

11. Husband and wife ⚷221

Under statute expressly conferring on married woman the right to sue alone for recovery of her earnings, married woman living with husband and suing for personal injuries could recover for loss of wages without joining husband as a party plaintiff. Code Civ.Proc. § 370.

12. Appeal and error ⚷1151(2)

Where plaintiff at oral argument consents that, if she is not entitled to recover for special damages in personal injury action without joining her husband as a party plaintiff, judgment should be reduced by the amount of special damages established by the evidence, appellate court, if it concludes plaintiff is not entitled to recover such special damages, should reduce the judgment accordingly and not reverse.

13. Husband and wife ⚷221

Statute authorizing a married woman to sue for personal injuries without joining husband as a party, while it did not divest husband of his primary right to sue for consequential damages, conferred upon married woman living with her husband a right to recover in personal injury action for consequential damages, such as medical expenses, without joining husband as a party. Code Civ.Proc. § 370.

14. Husband and wife ⚷209(2)

Where married woman living with husband sues for personal injuries and consequential damages without joining husband as a party, it may readily be inferred that husband has consented to her acting on behalf of the community under familiar agency principles.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Sally Ann Louie against Hagstrom's Food Stores, Inc., to recover for personal injuries sustained in a fall in the entrance to defendant's grocery store. From judgment entered upon a verdict in favor of plaintiff and from order denying defendant's motion for judgment notwithstanding the verdict, defendant appeals.

Judgment and order affirmed.

Theodore Hale and Carroll B. Crawford, both of San Francisco, for appellant.

J. Adrian Palmquist, of Oakland, and Nathan G. Gray, of Berkeley, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover for personal injuries resulting from a fall in the entrance to defendant's grocery store. The cause was tried before a jury. It brought in a verdict of $2,500. From the judgment entered on the verdict, and from the order denying the defendant's motion for a judgment notwithstanding the verdict, defendant appeals. It is defendant's theory on this appeal that the evidence is insufficient, as a matter of law, to establish any negligence on its part, that the evidence demonstrates, as a matter of law, that plaintiff was guilty of contributory negligence, and that the court erred in not sustaining its objections to certain evidence relating to several items of consequential damage, and erred in its instructions on this issue.

[1] Defendant operates a grocery and vegetable store in Oakland. Plaintiff was a regular customer of the store. The establishment is of the self-service type, with

a cashier's stand located near the front of the store a short distance from the entrance. The floor is of concrete, and the various articles for sale are displayed in open shelves, boxes and bins. In approximately the center of the wide entrance is a substantial wooden post extending from the floor upwards into the frame of the door. The accident happened at the base of this post, while plaintiff was leaving the store after having selected and paid for her various purchases. The day in question was October 6, 1945, which was a Saturday, and the time was between 4 and 6 p. m. Admittedly, Saturday is a very busy day in the store and, admittedly, from 3 to 5 p. m. is one of the busiest periods. Defendant had on duty four employees at the time of the accident, but one was upstairs, one in the back room, and one in the back of the store. None of these three employees saw the accident. They were called as witnesses for defendant. The cashier, a Miss Willis, was not called as a witness, there being evidence that she was out of the state at the time of trial. There is evidence that Miss Willis was working in such a position that when she was wrapping packages or checking purchases her back was to the post. There is also evidence, however, that her duties called for her to turn around to get articles from places where she would be facing the post. Although there is some conflict in the evidence, that most favorable to plaintiff, which we are required to accept, is to the effect that the cashier could see the foot of the post from her spot near the cash register. This evidence is corroborated by pictures introduced into evidence which show that this is the fact.

There is no dispute that it was a puddle of syrup that caused the fall. One of the employees of defendant testified that after the accident he cleaned up the syrup from the cement floor; that there was a broken glass pint jar of Karo syrup lying in a torn paper bag alongside the post. Defendant makes no contention that the syrup was plaintiff's, or that she had dropped it or caused it to drop. Plaintiff makes no contention that any employee of defendant placed the broken bottle at the foot of the post. On this appeal there is no dispute concerning the nature or extent of plaintiff's injuries.

Plaintiff testified that she selected her purchases, had them checked by the cashier, paid for them, picked them up, and started to leave the store, intending to go to her husband's car then parked near the store. Just as she reached the post she slipped and fell in a sitting position. She tried to get up and slipped again. She testified that she "walked into something that was slippery and sticky and caused my feet to fly from under me"; that she concluded she had fallen in some syrup; that she did not see the syrup "till I found myself sitting in it"; that as she sat on the floor she saw the bag near the post with the syrup seeping from it; that the puddle of syrup was inside the entrance to the store; that her packages flew from her arms when she fell; that the seeping syrup had formed a puddle "about a foot and a half" at the base of the post; that when she fell and sat in the puddle "it smeared to a much larger puddle"; that the syrup got all over her shoes, on and under her clothes; that a little boy picked up her packages and the cashier grabbed a towel and tried to clean her off; that she refused assistance because she was embarrassed and in pain and wanted to get home and lie down.

One of the employees of defendant, Pattee by name, testified that at the time of the accident he was in charge of the produce counter and that it was also his duty to sweep the store periodically and to keep the aisles clear. At the time of the trial—October, 1946—he was the manager of the store in question. He testified that he cleaned up the syrup after the accident; that there was an egg-shaped puddle of syrup of about six to eight inches; that he swept the floor periodically and always swept from the front towards the back; that it took about fifteen minutes to sweep the entire store; that he had just completed the sweeping operation when the accident occurred. There is some confusion in his testimony on this point, defendant's counsel at the trial interpreting Pattee's evidence to mean that it was five or ten minutes after the sweeping operation had been completed that the accident occurred. The testimony is susceptible of that interpretation. Pattee testified that when he swept the entrance the broken bottle of syrup was not there. Thus there was a period of between fifteen to twenty-five minutes immediately before the accident that Pattee, and apparently no other employee, had examined the entrance to the store.

Pattee also testified that he was familiar with the characteristics of syrup; that the kind here involved was Karo; that Karo is a thick syrup that does not flow freely; that October 6, 1945, was a cold day; that syrup will flow more freely under conditions of warmth than under cold conditions; that Karo is thick and adhesive and does not flow freely; that if Karo were dropped on the floor it would "just sit there before it began to gradually ooze out."

The other employees of defendant knew nothing about the accident and could add nothing to the factual background. On this evidence defendant contends that, as a matter of law, there is insufficient evidence to sustain the implied finding of the jury that it was negligent, and urges that its motions for a nonsuit, directed verdict and judgment notwithstanding the verdict should have been granted. In this connection defendant vigorously contends that there is no evidence to show when the bottle of syrup was dropped on the floor, nor how long it had been there prior to the accident, nor that any employee of defendant put it there, nor that any employee of defendant had actual knowledge of its presence, nor any evidence to support a finding of constructive knowledge. Plaintiff freely admits that there is no evidence that any employee of defendant placed the syrup on the floor, and it must be conceded that there is no direct evidence of the exact time the bottle was broken, and there is no evidence that any employee of defendant had actual knowledge of its presence. The real question presented is whether there is sufficient evidence to sustain the implied finding of the jury that the syrup had been on the floor for a sufficient length of time so as to have required defendant or its employees, in the exercise of ordinary care, to have discovered it and corrected the condition before the accident.

[2, 3] As frequently occurs in the field of torts there is no substantial dispute over the applicable rules of law—the real dispute is over the application of those rules to the facts of the case. Admittedly, the plaintiff, as a customer, was the business invitee of defendant. Admittedly, the defendant is not an insurer of the safety of business visitors. The true rule is that the owner or occupier of business premises owes to invitees a duty to exercise reasonable care in keeping the premises reasonably safe for such invitees. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Owen v. Beauchamp, 66 Cal.App.2d 750, 152 P.2d 756; McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950. To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier "must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it." Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841, 845; see, also, Rothschild v. Fourth & Market St. Realty Co., 139 Cal.App. 625, 34 P.2d 734; Stoddard v. Roberts Public Markets, Inc., 27 Cal.App.2d 166, 80 P.2d 519; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346; Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646.

The same rule is adopted by the Restatement of Torts. Section 343 reads as follows: "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care should discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them."

[4, 5] So far the parties agree. But the defendant contends that before the question can arise as to whether the owner

or occupier should have discovered the defective condition there must be some evidence of how long the defective condition existed, and it urges that there is no such evidence here. It seems to be the thought of defendant that such evidence must be direct evidence. That is not the law. The true rule is that, while plaintiff must prove that the defective condition existed long enough so that by the use of reasonable care it should have been discovered and remedied, that fact, like other facts, may be proved by circumstantial as well as by direct evidence. It is generally a question of fact for the jury as to whether, under all the circumstances, the defective condition existed long enough so that a reasonable man exercising reasonable care would have discovered it. In Rothschild v. Fourth & Market St. Realty Co., 139 Cal.App. 625, 627, 34 P.2d 734, the court stated: "However, the question whether the condition which caused the injury had existed so long as to be discoverable by the defendant within a reasonable time is one for the jury."

In Tuttle v. Crawford, 8 Cal.2d 126, 130, 63 P.2d 1128, 1130, the Supreme Court stated the rule as follows: "Whether the floor of a store or public market place was so negligently maintained as to render the person responsible for its condition liable in damages is a question of fact to be decided by the jury."

The same court in Hatfield v. Levy Brothers, 18 Cal.2d 798, 807, 117 P.2d 841, 846, declared: "Further, the question of whether the condition which caused the injury had existed so long as to be discoverable by the store owner within a reasonable time is for the jury."

[6] The exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances. A person operating a grocery and vegetable store in the exercise of ordinary care must exercise a more vigilant outlook than the operator of some other types of business where the danger of things falling to the floor is not so obvious. This was recognized by the Supreme Court in the Tuttle case, supra, where, at page 130 of 8 Cal.2d, at page 1130 of 63 P.2d, the court stated: "The fact that the attention of persons who visit public markets is attracted by the display of the wares offered for sale and more or less absorbed by the transactions which they have in mind would seem to increase the necessity of exercising care to the end that the floor spaces and aisles allotted to the use of customers should be made safe and kept fit for such purpose."

[7] In the instant case it is quite clear that there was sufficient circumstantial evidence from which the jury could have inferred that the syrup was on the floor a sufficient time so that, in the exercise of reasonable care, the defendant should have discovered it and remedied the defective condition. There is evidence that the cashier could see the foot of the pole from her position at the cashier's desk; that while her back was to the pole when wrapping packages and collecting money her duties required her to face the front of the store on frequent occasions. Moreover, it is a reasonable inference that when this glass jar fell to the concrete floor with sufficient force to break it, it must have made an appreciable noise which the cashier should have heard. There is evidence that no employee of defendant examined the front entrance for between fifteen to twenty-five minutes immediately preceding the accident. There is evidence that the puddle of syrup had reached appreciable proportions before the accident. There is evidence of defendant's own witness that this syrup was quite thick, possessed adhesive qualities, that the day was cold, and that on such a day the syrup would flow quite slowly. It is a reasonable inference that for this heavy thick fluid to have seeped through the paper bag and to have formed a puddle of appreciable proportions would take a substantial period of time. When this evidence is considered, keeping in mind that this was a very busy grocery and vegetable store, and keeping in mind the obvious dangers that exist in such establishments, we think there was ample evidence, under the rule of the cited cases, to sustain the jury's implied finding that this condition existed

long enough so that defendant should, in the exercise of ordinary care, have discovered and remedied it.

None of the California cases cited by defendant compels or suggests a contrary conclusion. While defendant cites some cases from other states that contain language supporting its position, in view of the wealth of California authority on the subject those cases cannot be deemed authoritative in this state. In support of its contention that plaintiff, as a matter of law, has not met her responsibility of showing the existence of the defect for a sufficient length of time to bring into operation the rule of constructive notice defendant places its main reliance on McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950, and Owen v. Beauchamp, 66 Cal.App.2d 750, 152 P.2d 756. In the McKellar case the appellate court affirmed a judgment for the defendants based on the granting of a motion for judgment notwithstanding the verdict. There the plaintiff, a tenant in an apartment house, slipped on some oily substance on the lobby floor. Her main theory was that the janitor negligently allowed garbage drippings to fall on the floor. She offered no substantial evidence on that issue. Plaintiff also argued that if a third person dropped the substance on the floor defendant should have remedied the condition. The appellate court held that there was no evidence at all to support that contention because there was no direct or circumstantial evidence as to how long the unknown oily substance had been on the floor. That case is to be distinguished from the instant one where, as already pointed out, there was substantial evidence to support a reasonable inference that the syrup had been on the floor an appreciable time. Moreover, as already pointed out, while the "degree" of care in the instant case is identical with that required in the McKellar case, the "quantum" of care necessary to constitute "reasonable" care is more exacting and greater in a public store than in an apartment house lobby.

The other case upon which defendant places its main reliance is Owen v. Beauchamp, supra. It was decided by a divided court, and, as in the McKellar case, two justices of the Supreme Court voted for a hearing. Here the plaintiff slipped and fell on some dental wax on the floor of a dentist's reception room. The trial court directed a verdict for defendant and the appellate court affirmed. Apparently it was the theory of plaintiff that upon proof of the presence of the wax on the floor she had proved sufficient facts to take the case to the jury. There was a total absence of evidence on the "lapse of time" issue. In the instant case there was ample evidence that the syrup had been on the floor a substantial time.

[8, 9] The next contention of defendant is that the evidence, as a matter of law, shows contributory negligence. The contention is predicated upon plaintiff's evidence that she did not look at the floor as she walked towards the entrance of the store. This point is without merit. It is elementary law that contributory negligence becomes a question of law when, and only when, from the facts, reasonable men can draw but one inference, and that an inference that points unerringly to the negligence of plaintiff contributing to the injury. In all other cases the question of contributory negligence is one of fact for the jury. See discussion and cases cited in DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 92 P.2d 899; Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 85 P.2d 152; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128. The exact point now urged by defendant—that the customer is obligated to keep his eyes on the floor—was decided adversely to defendant's contention in Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, at page 601, 111 P.2d 346, 349, where it was stated: "Defendant operated a retail store for the purpose of selling goods to customers. In order to promote sales the goods were displayed on counters to attract the attention of the customers. It should be trite to suggest that a customer could not look at the goods on the counters and at the same time keep his eyes on the floor. Since it was the intention of defendant that its customers should see the goods displayed on the counters, and not have to watch the floor,

it should have realized that dangerous substances on the floor would create a dangerous condition and should have acted accordingly."

The last point raised by defendant raises a most troublesome question. In her complaint plaintiff prayed for $5,000 general damages, and $245.38 special damages for loss of wages, cost of X rays and medical care. The jury brought in a verdict of $2,500. The evidence shows that plaintiff is a married woman and clearly indicates that at the time of the accident, and after, she was residing with her husband. The husband was not made a party plaintiff. The defendant in its answer as a defense to the cause of action for consequential damages that plaintiff was a married woman living with her husband "and that said plaintiff has not the legal capacity to maintain" the action for special damages. The trial court instructed that plaintiff could recover for special damages. Defendant now maintains that this was error because, so it is contended, the husband is the only one that may recover for such damages.

[10, 11] Before directly discussing the legal point involved, the state of the evidence on the issue should be reviewed. At the trial the plaintiff offered evidence of but two items of special damage—the amount of the doctor's bill, and loss of wages. The evidence as to the amount of loss of wages showed that such loss was substantial. The evidence on this issue came into the case without objection and defendant's counsel cross-examined plaintiff at length on this issue. This being so, defendant cannot now object to the introduction of this evidence of special damages. Moreover, whatever may be the law as to the necessity of joining the husband where the wife sues to recover for general and special damages, § 370 of the Code of Civil Procedure expressly provides that a "married woman * * * may sue without her husband being joined as a party in all actions, including those for injury to her person * * * or for the recovery of her earnings * * *." This section expressly confers the right on a married woman to sue alone for the "recovery" of her earnings.

[12] This leaves for consideration only the amount of the doctor's bill, that being the only other item of special damage on which evidence was offered. While the doctor for plaintiff was on the stand plaintiff sought to offer proof that the reasonable value of the doctor's services was $150, which amount was unpaid. Defendant objected on the ground that the husband alone could sue for such damage. After argument the trial judge overruled the objection and admitted the evidence that such services were reasonably worth $150. This is the only item of special damage involved on this point. Even if defendant were correct on this point, which it is not, the then erroneous admission of this evidence would not require a complete reversal. Plaintiff, while contending that a married woman may recover for such damages, at the oral argument consented that, if she is in error, this court should reduce the judgment by the amount of $150. In that event, that would be the proper procedure for an appellate court to follow.

We turn now directly to a discussion of the right of a married woman living with her husband when she sues to recover for personal injuries, to recover also for consequential damages, such as medical expense. The law is most confused on this subject. There are some appellate court cases holding or implying that even though the wife may, by statute, sue alone for her personal injuries, she cannot, without joining her husband, recover for consequential damages directly attributable to such injuries, because, so it is said, the recovery would be community property and the husband has the power of management and control over such property. Redwing v. Moncravie, 131 Cal.App. 569, 21 P.2d 986; Martin v. Costa, 140 Cal.App. 494, 35 P.2d 362; Meier v. Wagner, 27 Cal.App. 579, 150 P. 797. There is at least one early case—Fassett v. Nascimiento, 108 Cal.App. 14, 291 P. 269—and several much later appellate court cases, where it was directly held that § 370 of the Code of Civil Procedure, supra, conferring on the wife the right to sue alone for her personal injuries, includes, by necessary implication, the right to recover for consequential damages arising out of such injuries. The leading case so holding, and where the point is adequately discussed, is Purcell v. Goldberg, 34 Cal.App.2d 344, 93 P.2d 578. The Supreme Court, without a dissenting vote, denied a hearing in that case. This case was followed in Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485, and again a hearing was denied by the Supreme Court, two justices voting for a hearing. See, also, Ades v. Brush, 66 Cal.App.2d 436, 152 P.2d 519. These later cases would be conclusive on the issue were it not for the fact that subsequent to the decision in the Hyman case the Supreme Court decided the case of Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025. In the Purcell and Hyman cases the problem had arisen in factual situations where the wife was injured, brought suit for her personal injuries, and attempted, in addition, without joining her husband, to recover for consequential damage. In both cases where the problem thus directly arose it was held that the wife could recover for such items of damage. But in the Sanderson case the problem did not arise in any such clear-cut fashion. The circumstances were most unusual. Job and Hazel Sanderson were husband and wife. They owned, as community property, an automobile. While the husband was operating the car, accompanied by his wife, a collision occurred between that car and one owned by defendant. Job and Hazel Sanderson filed an action in the Small Claims Court to recover for damages to their automobile and for medical expenses paid by the husband for the care of certain injuries received by the wife in the collision. The plaintiffs recovered judgment for $12.58 and that judgment became final. Thereafter Hazel Sanderson alone commenced an action against defendant in the Superior Court to recover damages for her personal injuries. The defendant contended that the wife had improperly attempted to split her cause of action by suing first in the Small Claims Court for consequential damages, and later in the Superior Court for personal injuries, and that the first action was a bar to the second. The trial court so held. This was reversed by the Supreme Court, it being held that the Small Claims Court judgment was not res judicata in the Superior Court action. It is important to note that that was the main issue before the Supreme Court. That court very properly points out that in the first action the husband could have sued alone and that the wife was not a necessary party to that action. The court then went on to discuss whether the wife had improperly split her cause of action against defendant by joining in the first action with her husband to recover consequential damages, and then suing alone in the second action to recover for her injuries. In the course of this discussion the Supreme Court stated, at page 568 of 17 Cal.2d, at page 1028 of 110 P.2d: "Therefore, unless it can be said that the provisions of section 370, Code of Civil Procedure, authorize the bringing of an action by the *wife* to recover for incidental or consequential damages which may have been sustained by reason of financial loss to the community,—which right of action has heretofore been generally recognized as existing in the husband—there has been no 'splitting' of a cause of action."

After discussing certain other code sections relative to the status of husband and wife with regard to the property of the community, and the husband's duty to support his wife and supply her with medical care and attention, the court said, at page 569 of 17 Cal.2d, at page 1028 of 110 P.2d: "When read in the light of the Civil Code sections hereinbefore referred to, there is nothing in the language of section 370 of the Code of Civil Procedure which would imply that in enacting the provisions of that section the Legislature intended to divest the husband of the primary right (which theretofore had been recognized as existing in the husband) to bring an action for the recovery of damages due to financial loss which had resulted to the community through the wrongful act of another,—and, in lieu thereof, to vest that right in the wife, merely because the damages thus sought to be recovered may have been sustained as a result of injuries which were personal to the wife."

At page 570 of 17 Cal.2d, at page 1028 of 110 P.2d, appears the following: "Although a few decisions have been rendered in this state wherein, in an action instituted by a married woman, in her own name, for the recovery of general damages for injuries to her person, it was held that she might also recover consequential damages [without citing any of those decisions, and particularly without mention of the Goldberg and Hyman cases, supra],—the weight of authority in this state is to the effect that the right of action for the recovery of consequential damages which may result from financial loss suffered by the community resides in the husband by virtue of his right of control of the community property." Citing the Redwing case in 131 Cal.App. 569, 21 P.2d 986 and the Martin case in 140 Cal.App. 494, 35 P.2d 362.

[13] It is most important to note what was actually decided in the Sanderson case. So far as the issue under discussion is concerned all that was decided was that the husband may sue for such consequential damages suffered by his wife, and that when he sues, the wife is not a necessary party to the action. That is undoubtedly good law. As stated by the Supreme Court, the "primary right" to recover rests in the husband by virtue of his power of management and control over the community property. When the husband is a party he is the one who is legally entitled to recover for such consequential damages. But the very existence of a "primary right" implies the existence of a "secondary right," and such "secondary right" obviously rests in the wife by virtue of § 370 of the Code of Civil Procedure. That section did not divest the husband of his "primary right" to sue for such damages. It merely, in permissive language, conferred a right on the wife to sue for damages to her person and by necessary implication for consequential damages resulting from such injury.

[14] Moreover, when a wife is living with her husband, and sues for her personal injuries and likewise for consequential damages resulting therefrom without joining her husband, it may readily be inferred that the husband has consented to her acting on behalf of the community under familiar agency principles. Ades v. Brush, 66 Cal.App.2d 436, 152 P.2d 519. It must be remembered that the wife has a vested interest in the community property. Certainly, under such circumstances if the wife first recovered for such injuries and then the husband sought to recover, we would have no difficulty at all in holding the husband was estopped and that his action, if any, was against his wife. That fully protects a defendant. While he has a legal right not to be sued twice for the same damage, he has no legal right to escape liability entirely on a mere technicality. In many cases that would be exactly what would happen if defendant's arguments were to prevail.

In view of the fact that the point here under discussion was directly involved and decided adversely to the contention of defendant in the Goldberg and Hyman cases, supra, in view of the fact that the Supreme Court did not cite and therefore did not overrule those cases in the Sanderson case, supra, in view of the fact that the holding in the Sanderson case can be logically reconciled with the Goldberg and Hyman cases without overruling those cases, and in view of the sound and logical reasons that support the Goldberg and Hyman cases, we are inclined to follow the rule of those cases until they are directly overruled or until the Supreme Court directly decides to the contrary.

The judgment and order appealed from are affirmed.

BRAY, J., and FINLEY, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

HUNT et al. v. MAYOR AND COUNCIL OF CITY OF RIVERSIDE et al.*

Civ. 3682.

District Court of Appeal, Fourth District, California.

Sept. 25, 1947.

Rehearing Denied Oct. 15, 1947.

Hearing Granted Nov. 20, 1947.

1. Municipal corporations 🔑108

Where city charter definitely sets forth manner of exercising initiative and referendum powers reserved to city under Constitution and city enacts legislation providing that certain ordinances on subjects within exceptions stated in Constitution shall not be subject to referendum, court must assume that referendum power is reserved to city electors as to any ordinance not within charter exceptions. Const. art 4, § 1; art. 11, § 8.

2. Municipal corporations 🔑108

The declaration of Constitution that its provisions do not affect or limit referendum power reserved to people of any city by its charter does not limit constitutional reservation of such power to city electors, nor enlarge referendum powers reserved by charter, but charter reserving powers exceeding those reserved in Constitution gives people of city additional powers therein described. Const. art. 4, § 1; art. 11, § 8.

3. Municipal corporations 🔑108

A city cannot, by its charter, abridge, limit, or restrict referendum powers reserved to people by Constitution. Const. art. 4, § 1; art. 11, § 8.

4. Municipal corporations 🔑4

City charters are subject to constitutional limitations.

5. Municipal corporations 🔑63(1), 108

The right of referendum, reserved to people of city by Constitution and city charter in regard to all legislative matters, still exists, unless expressly limited as to any particular legislative act, and courts cannot create exception thereto, but intention to make exception must be clearly indicated in charter. Const. art. 4, § 1.

6. Municipal corporations 🔑108

The provisions of Riverside city charter that no ordinance or action made subject to referendum by charter shall go into effect before 30 days from time of mayor's approval thereof, except ordinance for immediate preservation of public peace, health or safety, do not except sales tax ordinance from referendum power reserved by people of city. St.1907, p. 1277; St. 1929, p. 2102; St.1935, p. 2307; Const. art. 4, § 1; art. 11, § 8.

7. Municipal corporations 🔑108

The provision of Riverside city charter that ordinances providing for levying of taxes mentioned in charter shall not be subject to referendum provisions does not except sales tax ordinance from such provisions, notwithstanding preceding charter provision that all taxes, licenses, etc., shall constitute revenue of city; taxes mentioned referring to taxes on real and personal property. St.1907, p. 1277; St.1929, p. 2102; St.1935, p. 2307; Const. art. 4, § 1; art. 11, § 8.

8. Licenses 🔑1

A "sales tax" is an "excise" or "privilege" tax, as distinguished from "personal property tax".

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax", "Personal Property Tax", "Privilege Tax" and "Sales Tax".

9. Municipal corporations 🔑108

The provision of Riverside city charter that no ordinances, except initiative, referendum, recall, election, or tax ordinances, shall have any effect without mayor's approval, does not exempt all tax ordinances, including sales tax ordinances, from referendum provisions of charter. St.1907, p. 1277; St.1929, p. 2102; St. 1935, p. 2307; Const. art. 4, § 1; art. 11, § 8.

10. Municipal corporations 🔑108
Statutes 🔑35½

City charters and statutes containing referendum provisions should be liberally construed to give people broadest powers of referendum.

11. Municipal corporations 🔑108

The Riverside city charter subjects city legislation on every municipal subject to referendum, unless excluded expressly or by clear and necessary implication. St.

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* Subsequent opinion 191 P.2d 426.

1907, p. 1277; St.1929, p. 2102; St.1935, p. 2307; Const. art. 4, § 1; art. 11, § 8.

12. Municipal corporations ⚷108

Exemption of certain ordinances, including ordinances providing for levy of taxes for usual and ordinary purposes of government, from operation of referendum provided for in city charter, must be contained in charter and not left to city legislative body's discretion.

13. Municipal corporations ⚷108

An ordinance of city of Riverside, imposing license tax for privilege of selling tangible personalty at retail, is subject to referendum provisions of city charter. St.1907, p. 1277; St.1929, p. 2102; St. 1935, p. 2307; Const. art. 4, § 1; art. 11, § 8.

14. Municipal corporations ⚷79

The section of Elections Code, requiring signers of municipal referendum petitions to affix dates of signing to their signatures, is inapplicable to cities providing in their charters for manner and procedure to be employed under initiative and referendum provisions thereof, when procedure adopted conforms to state constitutional provisions. Elections Code, § 45; Const. art. 4, § 1; art. 11, § 8.

15. Municipal corporations ⚷8

Provisions of municipal charters, duly ratified by Legislature, are clothed with all dignity of, and entitled to all validity and presumptions attending and protecting, ordinary statutory enactments.

16. Municipal corporations ⚷108

A legislative enactment for purpose of facilitating and safeguarding operation of self-executing constitutional provision, such as that reserving powers of initiative and referendum to people of cities and towns, should be liberally construed, so that constitutional right may not be defeated. Const. art. 4, § 1.

17. Municipal corporations ⚷108

Signers of initiative petitions, signed and verified as provided by law, are presumed to be legal voters and entitled to sign petitions.

18. Municipal corporations ⚷108

Initiative petitions, which have been circulated, signed, and filed, are presumed to be valid, and burden of proving their invalidity rests on those protesting against them.

19. Mandamus ⚷172

In mandamus proceeding to compel mayor and council of city of Riverside to submit sales tax ordinance to city electorate after council's refusal to do so on ground that city charter referendum provisions were inapplicable to such ordinance, council was precluded from raising, for first time, question of insufficiency of referendum petition because of signers' failure to affix dates of signing to their signatures. Elections Code, § 45; St. 1907, p. 1277; St.1929, p. 2102; St.1935, p. 2307.

20. Municipal corporations ⚷108

The filing of referendum petition for submission of sales tax ordinance to electors of city of Riverside within 30 days after mayor's approval of ordinance, as required by city charter provision respecting ordinances made subject to referendum by charter, but more than 30 days after passage of ordinance by council, was timely, though charter declared tax ordinances effective without mayor's approval. St.1907, p. 1277; St.1929, p. 2102; St. 1935, p. 2307.

21. Municipal corporations ⚷108

Whether some electors of city of Riverside signed referendum petition for submission of sales tax ordinance to electorate before mayor's approval of ordinance was immaterial on question of sufficiency of petition, where city clerk certified that petition contained required number of signatures of qualified electors and there was no showing that it contained signatures of voters not qualified to sign it. St.1907, p. 1277; St.1929, p. 2102; St.1935, p. 2307.

22. Municipal corporations ⚷108

The right given by Riverside city charter to file amended initiative petition after city clerk certifies that original petition is insufficient, and procedure prescribed thereby in reference to such petition, do not apply to referendum petition after time fixed by charter for filing thereof and after ordinance sought to be submitted to electors would otherwise have become effective. St.1907, p. 1277; St.1929, p. 2102; St.1935, p. 2307.

23. Municipal corporations ⚷108

A referendum petition, filed within 30 days after mayor's approval of sales tax ordinance, for submission thereof to electorate of city of Riverside, was filed within 30 days after ordinance otherwise would have become effective, and hence was sufficient, though right given by city charter to file amended initiative petition and procedure followed in reference thereto do not apply to referendum petition after such 30-day limit and time when ordinance would otherwise have become effective. St.1907, p. 1277; St.1929, p. 2102; St.1935, p. 2307.

24. Municipal corporations ⚷120

The provisions of Riverside city charter that all ordinances passed by council must be submitted to mayor for approval or disapproval and that no ordinance, except tax and other specified ordinances, shall have effect without mayor's approval, do not modify positive declaration in city charter that ordinance made subject to referendum thereby shall not go into effect before 30 days from time of its approval by mayor. St.1907, p. 1277; St.1929, p. 2102; St.1935, p. 2307.

Proceeding by Roy C. Hunt and others for a writ of mandate to compel the Mayor and Council of the City of Riverside to submit to the electorate thereof, under referendum provisions of the city charter, an ordinance imposing a retail sales tax.

Writ granted.

Best, Best, Gabbert & Krieger, of Riverside, for petitioners.

Miguel Estudillo, City Atty., and Albert H. Ford, Deputy City Atty., both of Riverside, for respondents.

GRIFFIN, Justice.

In 1907 the City of Riverside adopted a charter (Stats.1907 p. 1277) containing certain provisions for the initiative and referendum. In 1929 (Stats.1929, p. 2102) this charter, in reference to the initiative and referendum provisions, was reenacted under authority of section 8, article XI of the Constitution. The charter was later amended (Stats.1935, p. 2307). On May 13, 1947, the city council duly adopted ordinance number 1260 entitled "An Ordinance * * * imposing a license tax of one per cent on gross receipts for the privilege of selling tangible personal property at retail." It was approved by the mayor on May 23, 1947. It provided for permits to be issued to retailers, for the collection and payment of such tax, and for penalty for its violation. The ordinance was to become effective on July 1, 1947. It was patterned, in the main, after the California Retail Sales Tax Act of 1933 (Stats.1933, p. 2599). On May 26, 1947, petitioner filed a referendum petition, in different sections, to which petition each signer added to his signature his place of residence. A proper verification of the signatures was attached. On June 6, 1947, the city clerk found that the petition contained an insufficient number of signatures. On June 18, 1947, an amended petition, in the same form, was filed. The city clerk then, on June 23, 1947, certified that the petition was signed by the requisite number of qualified and registered electors, to wit, 904. The entire vote for all candidates for mayor at the last preceding election was 8874.

The mayor and city council refused to repeal said ordinance and to submit the same to the vote of the electors of the city, which refusal was based mainly upon the advice and opinion of the city attorney, which opinion is set forth in the answer, and is to the effect that the referendum provisions of the city charter were not applicable to an ordinance creating a privilege tax levied for the purpose of raising revenue to meet the usual, common, ordinary expenses of the city. In support of a demurrer to the petition claiming that the facts stated therein do not entitle petitioners to relief, respondents also contended that the petition for referendum was insufficient for reasons hereinafter discussed.

Section 1, Article IV of the Constitution of California has specifically exempted from the powers of referendum reserved to the people of the state, acts calling elections, acts providing for levies and appropriation for the usual current expenses of the state, and urgency measures. The final clause of that section reserves the power of referendum to the electors of cities as well as the state, to be exercised under such procedure as may be provided by law. It then provides that nothing contained in that section shall be construed as *affecting* or *limiting* the present or future powers of cities having charters adopted under the provisions of section 8 of article XI of the Constitution. The section is self-executing and provides that legislation may be enacted to facilitate its operation, but in no way *limiting* or *restricting* either the *provisions of this section* or *the powers herein reserved.* It is now argued that the referendum provisions of the State Constitution, and all of the exceptions therein noted, are read into and became a part of the charter, with the same effect as though they had been expressly incorporated therein, citing Brown v. Boyd, 33 Cal.App.2d 416, 422, 91 P.2d 926; that since it has been held that under the State Constitution the Retail Sales Tax Act of 1933 was not subject to referendum (citing Roth Drug, Inc. v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022), a similar sales tax act adopted by the city is likewise not subject to referendum, particularly where the tax is levied for the usual and ordinary expenses of city government.

[1] It has been held that where a city charter does not "provide for the exercise of the constitutional power reserved to the electors by way of a referendum" (Brown v. Boyd, supra, 33 Cal.App.2d at page 419, 91 P.2d at page 929) the constitutional reservation is read into and becomes a part of the charter with the same effect as though it had been expressly incorporated therein. However, we are convinced that since the constitution has reserved the power of referendum to the electors of the city and the city has adopted a charter under it and has therein definitely set forth "the manner of exercising the initiative and referendum powers" reserved to such cities under the Constitution (Art. IV, sec. 1) and the city has enacted legislation "to facilitate its operation" and has provided therein that certain legislative acts or ordinances of the city council shall not be subject to referendum and such exceptions come within the exceptions set forth in the State Constitution on that subject, then it must be assumed that the power of referendum is reserved to the electors of that city as to any legislative act or ordinance not included within the exceptions set forth in the charter. In other words, under the circumstances here related, we must look to the provisions of the city charter to determine whether the ordinance levying the sales tax, even for the claimed purpose of "usual current expenses" of the city, was included within its provisions under a proviso exempting or excepting certain ordinances from the referendum power reserved in the people of that city.

[2] This conclusion is fortified by the case of Brown v. Boyd, supra (hearing denied by the Supreme Court), in which cases Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977, and Long v. Portland, 53 Or. 92, 98 P. 149, 1111, are adopted and cited as authority for the statement:

"The declaration of the Constitution that its provisions do not affect or limit the referendum power reserved to the people of any city by its charter does not limit the constitutional reservation, nor *enlarge those reserved by such charter.* The two reservations are thereby made independent of each other. The constitutional reservation goes to the full extent expressed by its language. If the charter differs from the Constitution in any respect, it does not thereby diminish the power reserved by the Constitution. *On the other hand, if the powers reserved by the charter exceed those reserved in the Constitution, the effect of the charter would be to give to the people the additional powers there described.*"

[3, 4] It must follow then that since the legislature would have no authority to limit or restrict the powers of referendum reserved to the people, the city, by the terms of its charter, could not abridge, limit nor restrict the powers thus reserved.

Hill v. Board of Supervisors, 176 Cal. 84, 86, 167 P. 514. Charters are subject to the limitations of the Constitution. Voorhees v. Morse, 1 Cal.2d 179, 189, 34 P.2d 153. The inference is then that if the city charter does not create all of the exceptions permitted by the Constitution but designates certain exceptions therein contained, and the ordinance in question is not within those designated exceptions, the "effect would be to give to the people the additional power" (of referendum) as to that described ordinance.

[5] The right of referendum in regard to all legislative matters is reserved to the people by the Constitution and the charter, and it still exists unless expressly limited as to any particular legislative act. Hopping v. Council of City of Richmond, supra, 170 Cal. at page 610, 150 P. 977; Spencer v. City of Alhambra, 44 Cal.App. 2d 75, 111 P.2d 910. The courts cannot create an exception. It must be clearly indicated that such an exception was intended in the charter. Hopping v. Council of City of Richmond, supra, 170 Cal. at page 617, 150 P. 977.

[6] We will therefore examine the provisions of the charter of the City of Riverside in this respect under the rules thus stated. Sec. 233, p. 71 thereof relates to the referendum provisions of the charter. It provides generally:

"* * * no ordinance passed by the council (except when otherwise required by the general laws of the state or by the provisions of this charter, respecting street improvements, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency * * *) and no action made subject to the referendum by this charter shall go into effect before thirty days from the time of its approval by the mayor * * *. And if during such thirty days, a petition signed by electors of the city * * * be presented * * * the same shall * * * be suspended from going into operation. * * *"

We find nothing contained within the provisions of that section that would except an ordinance levying a sales tax, in the City of Riverside (under ordinance number 1260) from the reserved power of referendum by the people of that city. Article XV of the charter provides: "Revenue and Taxation." Section 202: "All taxes, licenses, fines, penalties and all moneys received from any source shall constitute the revenue of the city and shall be collected and paid into the city treasury." Section 203 provides the time when department heads must submit estimates of their contemplated expenditures for the year. Section 204 provides for an estimate to be furnished the city council showing probable income and revenue collected from "fines, licenses and other sources of revenue, exclusive of *taxes upon property*, and what amount will probably be required to be levied and raised by taxation in order to meet the necessities of each specific fund for such fiscal year." Section 205 requires the council to "fix by ordinance the amount of money necessary to be raised *by taxation upon the taxable property of the city*, as revenue to carry on the various departments of such city * * * not to exceed the limit fixed by the charter. * * *" Section 207 makes it the duty of the mayor and council to provide by ordinance a system for the "assessment, levy and collection of all city taxes and for the *sale of property* for delinquent taxes * * *." It also provides that all taxes assessed shall constitute liens on the property assessed. A system of collection of "the city taxes" by the county tax collector is provided for, if adopted, and "the taxes so levied and collected shall be paid to the city treasurer." Section 211 then provides: "Ordinances providing for the *levying of the taxes mentioned in this article* shall not be subject to the provisions of the referendum referred to in section 233 of article XXI." That paragraph provides further that the council shall not have power to levy a general tax greater than $1.35 on each $100 of the assessed valuation of all property within said city. This limit is exclusive of all taxes for the payment of principal and interest on the bonded indebtedness of the city, all district taxes, special taxes, special assessments and all taxes for library or school purposes. It also provides that this limit may be changed at any time by an ordinance adopted by a majority vote of all of the electors voting on such question.

[7, 8] In support of their action in refusing to submit the ordinance to the electorate, respondents rely principally upon the words used in section 202, namely, that "*All* taxes, licenses," etc., "shall constitute the revenue of the city," and argue that since the use of the words "All taxes" in that section must be all inclusive and include all forms of taxes as well as sales taxes, the provision in section 211 that "Ordinances providing for the levying of the taxes mentioned in this article shall not be subject to the provisions of the referendum" would except such an ordinance as the one here in question from the provisions of the referendum.

We believe this to be a strained construction of Article XV when read in its entirety. Section 202 is but one paragraph in that article apparently designed for the specific purpose of defining what constitutes the revenue of the city. If respondents' contention is tenable, and the construction for which they argue could be placed on these two sections, then any ordinance of the city council which created or fixed any tax, whether for a new city hall, a new city jail, or other such public improvement, would be excepted from the referendum provisions of the charter. Such an interpretation would not be tenable. Hill v. Board of Supervisors, supra; Hopping v. Council of City of Richmond, supra.

Sales taxes are not mentioned in Article XV of the charter. It is apparent that the framers of the city charter did not have in mind at the time the provisions of that article were written that it would or did include a sales tax ordinance, nor did they have in mind excepting from the referendum power of the people any kind of a tax ordinance that might be thought of in the future, including a sales tax. Practically the whole of article XV of the charter is devoted to the property tax and that property tax is referred to throughout the article. It therefore seems consistent to construe the phrase "the taxes mentioned in this article," appearing in section 211, as referring to the same taxes the framers of the charter apparently had in mind and were referring to in the other sections of Article XV, that is, the property tax on real and personal property. A sales tax is not a tax upon property but has been declared to be an "excise" or "privilege" tax, as distinguished from a personal property tax. Roth Drug, Inc. v. Johnson, supra.

[9, 10] Respondents also argue that there is one other provision of the city charter (sec. 10, art. III) indicating that no *tax ordinances* are subject to a referendum. It reads in part: "* * * No * * * ordinance, except initiative, referendum, recall, election or tax ordinances, shall have any effect without the approval of the mayor." We are unable logically to conclude that this provision indicates that the framers of the city charter intended thereby that *all* tax ordinances were exempt from the provisions of the referendum. Charters and statutes should be liberally construed to give the people the broadest powers of the referendum. Ley v. Dominguez, 212 Cal. 587, 299 P. 713; McClure v. Nye, 22 Cal.App. 248, 133 P. 1145; Dwyer v. City Council, 200 Cal. 505, 253 P. 932; Whittemore v. Seydel, 74 Cal.App.2d 109, 115, 168 P.2d 212; Dye v. Council of the City of Compton, 80 Cal.App.2d 486, 182 P.2d 623.

[11, 12] The charter as a whole impels the conclusion that it was intended that legislation on every municipal subject should be subject to referendum unless expressly or by clear and necessary implication it is excluded. It is true that certain laws are usually exempted from the operation of the referendum for definite reasons and these exemptions usually include ordinances for the levying of taxes for the usual and ordinary purposes of government. 28 American Jurispudence pp. 156, 157, secs. 8, 9 and 10. This exemption, however, is one to be contained in the charter and not left to the discretion of the legislative body. The charter clearly recognizes all usual limitations on the power of referendum and provides in the last paragraph of section 211 for a maximum tax levy of $1.35 on the assessed valuation of property within the city which

is the usual revenue of the city as determined under sections 204 and 205 of the charter, which sections provide for the probable wants of all the departments of the municipal government and, apparently, is the tax "mentioned in this article" which is free from referendum provisions. That paragraph specifically provides that the city council shall have no power to levy a "general tax" greater than $1.35 per hundred on the assessed valuation of all property within the city, exclusive of special taxes, etc., for the purposes described, unless authorized by a vote of the people.

[13] We therefore must conclude that, under proper petition and proceedings, the ordinance here in question is subject to the referendum provisions of the city charter.

In respect to the petition, it is first contended that each of the signers of the referendum petition failed to "affix thereto the date of his signing" as required by sections 45, 1701 and 1773 of the Elections Code; that it does not appear from the petition between what dates it was circulated, and that accordingly the clerk could not determine that the signers were registered and qualified voters on the dates when they signed the petition, and it could not be determined therefrom whether or not the petition was circulated and signed before the ordinance was adopted by the council and approved by the mayor. It is also argued that the petition was premature and that there was no ordinance subject to referendum prior to its approval by the mayor or passage over his veto, citing Whitmore v. Carr, 2 Cal.App.2d 590, 38 P.2d 802; Thompson v. Kerr, 16 Cal.2d 130, 104 P.2d 1021; Gray v. Kenny, 67 Cal.App.2d 281, 153 P.2d 961; Chester v. Hall, 55 Cal.App. 611, 204 P. 237; Secs. 10 and 233 Riverside Charter.

It does not appear from the petition that the dates of signing were affixed to the petition by the signers opposite their signatures.

Sections 45, 1701 and 1773 of the Elections Code require that each signer add to his signature the date of his signing. Section 1777 of the Elections Code provides, however, that chapter three, division IV, in which chapter sections 1701 and 1773, supra, are found, does not apply to cities having a charter adopted and ratified under the provisions of section 8, article XI of the Constitution. Section 45, supra, is not contained in that chapter.

[14] The question, therefore, resolves itself into this: Is section 45 of the Elections Code (based on former Political Code section 1083a), requiring that each signer of a referendum petition shall, at the time of signing the petition, himself, affix thereto the date of his signing, applicable to a municipality having a charter duly adopted under article XI section 8 of the Constitution wherein provision has been made setting forth the manner and procedure for exercising the power of initiative and referendum? Provision was made in the charter of the City of Riverside for the initiative and referendum of legislative acts of that city. Under the authority of article IV section 1 of the Constitution that city has provided, in detail, in its charter, the "manner" and "procedure" by which this reserve power is "to be exercised." The charter does not require that the signer "affix the date of his signing" but only requires that "each signer shall add to his signature his place of residence, giving street and number." The Constitution, under which this charter was adopted, made no provision for affixing the date of signing by the elector, but only required that "each signer (qualified elector) shall add to his signature his place of residence, giving the street and number if such exist."

In Ley v. Dominguez [212 Cal. 587, 299 P. 718], supra, a similar question arose under the city charter of Los Angeles in reference to the application of section 1083a of the Political Code (now carried into section 45 of the Elections Code). That section then required that, "Wherever, by the constitution or laws of this state," any referendum petition is "required to be signed by qualified electors, only an elector who is a registered qualified elector *at the time he signs* such petition * * * shall be entitled to sign" any such petition, and that such signer "shall at the time of so signing such petition * * * affix thereto the date of such signing." It was there held that the added qualification, namely, that he shall be "a registered qualified elector" at the time of signing applied "only to state legislation and has no application in and of itself to municipalities." As applied to *state legislation* and *general laws* the additional requirement not specified in the Constitution (that the signer shall affix the date of his signing) has been upheld. Uhl v. Collins, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1370; Thompson v. Kerr, supra; Chambers v. Glenn-Colusa Irrigation District, 57 Cal.App. 155, 206 P. 773.

Section 45 of the Elections Code was subsequently amended by adding the provision that "each signer of any *municipal* * * * referendum * * * petition * * * shall * * * affix thereto the date of his signing." This provision may be applicable to municipalities not having charters or not having charter referendum provisions, (Brown v. Boyd, supra), and to municipalities whose charters adopt the general laws of the state as to the "manner" or "procedure" for exercising the power of initiative or referendum. Dye v. Council of the City of Compton, supra. We are convinced, however, that the holding in the Ley v. Dominguez case still prevails in such cities as have provided in their charters for the "manner" and "procedure" to be employed under the initiative and referendum provisions of their charters, when the procedure adopted conforms to and is consistent with the provisions of the State Constitution. 18 Cal. Jur. 950, sec. 233.

[15] Municipal charters, duly ratified by the legislature, clothe such charter provisions with all the dignity of an ordinary statutory enactment and entitle them to all the validity and presumptions which attend and protect other statutory enactments. Taylor v. Cole, 201 Cal. 327, 257 P. 40.

In Whitmore v. Carr, supra, 2 Cal.App.2d at page 592, 38 P.2d at page 803, it is said:

> "This power of referendum, as well as that of the initiative, is reserved by section 1 of article 4 of the Constitution to the people of each city and town in the state, with the right in cities acting under a charter to provide for the manner in which the power may be exercised."

[16-18] Where a constitutional provision is self-executing, as here, legislative enactment for the purpose of facilitating and safeguarding its operation should be liberally construed in order that the constitutional right may not be defeated. See Chester v. Hall, 55 Cal.App. 611, 204 P. 237, where it was held that a petition for a county charter election was not void where it was sufficient to enable the county clerk to satisfy himself *from the registration records* that the required number of petitioners were qualified electors at the time of signing, even though some did not affix the date of signing. There is a presumption, where initiative petitions have been signed and verified as provided by law, that those signing the petitions were legal voters and entitled to sign the same and that petitions which have been circulated, signed, and filed are valid, and the burden of proof to show their invalidity rests upon those protesting against them. 28 Am.Jur. 174, sec. 41.

[19] Many of the cases relied on by respondent are in the form of mandamus to compel the *city or county clerk,* who has refused to certify to the sufficiency of the petition, to do so. In the instant case the clerk has made the examination required by the charter, that is, "examined and from the great register and certificate of registration, ascertained whether or not said petition is signed by the requisite number of qualified and registered electors," has attached his certificate indicating that he found the petition "to be sufficient," and has submitted the same to the council. There was no provision in the charter that the clerk certify that there was affixed to each signature on the petition the date of the signing. The clerk performed his duty. Under the charter (sec. 233) if a petition signed by electors of the city, sufficient in number, protesting against the passage of such ordinance, be presented to the council "the same shall thereupon be suspended from going into operation and it shall be the duty of the council to reconsider such ordinance" and they "shall submit it to a vote of the electors." The city clerk is not a party to this mandamus proceeding. He is not claiming that the petition is insufficient. On the other hand, he has found it to be sufficient. It is the city council which is claiming it to be insufficient. It appears from the opinion of the City Attorney that

the city council refused to call the election for the sole reason set forth in that opinion, which is the reason disposed of in the first question herein discussed. The question of the sufficiency of the petition as to the particulars here discussed was not raised nor mentioned until this proceeding was commenced. In State v. Superior Court, 70 Wash. 352, 126 P. 920 at page 921, a similar proposition was considered in a proceeding in certiorari. It was there stated:

"Where it is thus manifest that the sufficiency of the petition was not a question considered by the commissioners at the time it was certified to them, but that its consideration was postponed upon other grounds, it would seem that that question should be forclosed in a proceeding of this character."

Good v. Common Council, 5 Cal.App. 265, 90 P. 44, was an action in mandamus directed to the city council, commanding defendants to order a recall election. A petition for recall was filed against one of its members and certified by the city clerk. The petition was found by him "to be sufficient." The council refused to act on that petition for several assigned reasons respecting its sufficiency among which was the claim that the declaration of the sufficiency of the petition rested in the discretion of the common council and could not be controlled by the mandate of the courts. It was there stated that the certificate of the city clerk was that he compared the names on the petition with the great register and found the petition to be sufficient; that this was the result of his examination; that this implied "that it fulfilled the requirements of the law"; that there was nothing to be done by the common council in this connection; that there was no discretion vested in the common council in connection with the calling of the election under such circumstances; that that body's functions were purely ministerial and that the "duty of determining whether or not the petition contains the proper number of signatures and the comparing of them with the great register devolved upon the city clerk. He is the person given authority to hear and determine the question of the sufficiency of the petition, and no appeal therefrom is provided and none apparently intended to be given. This is evident from a provision of the act requiring the return of the petition by the city clerk to the petitioners if found insufficient, and which, in effect, negatives petitioner's right of appeal * * *. But conceding that the council had supervisory power and refused to order an election in the face of a sufficient petition, *mandamus* will lie to compel it to act." (Citing cases.) See, also, Boggs v. Jordan, 204 Cal. 207, 267 P. 696; 28 Am.Jur. p. 173 sec. 37; State ex rel. Wagner v. Summers, 33 S.D. 40, 144 N.W. 730, 50 L.R.A.,N.S., 206, 216, Ann.Cas. 1916B, 86.

We therefore must conclude, in respect to the claimed insufficiency of the petition, that the city council was precluded from raising that question, for the first time, in this mandamus proceeding.

[20, 21] The next question meriting consideration is the contention that the referendum petition was not filed within the thirty-day period prescribed in the charter. The charter provides (Sec. 233) that "no action made subject to the referendum by this charter shall go into effect before thirty days from the time of its approval by the mayor * * * and if during said thirty days, a petition signed by the electors * * * protesting * * * be presented to the council * * * the council shall submit the ordinance proposed, to the vote of the electors * * * ."

Section 10 of the charter provides: "All resolutions and ordinances after passage by the council must be submitted to the mayor who shall, within ten days after he has received the same, endorse his approval or disapproval thereon." It likewise provides: "No * * * ordinance, except initiative, referendum, recall, election or tax ordinances, shall have any effect without the approval of the mayor."

The original referendum petition was filed on May 26, 1947. The amended petition was filed on June 18, 1947. The ordinance was passed by the city council on May 13, 1947, and approved by the mayor on May 23, 1947. Under the provisions of section 233 of the charter the original petition, as well as the amended petition, was filed within the thirty days after the approval of the ordinance by the mayor.

In Solomon v. Alexander, 161 Cal. 23, 118 P. 217, 218, it was held that under the provisions of the city charter of Los Angeles, which provided that no ordinance "shall go into effect before 30 days" after its passage and approval by the mayor, the thirty-day period within which the referendum petition must be filed commences to run from the time of the approval of the ordinance by the mayor. See also, 18 Cal.Jur. 952, sec. 235.

Respondents claim that since it was a tax ordinance, under section 10 of the charter it would become effective without the approval of the mayor and that the petition, as amended, would not have been filed within thirty days from the *passage by the council;* that the thirty days ran from that time since the mayor was not required to sign such an ordinance. In this connection it is argued that the petition may have contained signatures of voters who signed prior to the approval of the ordinance by the mayor and therefore such signatures should not be counted. The argument to this contention is covered by our conclusion heretofore reached in reference to the effect of the certificate of the city clerk attached to the petition, as amended, certifying that he had "examined the petition as required by law and found it to contain 904 signatures of qualified and registered electors and * * * to be sufficient." There is no showing that the petition contained signatures of voters not properly qualified to sign it.

[22] After the city clerk certified, on June 9, 1947, that the original petition was insufficient, an amended or supplemental petition was filed on June 18, 1947, and the above-mentioned certificate was, on June 23, 1947, attached to it and it was submitted by him to the city council.

It is now argued that the city charter made no provision for the filing of a supplemental petition pertaining to the referendum and therefore no sufficient petition was in fact presented to the city council. If a sufficient referendum petition was not filed before the ordinance became effective this contention must be sustained. Rushton v. Lelander, 15 Cal.App. 448, 115 P. 56; Dalton v. Lelande, 22 Cal.App. 481, 135 P. 54; Mann v. Brison, 120 Cal.App. 450, 7 P.2d 1110, 9 P.2d 257. This is particularly true because the city of Riverside reenacted the provisions of its charter in this respect in the year 1929 and the rule of construction involving legislative intent in adopting statutes previously construed comes into effect. Dalton v. Lelande, supra, decided in 1913. Under section 232 of the charter pertaining to the initiative petition, it is specifically provided that "if, by the clerk's certificate, the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate * * * If, the petition shall be found to be sufficient the clerk shall submit the same to the council without delay."

Section 233 of the same article of the charter pertains to the referendum petition. It makes no specific provision therein as it did in reference to the filing of an amended initiative petition. It does contain the provision that "Said petition shall be in all respects in accordance with the provisions of the first section of this article (The Initiative) and shall be examined and certified by the clerk in all respects as therein provided." These provisions of the charter are practically identical with the provisions of the Los Angeles charter construed in Rushton v. Lelander, supra, and the ruling in that case must prevail here. It was there held that the right to file an amended petition and the procedure to be followed in reference to the initiative petition did not apply to the referendum petition *after the thirty-day limit and after the ordinance would have otherwise become effective.*

[23] The only escape we see for the petitioners is the claim that the entire petition, both original and as amended, was filed within thirty days of the time the ordinance would have become effective. The petition, as amended, was filed on June 18, 1947. According to the clerk's certificate it, at that time, contained a sufficient number of signatures. And since we have concluded that this ordinance was subject to referendum, section 233 of the charter provides that under such circumstances it shall go into effect thirty days *from the time of its approval by by the mayor.* It was approved by the mayor on May 23, 1947, and the petition, as amended, was filed well within the thirty-day limit therein provided. Under these

circumstances the case of Dalton v. Lelande, supra, and other cases cited, can be distinguished.

[24] Section 10 of the charter does not provide that such a tax ordinance, as the one here being considered, takes effect upon passage by the city council without the approval of the mayor. Whether a tax ordinance which is not made subject to the referendum might have such effect is not before us. In the face of the positive declaration in the referendum provisions of the charter that any ordinance made subject to the referendum by the charter shall not go into effect before thirty days from the time of its approval by the mayor, we cannot hold that section 10 of the charter modifies this positive declaration set forth in section 233. We must therefore conclude that a sufficient petition for referendum was filed within the time prescribed by the charter.

Therefore, a writ of mandate should issue to respondents commanding them forthwith to reconsider said ordinance and either repeal the same or submit said ordinance to the vote of the electors of the city as provided in section 233, article XXI of the charter of the City of Riverside.

Writ granted.

BARNARD, P.J., and MARKS, J., concur.

81 Cal.App.2d 625

RATHER v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13259.

District Court of Appeal, First District,
Division 2, California.

Sept. 30, 1947.

1. Trial 🔑203(1)

A litigant requesting it is entitled to proper instructions presenting his theory of the case based on the pleadings and proofs.

2. Appeal and error 🔑1066

The giving of a last clear chance instruction where there is insufficient evidence to justify submission of such issue is fatally prejudicial error.

3. Negligence 🔑83

"The last clear chance" rule presupposes that the plaintiff has been negligent.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

4. Railroads 🔑282(13)

In suit for injuries sustained by ten year old boy when struck by southbound interurban car after alighting from northbound car and going around back of car, plaintiff was not entitled to instruction on last clear chance doctrine, since he was not in position of danger until he was actually on southbound track, and at that time southbound motorman no longer had opportunity to act.

5. Negligence 🔑83

The duty to act under "last clear chance" doctrine is a duty to exercise ordinary care in an emergency and that duty is the same whether person in peril is a child or an adult.

6. Railroads 🔑274(1)

The passenger station rule was applicable in suit for injuries sustained by ten year old boy when struck by interurban car at crossing at which car stopped on signal.

7. Railroads 🔑278(6)

The fact that ten year old boy was struck by interurban car at a station was immaterial in determining motorman's responsibility under last clear chance doctrine.

8. Railroads 🔑274(5)

The fact that no bell was rung or other warning given of approach of interurban car which struck ten year old boy at signal-stop station was immaterial where boy admitted that he had seen the car approaching.

9. Appeal and error 🔑1070(1)
Trial 🔑343

A general verdict imports finding in favor of prevailing party on all material issues, and if one issue alone is sustained by evidence and is not affected by any error, want of evidence to sustain other issues or errors committed in regard to them cannot be prejudicial.

10. Appeal and error ⚷1056(6)

In suit for injuries sustained by ten year old boy when struck by an interurban car, where there was abundant evidence to sustain implied finding of boy's contributory negligence, error, if any, in refusal to admit in evidence operating rules of the railway, which would have related only to railway's negligence, was not prejudicial error.

11. New trial ⚷29

In suit for injuries sustained by ten year old boy when struck by interurban car, denial of new trial on ground of misconduct of defendants' counsel in getting before jury idea that they had eyewitness, who was never produced, who saw boy run in front of train was not error.

12. New trial ⚷20

In suit for injuries sustained by ten year old boy when struck by interurban car operated by municipality, there was no error in denial of new trial on ground of false statements in voir dire examination of juror who stated that he would be a fair juror and had no friends or relatives employed by city, notwithstanding that he was thereafter seen talking to police officers in friendly manner and had a brother who was a retired police officer and had himself been on police force at one time.

13. Appeal and error ⚷977(5)
New trial ⚷6

The trial judge has sound discretion in granting or denying motion for new trial, even though based on affidavits, and in absence of clear abuse of discretion, denial of motion for new trial will not be disturbed on appeal.

14. New trial ⚷159

The trial court by order denying a new trial impliedly determined that no prejudice was suffered through alleged misconduct of either counsel or jury.

15. Appeal and error ⚷930(1)

The jury must be presumed to have done its duty in reaching a verdict. Code Civ.Proc. § 1963, subd. 15.

Appeal from Superior Court, San Francisco; Franklin A. Griffin, Judge.

Suit by Jack Rather, by and through his guardian ad litem, Anna May Rather, against the City and County of San Francisco and others to recover damages for personal injuries when the plaintiff was struck by a southbound interurban car of the defendant municipality. Judgment for the defendants, and the plaintiff appeals.

Judgment affirmed.

Fitz-Gerald Ames, of San Francisco, for appellant.

John J. O'Toole, City Atty., Thomas C. Ryan and George A. Helmer, Deputy City Attys., all of San Francisco, for appellees.

GOODELL, Justice.

Appellant sued for damages for personal injuries. The verdict was in favor of the defendants, and from the judgment entered thereon this appeal was taken.

Appellant, a ten year old boy, was struck by a southbound interurban car of respondent municipality on its San Mateo line at Baden crossing (a signal-stop station) on October 5, 1944 at about 1 p.m., and suffered a fracture of each leg, head injuries and an injury to his right hand.

A northbound car reached Baden crossing shortly before the accident, and its movements bear somewhat on the factors of time and distance in this case. Appellant rode on the rear end of the northbound car, and three older boys, who were his companions, rode on the front end. All four boys were en route to the golf course at Baden, to caddy, which they had done on several afternoons a week for several months.

The three boys on the front of the northbound car testified that as it approached the crossing they saw the other car on the southbound track at a distance of between 300 and 400 feet to the north, traveling at a speed of between 35 and 40 miles an hour. All three testified that just before they alighted at Baden crossing they again saw it, this time "just a few feet away", traveling at about the same speed. This testimony puts the southbound car almost opposite the northbound car when the boys alighted. One of the boys on the front testified that he saw the southbound car for the second time "just as it was passing the northbound car." Two of the boys got off the front end while the car was moving at from three to five miles an hour and ran along side the car toward its rear end. The third boy alighted from the front end after it stopped, and followed them.

Appellant alighted from the rear end of the northbound car at Baden road while it was moving at from three to five miles an hour, ran around the rear end, stopped, and then started to cross the southbound track, whereupon he was hit by the southbound car. None of the other three boys saw appellant after he left the northbound car and before he was struck, but one of them saw him just as he was struck.

Appellant's testimony will be summarized in some detail. He testified that when he got off the northbound car he ran around behind it but "stopped around the back of the car" and "looked up [north, to his right] to see if another car was coming". He saw a car "between 250 and 300 feet" away, but could not tell its speed, and "I thought I had time to go across, so I ran—went across—walked across". "Q. How far had you proceeded before you were hit? A. About a step and a half inside the southbound tracks," which is about where the southeasterly line of the Baden road crosses, diagonally, the southbound track.

He testified that he saw the car the second time, just before he was hit, "when it was about 50 feet away" and estimated its speed then at 35 or 40 miles per hour, judged "by the distance it traveled in such a short time." "Q. Did you make any attempt to jump out of the road? A. Yes, I did * * *. I started to turn around to jump out of the way" but was unable to "because the car was traveling too fast and it hit me before I had time to get out of the way".

Appellant testified that on former occasions about one out of four or one out of three times he had seen southbound cars approaching Baden station as he got off northbound cars and "they always slowed down" to between three and five miles an hour; that he had this in mind on the day he was struck; and on such other occasions they had always rung the bell.

On cross-examination he admitted running fast around the rear end of the northbound car, but denied that he continued running across the southbound track. He knew these cars had an overhang of about two feet beyond the rails and testified that when he stopped and looked to the right he was at about the point of the two foot overhang. He was asked why, after running around the rear end of the car, he had stopped and walked across the rest of the track, and answered, "Because usually when I went that way the cars always slowed down, before, when they saw a car letting off passengers. Q. Didn't you figure you could get over that track quicker if you kept on running? A. No. Q. Did you think you could get over it quicker by walking? You didn't think that, surely, did you? A. No."

To the question "After you saw that car coming 250 or 300 feet away did you keep your eyes on it as you walked across the remaining distance?" appellant answered "No." "Q. You turned away from it? A. Yes. Q. Where did you look then? A. I looked straight ahead."

Appellant had testified that between the time when he stopped (and looked to the right and saw the car coming) to the time he was hit he had walked about 15 feet. He was then confronted with the admitted fact that the distance between the northbound and southbound tracks was eight feet and that if he had stood at the point of the two foot overhang when he looked to the right, the distance between him and the nearest rail ahead would be six feet, making a total of little over eight feet (as against 15) to the center of the southbound track. He replied that he "was walking diagonally across the road, from the edge, southerly edge of the road."

"Q. And when you were in the middle [of the southbound track] and you looked the second time, the car was fifty feet away, is that right? A. Yes.

"Q. When you saw that car did you jump out of the way? A. No.

"Q. Did you walk out of the way? A. I started to get out of the way, but I never had time to get out of the way.

"Q. You started * * * jumping or running? A. I started to turn around * * *

"Q. * * * when you saw it fifty feet away did you start to jump? A. No.

"Q. Did you start to run? A. No.

"Q. Did you start to walk? A. I just turned around * * *

"Q. Jackie, you say that you were walking diagonally across from the time you saw the car 250 or 300 feet away the first time, up to the time you got into the middle of the southbound tracks, is that right? A. Yes.

"Q. When you were walking diagonally you were walking away from the car, weren't you? A. Yes.

"Q. In other words, your back was toward the car, is that correct? A. Yes.

"Q. Your back was toward the car from all the time that you first saw it, 250 or 300 feet away, up until the time you looked the second time, is that correct? A. Yes."

Appellant's deposition was read to him as follows: "Q. When you got behind the car on which you had been riding you saw a southbound car about 250 feet away—is that right? A. Yes. Q. Was it going fast? A. I don't know. I couldn't judge the speed from there." He admitted so testifying.

There is of course much more evidence in the case than that just narrated, but for the purpose of the discussion of appellant's first and principal point we confine ourselves to the testimony of the appellant himself and that of his three companions, who were his witnesses.

The crossing at Baden was a place where cars stopped on signal. On the westerly side of the tracks there is a platform and on the easterly side a bench. The Baden road intersects the tracks at an angle of a little less than 45 degrees. That the southbound car came into the crossing at a high speed is not seriously disputed. When the motorman was asked how fast the car was "going on this particular day as you approached the Baden crossing?" he answered, "Well, after leaving South City Junction, going up there, we go between twenty-five and thirty miles an hour". The appellant and the other boys were thoroughly familiar with the crossing.

[1, 2] Appellant's principal contention is that the court erred in refusing to instruct on the doctrine of the last clear chance. He argues that the case was tried on that theory, and that "A litigant requesting it is entitled to proper instructions presenting his theory of the case, based on the pleadings and proofs * * *" Citing 24 Cal. Jur. p. 826. That, of course, cannot be questioned, but it is likewise settled law that the giving of a last clear chance instruction in a case where there is not sufficient evidence to justify the submission of such issue, is fatally prejudicial error. Wallis v. Southern Pacific Co., 184 Cal. 662, 672, 195 P. 408, 15 A.L.R. 117; Giannini v. Southern Pacific Co., 98 Cal.App. 126, 138, 276 P. 618; Erwin v. Morris, 10 Cal.App.2d 168, 171, 51 P.2d 149; Johnson v. Southwestern Engineering Co., 41 Cal.App.2d 623, 626, 107 P.2d 417.

[3] Any discussion of the last clear chance rule might well open with the statement that such rule presupposes that the plaintiff has been negligent. Appellant recognizes this rule.

According to appellant's testimony he was standing several feet from the southbound track when he looked to the north and saw the car coming from that direction.

In Korchak v. Pacific Electric Ry. Co., 9 Cal.App.2d 89, 93, 48 P.2d 752, 754, the court said: "During all of the time that a pedestrian is approaching a railroad track he is in a position of absolute safety. The law is well established that an engineer or a motorman is not charged with knowledge that the pedestrian will change his position to one of peril, but he has a right to assume that the pedestrian will exercise his faculties of observation and caution, and will not remove himself from a place of safety and recklessly expose himself to danger, when it is obvious that with the slightest care he could stop and avoid the peril. Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 76 P. 719, 101 Am.St.Rep. 68; Billig v. Southern Pacific Co., supra [192 Cal. 357, 219 P. 992]; Basham v. Southern Pacific Co., 176 Cal. 320, 168 P. 359; Holmes v. South Pacific Coast Ry. Co., 97

Cal. 161, 31 P. 834; Green v. Southern Pacific Co., 122 Cal. 563, 55 P. 577; Choquette v. Key System Transit Co., supra, [118 Cal.App. 643, 5 P.2d 921]."

In Johnson v. Sacramento Northern Railway, 54 Cal.App.2d 528, 534, 129 P.2d 503, 506, this court said: "It is also significant to note that the 'situation of danger' or 'position of danger,' referred to in the authorities dealing with the last clear chance doctrine, is reached only when a plaintiff, moving toward the path of an oncoming train or vehicle, has reached a position 'from which he cannot escape by the exercise of ordinary care.' In other words, it is not enough, under the last clear chance doctrine, that plaintiff is merely approaching a position of danger, for *until he has reached a position of danger, he has the same opportunity to avoid the accident by the exercise of ordinary care, as has the defendant.* In such cases the ordinary rules of negligence and contributory negligence apply, rather than the exceptional doctrine of last clear chance. *It is only in cases in which, after plaintiff reaches a position of danger, defendant has a last clear chance to avoid the accident by the exercise of ordinary care, and plaintiff has no similar chance, that the doctrine is applicable.*" (Emphasis added.)

[4] According to appellant's own testimony, after running he came to a sudden halt and then walked. Under the authorities just cited he was not in a position of danger until after taking but a few steps, he was on the southbound track. This obviously was a matter of but a second or two and gave the motorman not only no clear chance, but no chance at all in which to act. The act creating the peril occurred "practically simultaneously with the happening of the accident". See Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 232, 28 P.2d 932, 936.

[5] Appellant invokes the rule that more care is required in cases of children of tender years than in the case of adults, because children act swiftly and impulsively. This case, however, has to do with the last clear chance rule and whether the person in a position of peril on the track is a ten year old boy or an adult does not increase or decrease the duty of the motorman thus suddenly confronted. The life of a human being, of whatever age, is at stake, under the rule the motorman must act at once if he has a clear chance to do so. His opportunity to act is no greater, nor his duty stricter, because the person in peril happens to be a child. His duty at that time is to exercise ordinary care in the emergency. The cases relied on by appellant (Shannon v. Central-Gaither Union School District, 133 Cal.App. 124, 23 P.2d 769; Brizzolari v. Market St. Ry. Co., 7 Cal.App.2d 246, 46 P.2d 783; Scalf v. Eicher, 11 Cal.App.2d 44, 53 P.2d 368; Harrison v. Gamatero, 52 Cal.App.2d 178, 125 P.2d 904) are therefore not in point in connection with the motorman's duty to exercise ordinary care once the peril has arisen.

Appellant's contention that "Children of tender years are not chargeable in law with contributory negligence" is not consistent with his concession that there is substantial evidence to sustain the plea of contributory negligence in this case, nor in view of his definite statement that contributory negligence is an "issue which is not here involved."

[6] Appellant argues that the passenger station rule (Wilkinson v. United Railroads, 195 Cal. 185, 198, 232 P. 131; MacGregor v. Pacific Electric Ry. Co., 6 Cal.2d 596, 599, 59 P.2d 123) is applicable to this case. The trial judge viewed the case that way, for in the course of appellant's testimony he said, "This is a station case, * * *" and he charged the jury accordingly. We view it the same way.

[7] Appellant argues that "In considering the degree of the duty of the respondent motorman and the degree of care resting upon him, to exercise the last chance to avoid the accident, it is important to keep in mind the very high degree of care resting upon an interurban railway company and its employees when operating its trains or cars over its station premises."

What has just been said respecting the duty owed to children of tender years answers this contention as well. On the last clear chance question the inquiry is whether the motorman exercised ordinary care to avoid the accident after the emergency had arisen. Respondents' negligence in violating the passenger station rule was, admittedly, concurred in by appellant. It was only after appellant's negligence had intervened that he was in peril and it was then that the motorman's duty arose to exercise ordinary care to avoid the accident (if he could) under the changed circumstances then existing. As said above, a human life was at stake (because of the concurrence of appellant's negligence) and at that critical juncture it made no difference whether the imperiled pedestrian was on station grounds, or elsewhere.

There are scores of cases of pedestrians injured in crossing railroad tracks where the last clear chance rule has been invoked, but there is no point in citing them because of differing facts.

One of the leading cases on the general subject (a pedestrian-automobile case, not a railroad case) is that of Palmer v. Tschudy, 191 Cal. 696, 218 P. 36, 37. There the plaintiff, intending to cross the street at a right angle intersection, glanced to the north and saw defendant's automobile approaching southbound about 200 feet away; she started across and after taking two or three steps, again glanced to the north and saw the automobile still approaching and, of course, nearer. She did not see it again until after the accident. The trial court submitted the case to the jury on the single issue of last clear chance. The jury returned a verdict for the plaintiff; the judgment was reversed. In that case the court restated the rule as follows: "The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; *that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so.* If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence. The rule does not require that the inability of the plaintiff to escape the danger shall be due to a situation which renders it physically impossible for her to do so. It applies equally when she is wholly unaware of the danger and for that reason unable to escape it. *But the rule also requires that if she is aware of the danger, or becomes aware of it, she must thereafter exercise ordinary care for her own protection. If, being aware of the danger and able to escape it by exercising ordinary care, she neglects to do so, she cannot invoke the last clear chance rule to place the burden of the resulting loss upon the other party. 'Obviously, if both parties to an accident could, by the exercise of ordinary care, have avoided it, neither can be said to have had the last clear chance.* It is only when a defendant charged with the negligent infliction of the injury, knowing plaintiff's peril, could *and the injured plaintiff could not* have avoided the injury that the defendant is liable. The liability is placed upon the party inflicting the injury only if immediately before the actual inflicton of the injury the injured person was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care, to extricate himself, and vigilance on his part would not have averted the injury.' Young v. Southern Pac. Co. [189 Cal. 746], 210 P. 259." (Emphasis added.)

The court then said:

"Measuring the facts of this accident by the foregoing rules of law, it becomes apparent that they do not meet the requirements of the last clear chance rule. According to plaintiff's version, when in a position of safety, within three steps of the east curb, she saw the automobile approaching the spot which she intended to traverse. Then she proceeded to walk across the street in front of the approaching automobile without ever again looking at it or in the direction from which it was approaching. Can it be justly said, under these circumstances, that the defendant could, and the plaintiff could not, have avoided the injury? Undoubtedly either one of them could have avoided it very easily. The defendant could have avoided it by bringing his automobile to a stop. Plaintiff could have avoided it by waiting until the automobile passed, or by keeping her eyes on it as she went forward and timing her steps so as not to pass in front of it so close as to be in danger. If her conduct in going forward in the manner in which she did was negligent, it was negligence which continued up to the very instant of the injury. 'This exception to the general rule [the last clear chance rule], however, has no application to a situation where, by their mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of injury.' Young v. Southern Pac. Co., supra.

"If we accept defendant's version, plaintiff stood in the middle of the street with her back to the approaching automobile, knowing that it was approaching her, without taking the slightest precaution for her own safety. If this was negligence, it continued up to the instant of the injury. If the approach of the automobile under these circumstances did not create a dangerous condition, there is no basis for the application of the last clear chance rule. If it did create a dangerous situation, plaintiff was aware of it from the beginning, and could easily have avoided it, either by stepping to one side of the street or by watching the automobile so as to keep out of its path. In this version of the facts it cannot be said that there was any point of time when the defendant could, and the plaintiff could not, have avoided the injury."

In view of the lengthy summary of the appellant's testimony in the instant case and the foregoing statement quoted from Palmer v. Tschudy, it is unnecessary to stress, by paraphrase or otherwise, the similarity of the two cases. There are minor differences. Tschudy's automobile was going no faster than five or six miles an hour, and was, of course, much lighter that the interurban car and could have been stopped much quicker. The automobile was traveling on a street 56 feet wide, with no other vehicle in the immediate vicinity, while the interurban car had no leeway whatever, but could operate only on its rails. These minor differences, however, only serve to emphasize the non-applicability herein of the last clear chance rule. As was said in Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 228, 28 P.2d 932, 934, supra, "where there is no evidence from which it might be found that all of said elements are present, it is reversible error to instruct the jury with respect to said doctrine (citation)." Here several elements were absent.

It might be added that the motorman testified that he did not see appellant until immediately before the impact. He was asked, "As you were passing the northbound car did you see him? and answered "Oh, just when he run from behind that car—it happened so—I would judge just a few feet." He testified that appellant was "running right straight across" with his back "partly to me, running". His testimony was that appellant was hit about 20 or 21 feet south of the Baden crossing. On cross-examination he testified that appellant was "about ten, maybe fifteen feet, something like that" in front of his car when he first saw him, and he threw off the power and applied the brakes at once.

[8] Appellant points out that no bell was rung or other warning given. His admission that he had seen the on-coming car renders this failure immaterial. In Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 282, 156 P. 51, 53, L.R.A. 1916E, 58, it is said: "Where a plaintiff by his own testimony admits that he knew of the approach of the car, the failure of the defendant to sound an alarm has no causal connection with the accident." See, also, Morales v. L. W. Blinn Lumber Co., 9 Cal.App.2d 292, 294, 49 P.2d 621.

Appellant next contends that the court committed prejudicial error in refusing to admit in evidence several operating rules of the respondent railway. It is sufficient for the purposes of this point to concede that such rules would have shown that the car should have slowed down to either three or eight miles an hour because Baden crossing was a station, or "junction", or "crossing", or because the car was "pressing another car discharging passengers". Admittedly the car was making from 25 to 30 miles an hour at the time.

The admission of these rules would have served to accentuate respondents' negligence and to paint a more aggravated picture.

The refusal to instruct on last clear chance left with the jury the two issues of negligence and contributory negligence. Their verdict was a general one in favor of the defendants. From the verdict there is no way of telling whether the jury went on the theory (1) that the defendants were not at all negligent, or (2) that they were, and that the negligence of the plaintiff, in concurrence with their own, proximately caused the accident. In Schultheiss v. Los Angeles Ry. Corp., 11 Cal.App.2d 525, 528, 54 P.2d 49, 50, a similar situation was presented and the court said: "It might also be here observed that a reading of the transcript of the evidence in this case clearly shows that the verdict of the jury herein could as well have been based upon a total lack of negligence on the part of respondent as upon contributory negligence upon the part of the appellant through a violation of the ordinance in question. In such a situation appellate courts will not look behind the verdict in an attempt to ascertain the theory adopted by the jury."

[9] It is settled law that "a general verdict imports findings in favor of the prevailing party on all material issues, and if upon such a verdict one issue alone is sustained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial." 2 Cal.Jur. p. 1029. See, also, 24 Cal.Jur. p. 885.

There is, of course, abundant evidence to sustain the implied finding of contributory negligence, and appellant does not challenge such sufficiency. Indeed, in conceding it he says that no such issue is involved.

[10] That being so, it follows that the admission of the operating rules, addressed as they necessarily must have been, to respondents' negligence, which is implicit in the verdict, could not have changed the result. Hence the rejection of the rules was not prejudicial error. The ruling was probably not erroneous at all. See Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 232, 28 P.2d 932, and cases there cited.

Appellant moved for a new trial on the grounds, among others, of irregularities and misconduct.

[11] The first misconduct is charged against respondents' counsel. It is claimed that they repeatedly got before the jury the idea that their side had an eyewitness who saw the appellant run in front of the train. Such witness, however, was never produced, and this very fact ordinarily would not, in the nature of things, harm the appellant but might—in view of the implied promise to produce her—harm the respondents. Be that as it may, the colloquies were all in open court and the judge was a party to them, made his own comments on them, and ruled in each instance in favor of the appellant. He "was in a better position to determine whether or not the situation worked to the prejudice of appellant than is this court". Mast v. Claxton, 107 Cal. App. 59, 67, 290 P. 48, 51. The objection is made that there was repetition and reiteration but these remarks are not in the same category as, for instance, repeated charges of the suppression of evidence. Keena v. United Railroads, 197 Cal. 148, 239 P. 1061.

[12] Next, misconduct is alleged in affidavits respecting the voir dire examination of one of the jurors. He answered that he had heard all the questions put to the others, and when asked whether his answers would generally be the same as theirs, replied "I would be a fair juror." He was then asked the leading question, You have no friends or relatives employed by the city?" and answered in the negative. "Q. And you don't know any of the attorneys in the City Attorney's office? A. No."

It never was brought out that he knew anybody in the City Attorney's office, but by affidavit it was shown that *some days after the trial* he was seen talking to two police officers in the place where he was employed, and from all appearances they were friendly. Their affidavits were not produced, nor was it shown when this friendship arose, or how close it was. It also developed that he had a brother who was a *retired* police officer and that he, himself, had been on the force in San Francisco from July, 1923, to November, 1926, about 20 years before the trial; also that he knew many people around the City Hall and the Hall of Justice. It appeared, also, that he had made strong and vociferous pro-defense arguments in the jury room.

It cannot be questioned that a false answer on a voir dire examination might easily be prejudicial misconduct but it must be borne in mind that the questions whether the juror had any friends or relatives employed by the city or knew any of the City Attorney's staff, are not for a moment to be compared with such a case as Williams v. Bridges, 140 Cal.App. 537, 542, 35 P.2d 407, where the juror had seen the fence at about the time it did the damage, but answered that she knew "absolutely nothing" about the accident; nor with Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870, where the question was whether the juror knew the plaintiff; nor with Mast v. Claxton, supra, where the inquiry was as to an attorney-and-client relationship; nor with Scott v. McPheeters, 52 Cal.App.2d 61, 125 P.2d 868, where the inquiry was as to a doctor-and-patient relationship. It was much further removed, much more general, much less personal.

[13] This case falls squarely within several well settled rules. In Balkwill v. City of Stockton, 50 Cal.App.2d 661, 123 P.2d 596, 601, it is said: "The trial judge has a sound discretion in granting or denying a motion for new trial even though the motion is based on affidavits. In the absence of clear abuse of such discretion the denial of a motion for a new trial, which is based on affidavits, will not be disturbed on appeal Spadoni v. Maggenti, 121 Cal.App. 147, 156, 8 P.2d 874." See, also, Schultz v. Sussman, 7 Cal.App.2d 100, 102, 45 P.2d 409.

In Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538, 540, the court said: "The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong."

[14] It is also settled that by its order denying a new trial "the court impliedly determined that no prejudice was suffered through the alleged misconduct of either counsel or the jury." MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 468, 271 P. 509, 512, citing Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538. See, also, Maffeo v. Holmes, 47 Cal.App.2d 292, 296, 117 P.2d 948.

[15] And, lastly, "The jury must be presumed to have done its duty in reaching a verdict". Maffeo v. Holmes, 47 Cal.App. 2d 292, 297, 117 P.2d 948, 951, citing sec. 1963, subd. 15, Code Civ.Proc.

The case of Abercrombie v. Thomsen, 59 Cal.App.2d 331, 138 P.2d 701, 704, relied on by appellant is readily distinguishable. There the question was whether the juror was a client of one of the attorneys in the case. The trial court granted a new trial on this and other grounds. The opinion points to the similarity of the case to Mast v. Claxton, supra (an attorney-and-client case where the misconduct, if any, was held not to be reversible), and to the holding therein that "The question was entirely within the discretion of the trial court." It points out that in Mast v. Claxton the motion for new trial was denied while in the Abercrombie case it was granted and that "a stronger showing is required to justify interference with an order granting a new trial than one which has been denied. Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960." In conclusion the court speaks of the necessity for "a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion."

We are satisfied that there was no abuse of discretion in passing upon these questions of irregularity and misconduct.

The judgment is affirmed.

NOURSE, Presiding Justice.

I concur in the judgment and in the reasoning of the opinion. I can find no merit in appellant's argument that the municipal employees are bound by the rules adopted by the private corporation. The powers and duties of municipal and other governmental employees are prescribed by the statutes and in ordinances of the governmental agency. When the city purchased the rolling stock and equipment of the private company it did not obligate itself to abide by the method or the manner of operating the railway.

DOOLING, Justice.

I concur in the affirmance of the judgment. I am not satisfied however that if it was error to exclude the operating rules of the company we should assume on appeal in support of the judgment that the jury found the defendants guilty of negligence. As pointed out in the main opinion the verdict may as well be attributed to a jury finding that defendants were not negligent, a result that might not have been arrived at if the operating rules had been admitted. In a close case, assuming that the operating rules were properly admissible, their exclusion in my judgment would require a reversal. On the record however the proof of plaintiff's contributory negligence is so convincing (although because of his youth he may not be held guilty of negligence as a matter of law) that no miscarriage of justice can be said to have resulted from this ruling. Cal.Const. Art. VI, sec. 4½. I prefer to place my concurrence on that point upon this ground.

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81 Cal.App.2d 661

PEOPLE v. BARRAZA.

Cr. 4157.

District Court of Appeal, Second District,
Division 2, California.
Sept. 30, 1947.

1. Burglary 🔑41(6)

Evidence warranted finding that prosecuting witness was not so intoxicated as to be unable to identify defendants accused of burglarizing witness' apartment.

2. Burglary 🔑41(6)

Evidence that hole was cut in window screen, that door was opened, that prosecuting witness was in apartment, and that thereafter watch and cigarettes were missing, sustained conviction for first degree burglary of defendants whom witness identified as persons who were in the apartment.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

William Hernandez Barraza was convicted for first degree burglary. From the judgment of conviction and from an order denying his motion for new trial, he appeals.

Judgment and order affirmed.

Burke, Marshall & Burke, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant has appealed from the judgment convicting him of the crime of burglary in the first degree and committing him to the Youth Authority of the State of California, and from the order denying his motion for a new trial. Having waived a trial by jury, he was tried by the court. The principal ground urged by him for reversal is that the evidence of the complaining witness is so inherently improbable that it is incredible.

The circumstances of the crime and the connection of appellant therewith were established entirely by the testimony of the complaining witness. She testified that on Christmas Eve, 1946, she and her husband left their apartment, which is located on the ground floor of the building, and went to a beer garden where they drank beer and played skee ball until about 11:00 o'clock. During that time the witness, her husband and others consumed approximately nine pitchers of beer. Since the size of the pitchers is not indicated by the evidence the amount of beer imbibed by the group is left to conjecture. About 11:00 o'clock they went to a friend's home where they drank both whiskey and beer; the prosecuting witness had three or four drinks of whiskey in a 1½ inch glass with "some kind of chaser." About 2:30 o'clock in the morning she and her husband returned to their apartment. They had a quarrel and he left the house. She obtained a blanket, reclined on a couch fully dressed and spread the blanket over her body. The apartment was lighted.

Some time after 4:00 o'clock in the morning (the call to the police was at 4:47) she was awakened and found two Mexican boys standing near the foot of the couch. The blanket had been removed, her clothes had been pushed up around her neck and she was nude from the waist down. Stating to the boys that she wished to call the hospital to ascertain the condition of her sick child, she went to the telephone and called the police, whereupon the boys ran away. When the police came she found that her husband's watch, which had been lying on top of the radio, also several packages of cigarettes, were missing. A slit had been made in the window screen next to the lock on the front door so that a hand could be inserted and the knob of the Yale lock on the inside of the door could be turned. About a week later she saw appellant at a near by grocery store and told her husband that he was the boy who had been in their apartment. The boy departed before he could be apprehended. Some time later she again saw appellant and called the police who arrested him.

[1] Appellant contends that the evidence shows that the complaining witness was intoxicated to such an extent before she reclined on the couch that she could not have been able to identify appellant or anyone else when she was awakened and therefore her story is inherently improbable. There is nothing in the record to show the improbability of her statement or to indicate that her testimony was not true. There is no evidence from which we can even surmise the extent of her intoxication either before or after her two-hour sleep. It is a generally known fact that some people become intoxicated after consuming a very small amount of alcoholic liquor and that others are able to absorb large quantities and still retain the ability to talk rationally, to recognize other people, and generally to exercise their senses. The record does not disclose to which class the prosecuting witness belongs. Her consumption of a quantity of beer while playing skee ball before 11:00 o'clock at night, and three or four glasses of whiskey with chasers (the character and the quantity of the chasers are not suggested by the evidence) between that time and 2:30 o'clock will not be presumed to have rendered her so intoxicated that after a sleep of two hours she was unable to recognize and identify the intruders in her apartment. The trial judge evaluated her evidence as against that of appellant, who denied his presence in the apartment and who, by his own evidence and that of others, attempted to establish an alibi. We find no reason to disturb the finding of the court.

Reference is made in appellant's brief to an affidavit of one Lena Araiza upon the subject of the intoxication of the complaining witness. The record does not indicate the reason for the filing of the affidavit. If it was used on the hearing of the motion for a new trial or upon the application for probation, we know not which, if either, the trial judge had the benefit of its contents. It did not affect the judgment of the court and, if we go so far as to deem it to be a part of the record of which a reviewing court may take cognizance the statements contained in it reveal no reason for a reversal.

[2] The only other point argued by appellant is that there is no evidence of burglary or of an attempt to commit burglary. The evidence that a hole was cut in the window screen, that the door was opened, that appellant was in the apartment, and that thereafter the watch and cigarettes were missing, is sufficient to sustain the conviction.

The judgment and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

81 Cal.App.2d 640

In re CULVER'S ESTATE.

Civ. 13367.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1947.

1. **Insane persons** ⚷42(2)

On settlement of fourth and final account of guardian of estate of incompetent person, court was authorized to re-examine three earlier accounts. Probate Code, § 931.

2. **Insane persons** ⚷42(4)

Documents indicating that, at time incompetent's brother allegedly loaned money to incompetent's husband, brother was without assets, and which were in possession of incompetent's guardian so that incompetent's executrix did not learn of their existence until six months after guardian's final account was settled which allowed brother's claim on notes given by incompetent in repayment by alleged loan by her brother to her husband, and five months after incompetent's appeal from order allowing final account, were "newly discovered evidence" which in an ordinary civil action would have warranted granting of a new trial, and therefore District Court of Appeal admitted documents in evidence and directed, that superior court rehear final account. Probate Code, §§ 1501, 1516.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick.

Proceeding in the matter of the estate of Mary C. Culver, an incompetent person. From an order settling the fourth and final account of the Anglo California National Bank of San Francisco as guardian of the estate of the incompetent, the incompetent appealed. On her death after her appeal, Lucille V. Smith, executrix of the last will of Mary C. Culver, deceased, is substituted as appellant, and the appellant moves for an order admitting in evidence in the District Court of Appeal three documents.

Motion granted, order reversed, and cause remanded with directions.

Boynton & Boynton, of San Francisco, for appellant.

Thomas P. O'Brien, of San Francisco, for respondent.

GOODELL, Justice.

This appeal is from an order settling the fourth and final account of the respondent as guardian of the estate of Mary C. Culver, an incompetent person. Mrs. Culver died after appealing, and her executrix was substituted for her.

When the case was called for argument appellant moved for an order admitting in evidence *herein* three documents which were not before the Superior Court but came into appellant's possession after the appeal was perfected. The motion was taken under submission with the appeal itself.

Mrs. Culver's health failed shortly after her husband's death, and on September 24, 1941 she was committed to the State Hospital at Stockton. On March 24, 1942 the bank was appointed guardian of her estate and Edward J. Curran, her brother and her only living relative, was appointed guardian of her person. In October, 1945, Mrs. Culver was discharged from the State Hospital and restored to capacity.

The first, second and third accounts of the bank as guardian were settled without contest while Mrs. Culver was in the State Hospital; the fourth and final account was settled after her restoration to capacity.

[1] It is conceded that on the settlement of the final account the court could, as it did, re-examine the three earlier accounts, as the rule respecting estates of incompetent persons is unlike that in estates of decedents (see In re Estate and Guardianship of DiCarlo, 3 Cal.2d 225, 230, 231, 44 P.2d 562, 99 A.L.R. 990; In re Estate and Guardianship of Vucinich, 3 Cal.2d 235, 240, 44 P.2d 567; Guardianship of Giambastiani, 1 Cal.App.2d 639, 643, 37 P.2d 142; see, also sec. 931, Pro. Code).

The principal objections to the final account were directed to the genuineness, execution and validity of two promissory notes in favor of E. J. Curran, both admittedly signed by Mrs. Culver, one for $4,500, dated July 1, 1940, payable one year after date, the other for $1,700, dated March 4, 1940, payable one day after date. Other objections were directed to expenditures made by Curran, either for Mrs. Culver's account before her committment or thereafter as guardian of her person, but they are not material to this discussion.

On the day on which the bank was appointed guardian, Curran presented to it a claim against his sister's estate based on the $4,500 note. The bank as guardian, on June 25, 1942, filed a petition for an order authorizing it to pay the debts of its ward (see sections 1501 and 1516, Pro. Code). At the hearing it appeared that a balance of $2800 remained unpaid on the note, and on July 8, 1942, an order was made directing the bank to pay Curran this balance of $2,800 (and $962 for advances and expenses) and ordering that upon the filing of a proper receipt the estate would be "discharged of any and all obligations to the said E. J. Curran * * *." The first account shows the payment on July 15, 1942 of the $2,800.

On April 24, 1944, a petition was filed by respondent for instructions as to the payment of another claim against the estate, reciting that Curran had presented a note for $1,700 dated March 4, 1940. The petition pointed out that the $1,700 note antedated the $4,500 note, and that Curran had not informed the bank that he held this further claim against the estate. It prayed for instructions as to whether it should pay or refuse to pay the note.

On May 9, 1944, the petition was heard and on the 11th an order was made directing the respondent to pay the $1,700 note. The third account shows its payment on May 11, 1944.

On the hearing of the final account Mrs. Culver testified that early in 1942 while she was confined in the State Hospital Curran on one of his visits prevailed on her to sign a form of promissory note which was not then filled out as to date, amount, maturity or otherwise; that she at first refused, but he persuaded her and she signed the blank form of note, stating to him at the time that her signature was worthless as she was incompetent and confined in an institution. She testified further than on another visit, this time in 1944, her brother under similar circumstances persuaded her, against her protest, to sign two other blank forms of promissory note.

It is the theory of the appellant that the $4,500 and $1,700 notes (and another note for $4,000 in favor of Curran, dated December 14, 1940, payable five years after its date, but not involved herein) were the three notes to which Mrs. Culver referred.

It was the claim of Curran, and he testified at the hearing, that in January, 1924, he lent Mrs. Culver's husband $10,000 in currency, for which the husband gave him notes which he had renewed every four years (1928, 1932, 1936) until his death in 1940; that this transaction had been purposely kept from Mrs. Culver by her husband and by Curran because of its secret nature, and that Curran had told his sister about it only after her husband's death, which was in June, 1940; that the notes now in question had been filled out by Mrs. Culver in her own handwriting and signed by her on or about the dates which they bear (which, of course, was before her commitment) and that she had executed them so as to honor and keep alive the obligation of her deceased husband.

Mrs. Culver branded all this testimony as an "outrageous falsehood," stating that neither she nor her deceased husband ever owed her brother a cent, but that, on the other hand, she had lent *him* money from time to time, had herself paid the rent of his living quarters and had paid his moving expenses.

Two handwriting experts called by the respondent expressed the opinion that the handwriting in the body of each note was Mrs. Culver's. A handwriting expert, called as the court's own witness, testified that in his opinion the handwriting in the body of each note was not hers, but might have been Curran's.

To discredit Curran's testimony it was shown without contradiction that between 1934 and 1940 Curran had been on relief, or at least had held a W. P. A. job, and that as soon as he became eligible for old age pension he had applied for it and continued to receive it into 1942. He was confronted with various applications in which he had stated under oath that he had no assets exceeding $600 in value at the time when he claimed to hold this $10,000 obligation against his brother-in-law. He explained this apparent inconsistency by saying that he had then considered the $10,000 notes of no value.

The hearing of the fourth and final account was bitterly contested. There was much testimony on both sides, the hearings being spread over nine court sessions and running into 375 pages of transcript. There was testimony which, it is claimed, corroborates Mrs. Culver's statements as to the signing of the notes in State Hospital. It is not necessary to narrate the testimony in its entirety. The facts already stated are sufficient for an understanding of the importance of the pending motion to present this new evidence in this court.

It is clear that the order settling and approving the fourth and final account carried with it the implied findings that both the $4,500 and $1,700 notes were filled out by Mrs. Culver in her own handwriting; that they were not procured from her by undue influence or duress; that they were executed by her before she was under legal disability and not while in the State Hospital. The two orders instructing the respondent to pay the notes carried the same implied findings and the orders settling the first and third accounts did likewise.

The three documents now sought to be introduced consist of:

1. A large white envelope with the following typewritten thereon:

"Mrs. W. H. Culver.

"Not To be opened until Feb., 7 1987 unless circumstances dictate an earlier date."

2. A letter typewritten on the letter-head of "E. J. Curran Licensed Broker DeYoung Building San Francisco" reading as follows:

"July 1 1937

To Whom It May Concern:

"Anything of value of which I may appear to be possessed at the time of my death, equities or otherwise, is as a matter of fact the property of my devoted Sister, Mrs. Walter H. Culver 402 Wilson Ave., Vallejo, Calif., and she is entitled to undisputed possession thereof."

and purporting to be signed (in ink) "E. J. Curran."

3. A letter typewritten on the letter-head of "Edward J. Curran 601-602 DeYoung Bldg. Telephone Sutter 7397 San Francisco" reading as follows:

"July 1, 37

"My Dear Mame:

"I have endeavored for years to provide for the day when my spirit will have taken flight, and it will be necessary to make some disposition of the mortal remains. It is not material at this time to recite the details of my efforts suffice it to say they have been unproductive of any material results, this brings me to the point where I feel I can do nothing else but make the following suggestion.

"Had I been successful in making the proper provision my first wish would be to be laid away with my Darling, but I cannot entertain the thought of inflicting this burden on you, therefore suggest that my mortal remains be donated to some medical school, any but University of Cal. This procedure will provide the easiest way out and eliminate all expense. Incidentally I may in this way be able to contribute something to mankind for having lived among men my years.

"After all it matters not at all just what disposition is made of the remains."

and purporting to be signed (in ink) "E. J. Curran."

The appellant claims that had these writings been before the court at the hearing they would have completely discredited Curran's testimony and compelled a favorable ruling on Mrs. Culver's objections.

The notice of motion to introduce this new evidence was accompanied by affidavits showing that the documents had been in the possession of respondent and that it was not until December 18, 1946 (six months after the account was settled and five months after the appeal was taken) that appellant learned of their existence. This, of course, was a good reason why they were not available at the hearing. Rule 23(b) of the Rules on Appeal (22 Cal.2d

16) permits counter affidavits to be served and filed, but none was filed. The documents are clearly newly discovered evidence.

A motion for new trial is provided in certain probate proceedings, but not with respect to an order settling an account (sec. 1231, Pro.Code). However, it may be safely said that if three such documents were tendered as newly discovered evidence in an ordinary civil action under comparable circumstances a motion for new trial would have to be granted. In an article entitled "Fact Finding Power of the Appellate Courts of California", 16 Cal.Law Rev. 500, at 518, this analogy is drawn in the following apt language: "The basis for admitting such evidence in the appellate court might well be much the same grounds as have been held to justify the granting of a new trial because of newly discovered evidence." If, then, new evidence of this character would call for a new trial, it should persuade an appellate court to receive and consider it as an amplification of the settled record on appeal.

In Estate of Wirt, 207 Cal. 106, 111, 277 P. 118, 120, the court said: "We have heretofore held that section 956a of the Code of Civil Procedure is not intended to have application to cases wherein the production of original evidence was sought to be permitted in this court and the purpose of the production of such evidence would be to lead us to a reversal of the cause upon appeal. Where, however, it sufficiently appears that the production of such evidence was from any cause prevented when the matter in question was still pending before the trial court for its proper determination, * * * it would appear to be clear that in the interest of justice the judgment herein should be reversed, without cost to either party to this appeal, and that the cause should be remanded to the trial court, with instructions to reopen the same and to take such further proceedings therein as are in conformity with the views expressed in this opinion."

It is true that respondent there conceded that the case should be remanded, but it is reasonably certain that the court would have done so anyway because the appellants had been prevented from getting all their proof before the trial court. This they did on the second trial, and prevailed. Estate of Wirt, 125 Cal.App. 7, 12 P.2d 95.

In the instant case the evidence now proffered was not available, as we have seen, and the case seems to be squarely within the rule announced in the Wirt case.

[2] The appellant, in our opinion, is entitled to a complete rehearing of the guardian's fourth and final account with the three new documents before the court where their meaning, intent and effect can be fully explored and gone into, and where they may be weighed with all the evidence originally introduced the same as if they were before the court in the first instance. What we have said presupposes their authenticity. If there is any question on that score it can be raised in the trial court.

In view of the remanding of this case the following comment should be made on the question of notice, which is discussed in the briefs: prior to the 1943 amendment, section 1554, Pro.Code required that notice of the time and place of the hearing of a guardian's account, together with a copy of the account, should be given to the Director of Institutions or the Attorney General at least 8 days before the hearing. It does not appear from the record whether such notice was given when the first annual account (which shows the $2800 payment) was to be heard.

By the time of the filing of the petition for instructions respecting the $1700 note, section 1516, Pro.Code, had been amended (Stats.1943, p. 2993) to require a 15-day notice of hearing to the Director of Institutions. It appears that no such notice was given, for only fourteen days elapsed from the filing of the petition to the day set for the hearing.

The motion of the appellant for an order admitting in evidence in this court the three documents heretofore described is granted, and it is ordered that said documents be added to the settled record on appeal as part thereof. The part of the order appealed from is reversed and the cause remanded with directions to the Superior Court to rehear said fourth and final account and all issues raised by appellant's objections and exceptions thereto, in their entirety. Each side to pay its own costs on this appeal.

NOURSE, P.J., and DOOLING, J., concur.

OLSON et al. v. BIOLA COOPERATIVE RAISIN GROWERS ASS'N et al. *

Civ. 3578.

District Court of Appeal, Fourth District, California.

Oct. 2, 1947.

Hearing Denied Nov. 24, 1947.

1. Damages 🔑163(3)

Under code provisions relating to contract provisions for liquidated damages, one seeking to enforce a liquidated damage clause must generally allege and prove that the nature of the agreement was such that it would be impracticable or extremely difficult for the court to fix the actual damages in case of a breach. Civ.Code, §§ 1670, 1671.

2. Agriculture 🔑6

Under the Agricultural Code, a nonprofit cooperative marketing association can only fix by contract or by-laws the liquidated damages to be paid on a breach of contract with respect to the sale, delivery, or withholding of products that may be the subject of the contract, and any other attempt by association to go beyond those express statutory powers must fall within statutory provisions which only permit recovery of liquidated damages by contract where it is impracticable or extremely difficult to fix the actual damages. Agricultural Code, §§ 1208, 1209, 1213; Civ. Code, §§ 1670, 1671.

3. Agriculture 🔑6

A non-profit cooperative marketing association can contract for the payment by a member of a fixed sum for the violation of his agreement to deliver all his products to the association for processing and marketing. Agricultural Code, §§ 1208, 1209.

4. Agriculture 🔑6

Where members of cooperative raisin growers association delivered all their raisins to association's packer, and raisins were accepted by the packer, there was a completed sale, and no liquidated damages could be recovered under Agricultural Code from members because raisins contained excess moisture. Agricultural Code, §§ 1208, 1209.

5. Agriculture 🔑6

Section of Agricultural Code providing that any provisions of law that are in conflict with Agricultural Code shall not be construed as applying to non-profit cooperative marketing associations, did not render inapplicable, with respect to raisins of inferior quality, sold by members of association, statutory provisions that a contract may not fix amount of damages to be paid for future breach except where it is impracticable or extremely difficult to determine the actual damages sustained, since those statutory provisions are not in conflict with the Agricultural Code in such case. Agricultural Code, §§ 1208, 1209, 1213; Civ.Code, §§ 1670, 1671.

6. Agriculture 🔑6

Members of cooperative raisin growers association who sold raisins which contained excess moisture were not liable under marketing agreement for liquidated damages where agreement manifested intent to permit recovery of liquidated damages only when a grower failed or refused to deliver all his raisins to the association. Civ.Code, §§ 1670, 1671.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by A. J. Olson and others against the Biola Cooperative Raisin Growers Association, a corporation, and others to recover liquidated damages for delivery of sub-standard raisins to the Association under the provisions of a marketing agreement between the Association and its various members. From a judgment against defendants, defendants appeal.

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* Subsequent opinion 193 P.2d 929.

Judgment reversed.

Lawrence W. Young, Milo Popovich, Chester R. Andrews and William C. Crossland, all of Fresno, for appellants.

Irvine P. Aten and Aynesworth & Hayhurst, all of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment against defendants in the sum of $19,846.79, besides interest and costs, in an action to recover liquidated damages for the delivery of sub-standard raisins to Biola Cooperative Raisin Growers Association (hereafter called Biola) under the provisions of a marketing agreement between Biola and its various members.

Biola was organized under the laws of California as a nonprofit cooperative marketing association. It had nineteen or twenty members. It is not clear whether defendant E. Morello was a member during the time involved here. At least he delivered no raisins during that time and no judgment was rendered against him.

Biola had a board of directors of five members, all of whom are defendants together with other members. Plaintiffs are also members.

Under date of October 20, 1944, plaintiff Chris H. Scheidt and Biola entered into a contract whereby Scheidt agreed to do all the labor and furnish materials for, to receive, process and pack the raisins of the association members for $27 per ton plus the additional cost of fiber over 1943 prices, or $7 per ton if packed in picking boxes and stemmed only. He was to do other work for which he was to receive additional compensation and the total sum was to be reduced by $900 as rent for the packing house and equipment and $1,800 as compensation for a bookkeeper.

Delivery of raisins to the packing house started shortly after the date of the packing contract and was concluded early in 1945. The federal regulations permit a moisture content of 18% in raisins to be processed. The evidence satisfies us that the eight growers against whom judgment was rendered delivered some of their raisins with a higher moisture content so that they could not be run through the stemmer without further drying either by the sun or dehydration.

All of the parties except J. H. Scheidt and E. Morello stipulated to an arbitration to determine the quality of the raisins delivered. The arbitrators reported that 2,610,247, pounds of the raisins delivered were in good condition and were processed and sold and that 963,886 pounds were unprocessed and were sold in boxes to other dealers; that of those sold in boxes some were in good condition and could have been processed, others were damaged by rain and still others were "midgets"; that the balance were too wet to be processed. Defendants J. H. Scheidt and E. Morello were not parties to the arbitration but the evidence satisfies us that J. H. Scheidt as well at the other seven defendants against whom judgment was rendered delivered a considerable quantity of raisins that were too wet to be processed. The trial court found "that 418-¼ tons of said raisins so delivered were not properly dried and cured but were too wet and contained too much moisture and were too heavy for processing and marketing." From the view we take of the case the exact weight of the wet raisins delivered is unimportant so we do not need to pursue that matter further.

All of the raisins, both wet and dry, were delivered at the packing house which was under the control of plaintiff Chris H. Scheidt. He received them knowing at the time of delivery or shortly thereafter that some of them were wet. He notified the officers of Biola of that fact but the wet raisins were not rejected nor returned and Scheidt and Biola continued to permit the delivery and acceptance of wet raisins all of which were ultimately sold. Some of the growers who delivered wet raisins offered to remove them from the packing house and properly cure them at their own expense which they were not permitted to do. Perhaps one of the reasons for this may be found in the assertion of Biola in its brief that all of the raisins both wet and dry were sold for $180 per ton and that each grower received for each ton delivered $10 from the government as a reward for drying his grapes instead of selling them fresh, so that no one suffered any loss by reason of the delivery of the wet raisins.

Many questions are argued in the briefs but we need only consider one of them, namely, can liquidated damages be collected in an action brought by members of Biola to collect the penalty under an allegation that after demand the directors failed to act because three of them, a majority of the board, were interested parties, having delivered wet raisins. The answer to the problem depends on the proper construction to be placed on sections 1208, 1209 and 1213 of the Agricultural Code, of sections 1670 and 1671 of the Civil Code and of the Marketing Contract between Biola and its members. We have been cited to and have found no case construing the sections of the Agricultural Code under facts similar to those we have before us here.

Section 1208 of the Agricultural Code provides in part as follows: "The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over fifteen years, all or any specified part of their products or specified commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; * * *."

Section 1209 contains the following: "The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; * * * and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties."

The first paragraph of section 1213 provides as follows: "Any provisions of law which are in conflict with this chapter shall not be construed as applying to the associations herein provided for."

Section 1670 of the Civil Code provides: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressely provided in the next section."

Section 1671 provides: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

Section 1 of the Marketing Agreement is as follows: "The Association buys and the Grower sells to the Association annually from the date the signing of the By-Laws of the Association and this agreement all of the raisins owned and grown by the Grower, and agrees to deliver the same and all thereof properly cured and in good condition to the plant of the Association."

Section 5 provides: "The Association reserves the power to set standards of maturity, quality, sugar, and moisture content, which must be met by all raisins delivered by the Grower." As far as the record discloses no such standards were set.

Section 7 contains the following: "In the event that Grower should fail to deliver raisins hereby sold in accordance with the terms of this agreement and these By-Laws, such act will injure the Association to an amount that is, and will be impracticable and extremely difficult to determine and fix, and that is, therefore, fixed at the amount of Twenty-five (25%) per cent of the average current seasonal price for each and every ton of raisins that the Grower fails to deliver in accordance with the terms hereof and these By-Laws, and which amount the Grower agrees to pay, and shall pay, to the Association upon demand, * *."

Section 13 provides in part as follows: "It is expressly understood and agreed that Grower has by this agreement agreed to and will deliver the raisins herein contracted to be delivered to the Association, or in lieu thereof to pay liquidated damages therefor as by this agreement provided for his failure so to do, * * *."

Section 14 provides for arbitration of any controversy between Biola and a member concerning the quality or quantity of any raisins delivered.

[1] It is firmly established in California as a general rule that a contract may not fix the amount of damages to be paid for a future breach except in a case where it would be impracticable or extremely difficult to determine the actual damages sustained. It is also generally held that the impracticability or difficulty in determining the actual damages suffered must be alleged and proved by the party seeking to recover liquidated damages. Rice v. Schmid, 18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589; Robert Marsh & Co. Inc., v. Tremper, 210 Cal. 572, 292 P. 950; Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445; Kekich v. Blum, 43 Cal.App.2d 525, 111 P.2d 411.

[2] An important exception to this general rule had been established in the case of non-profit cooperative marketing associations by the sections of the Agricultural Code from which we have already quoted. This exception permits such associations and their members to fix by contract the liquidated damages to be paid upon a breach of the contract in the particulars of the sale, or delivery, or the withholding of products that may be the subject of contract. While these provisions contain a grant of power that power is limited to the three subjects particularly and clearly mentioned so any attempt on the part of the association to go beyond those express powers granted must fall within the provisions of sections 1670 and 1671 of the Civil Code which only permit the recovery of liquidated damages where it would be impracticable or extremely difficult to fix the actual damages and the further rule established by the cases already cited that the impracticability or extreme difficulty in fixing the actual damages must be alleged and proved.

[3] It is well established by a long line of decisions even prior to the adoption of the Agricultural Code that a non-profit cooperative marketing association could contract for the payment by a member of a fixed sum for the violation of his agreement to deliver all of his products to the association for processing and marketing. Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959; California Canning Peach Growers v. Downey, 76 Cal.App. 1, 243 P. 679; California Canning Peach Growers v. Harris, 91 Cal.App. 654, 267 P. 572; Irwindale Citrus Ass'n v. Semler, 60 Cal.App.2d 318, 140 P.2d 716. All such cases deal with the quantity of fruit not delivered by a member who refused to deliver all his products to the marketing association. The quality of the fruit delivered was not an issue and was not considered in any of the cases. In the case the quantity of the raisins delivered is not an issue as it is admitted that the members delivered all of their raisins to Biola. It is the quality of the raisins that is in issue here so the decided cases are of no great assistance to us. It remains to be considered in the first instance whether or not the growers who delivered wet raisins violated their marketing contract in any of the particulars mentioned in section 1209 of the Agricultural Code in regard to "the sale or delivery or withholding" of products.

[4] Section 1 of the marketing agreement contemplates a sale of the raisins by the grower to Biola when it says that "the Association buys and the Grower sells to the Association * * *" his crop of raisins. Thus they contracted for a sale of the raisins for future delivery. This brings into force the provision of section 1208 of the Agricultural Code that "if they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery." Thus a sale of the raisins occurred and was completed on delivery and acceptance by Biola and the packer and no question remains of a breach by a grower of his obligation to sell his raisins to Biola. It is equally clear that there was no breach of his obligation by any grower in failing to deliver or by withholding any or all of his raisins, it being admitted that each grower delivered all his raisins to Biola. It follows that there was proved no breach of any of the three conditions set up in the Agricultural Code under which liquidated damages might be contracted for and recovered.

On the other hand plaintiffs argue that in section 1 of the marketing agreement each grower agreed to deliver his raisins "properly cured and in good condition", and that this covenant was breached by the delivery of wet raisins; that in section 7 each grower agreed to pay the liquidated damages if he failed to deliver his raisins "in accordance with the terms of this agreement"; that this covenant was broken by the delivery of wet raisins which were neither "properly cured" nor "in good condition"; that thereupon the agreement to pay liquidated damages came into effect and could be enforced. They argue further that under the quoted provisions of section 1213 of the Agricultural Code the provisions of sections 1670 and 1671 of the Civil Code cannot control in this case.

[5] The answer to this argument seems obvious. In the first place we have been cited to no section of the Agricultural Code that permits contracting for the recovery of liquidated damages for breach of an agreement as to the quality of the product to be delivered. As this case involves the quality, not the quantity, of raisins delivered, the provisions of the two sections of the Civil Code are not in conflict with the provisions of the Agricultural Code in so far as the facts of this case are concerned, so section 1213 of the Agricultural Code cannot aid plaintiffs.

[6] Next a study of the entire marketing agreement leads to the opinion that it was the intention of its framers to permit the recovery of liquidated damages only when a grower failed or refused to deliver all his raisins to Biola. Section 13 seems to be a summary of the prior provision on this subject. It conditions the agreement to pay liquidated damages upon the fact of failure to deliver. Section 7, the liquidated damage section, also suggests that it was intended to cover failure to deliver and not failure in the quality of the product. In addition to other provisions the section states that it would be impracticable and extremely difficult to fix the damages for failure to deliver raisins in accordance with the terms of the marketing agreement. It has been held that this is a true statement of a fact in the case of the failure to deliver. It is not true in case of the delivery of inferior quality raisins for the reason that raisins are graded and each grade has an ascertainable market value which may vary from season to season and from time to time. Raisins not properly cured have a less market value that those properly cured. The loss from a violation of this provision of the contract as to quality may be ascertained and determined under the ordinary rules of the law of damages.

This conclusion as to the damages in this case being ascertainable is supported by plaintiffs themselves. In their amended complaint they allege the loss from the delivery of wet raisins "to be upwards of $20.00 per ton". In their brief they arrive at the conclusion that "there was a net loss of $21.87 on each ton of raisins not packed out and delivered to the government." They reach this conclusion by the use of various government regulations effective in 1944 of which they urge us to take judicial notice.

Many practical reasons may be urged in support of the conclusion that liquidated damages should not be recovered when based solely on the inferior condition or quality of the raisins after the sale by the grower to the association has been completed by their delivery and acceptance. There are established grades for different quality of raisins which indicates that it is not always possible to have all raisins "Grade A". The quality of a crop often is dependent on many natural conditions not under the control of the grower and for which he is not responsible. The product may, from natural causes, be of inferior quality which the best husbandry cannot prevent. To permit an association to allow the consummation of a sale to it of inferior quality raisins by acceptance of delivery and then to permit it to collect a heavy penalty from the grower because of an inferior quality for which he might not be to blame might be ruinous to the grower and might permit other growers to profit from his misfortune. If the grower delivering inferior fruit is to blame for that condition and has breached his contract the association is not without adequate remedies at law and need not depend on the recovery of liquidated damages to recoup any loss.

The provisions of the Agricultural Code do not authorize contracts for the recovery of liquidated damages because of raisins of inferior quality having been delivered to and accepted by a non-profit cooperative marketing association. If it be assumed that it was the intention of the authors of the marketing agreement to permit the recovery of liquidated damages for the delivery of wet raisins the question of the validity of those provisions when inferior raisins are delivered and accepted must be determined by the provisions of sections 1670 and 1671 of the Civil Code and do not come within the provisions of the Agricultural Code. As the actual damages to Biola from the delivery and acceptence of wet raisins were easily ascertainable and are not impracticable or extremely difficult to fix, the recovery of liquidated damages cannot be approved.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

81 Cal.App.2d 677

BIOLA COOPERATIVE RAISIN GROWERS ASS'N v. SCHEIDT.

Civ. 3565.

District Court of Appeal, Fourth District, California.

Oct. 2, 1947.

Rehearing Denied Oct. 29, 1947.

1. Pleading 🔑148

In claim and delivery action by cooperative raisin growers association against packer who contracted to pack association's raisins, to recover possession of unpacked raisins delivered to the packer, packer's cross-complaint seeking to recover damages from association for breach of contract because the raisins were taken from his possession by association, was a proper pleading. Code Civ.Proc. § 442.

2. Agriculture 🔑6

In action for claim and delivery by cooperative raisin growers association against packer to recover possessions of raisins, wherein packer filed a cross-complaint for breach of contract because raisins were taken from his possession by association, exclusion of association's evidence that it sought packer's permission to regain possession of wet raisins so that raisins could be dried or dehydrated at no cost to packer, who was claiming liquidated damages because raisins were wet, but that packer refused permission, was reversible error, where packer had received raisins knowing that they were wet, and packing contract reserved to association a general supervision over packing operations. Code Civ.Proc. § 442.

3. Arbitration and award 🔑82(6)

Where stipulation under which arbitrators were appointed, only empowered them to determine the quality of raisins, and did not empower arbitrators to fix damages from delivery of raisins of inferior quality, and arbitrators did not attempt to do so, order approving arbitrators' report was not a "final judgment" from which an appeal could have been taken, and therefore plaintiff's failure to appeal from such order did not estop plaintiff from disputing the effect of the finding of the arbitrators. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action in claim and delivery by the Biola Cooperative Raisin Growers Association, a corporation, against Chris H. Scheidt, wherein defendant filed a cross-complaint for damages for breach of contract and for amount allegedly due defendant for additional services rendered the plaintiff. From a judgment in favor of the defendant and cross-complainant, the plaintiff and cross-defendant appeals.

Judgment reversed.

Lawrence W. Young, of Fresno, for appellant.

Irvine P. Aten and Aynesworth & Hayhurst, all of Fresno, for respondent.

MARKS, Justice.

This is an appeal by plaintiff and cross-defendant from a judgment against it in favor of defendant and cross-complainant, based on an alleged breach of contract. This is a companion case of Olson v. Biola et al., Cal.App., 184 P.2d 742, this day decided, which we will refer to as the Olson case. Some of the pertinent facts are set forth in the opinion in that case and need not be repeated at length here.

Biola Cooperative Marketing Association (herein referred to as Biola) is a non-profit cooperative marketing association organized under the laws of California. Defendant was a grower member of Biola and entered into a contract with Biola to process and pack its 1944 raisin crop. That contract and marketing agreement between Biola and its members are referred to and quoted from in the Olson case.

Raisins were delivered to defendant for processing between about November 1, 1944, and some time in February, 1945. Some of these raisins contained too high a moisture content to be processed. Defendant accepted delivery of these wet raisins without protest to the growers although he did inform the officers of Biola of their condition. He had knowledge of this condition at the time of their delivery. Defendant stopped his work of processing the raisins on March 1, 1945.

On April 9, 1945, plaintiff filed this action in claim and delivery and recovered possession of about 482 tons 891 pounds of the unpacked raisins. Neither in his original pleadings nor otherwise at the time the raisins were taken by Biola did defendant demand the return of the raisins so plaintiff disposed of all of them.

The trial court found there was 1305 tons of raisins delivered to defendant; that he packed out 783.4 tons and failed to pack out the tonnage already indicated of which 418¼ tons were too wet to process and about 70 tons were dry and could have been packed and sold. The evidence indicated there were about 80 tons of these dry raisins. These figures do not balance. The variance is explained by defendant as due to shrinkage during processing.

There was an amended cross-complaint which was amended and also supplemental amendments. This is also true of the answer of plaintiff. To save space we will refer to the variously amended cross-complaint as the cross-complaint and to the variously amended answer as the answer to the cross-complaint.

Plaintiff's complaint is in the usual form found in a claim and delivery action. Defendant denied that plaintiff was entitled to the possession of the raisins and asserted his right of possession under his packing contract with Biola dated October 20, 1944. See Olson case.

In his answer to the complaint defendant also alleged that all of the raisins were not packed by him because he and the officers of Biola "thought and believed the same were unpackable". He also asserted a lien on the raisins "so stored with defendant of the said 1944 crop for storage and preservation and for services rendered under said contract in the packing and shipping of the 1944 crop of raisins delivered by plaintiff and for the profits which defendant would have made upon the raisins which plaintiff prevented defendant from packing by taking possession thereof." Defendant also set up a summary of the report of the arbitrators referred to in the Olson case which showed the delivery of wet raisins by eight growers.

In his cross-complaint defendant sought damages from plaintiff for breach of contract by reason of the raisins being taken from his possession by plaintiff. He also sought recovery of various amounts allegedly due him for additional services rendered plaintiff and for $1,870.65 due him on account of his own dry raisins delivered to Biola to equalize his payments with those received by other growers.

Defendant also alleged in his cross-complaint that Biola had "failed, neglected and refused to condition said raisins for packing and shipping; that by reason of the said failure of the plaintiff and cross-defendant to perform its agreement and deliver raisins fit for shipment defendant and cross-complainant has been damaged in loss of profits to be made in the packing and shipping thereof in the sum of $13.00 per ton, being the total sum of $6,271.79." This was denied in the answer to the cross-complaint where it was alleged "that said defendant complained to said plaintiff that said raisins contained too much moisture to permit their packing, and that said plaintiff offered to go into the packing house where said raisins were located and segregate any raisins that defendant thought contained too much moisture to permit their packing, and that defendant refused to allow said plaintiff, or any of its agents, to inspect said raisins to determine their moisture content, or to otherwise treat said raisins so that the moisture content thereof could be eliminated so as to permit their packing in the event that any of said raisins contained too much moisture to permit their packing."

There was no finding on the issue thus made except one to the effect that if defendant had been permitted to pack the raisins taken by plaintiff he would have made a net profit of $12 per ton or a total of $5,789.34.

It was also found that the raisins taken by plaintiff from defendant "had a value of at least $27.00 per ton, or a total value of $13,026.08." It is difficult to conclude that this finding means just what it says. All of the records, papers and files in the Olson case were by stipulation admitted in evidence in this case and it was found in the Olson case that the same raisins had a market value of about $190 per ton. If the quoted finding was intended to mean that defendant had a special interest in those raisins of $27 per ton, the amount of his packing charges, it does not say so.

The judgment awarded plaintiff nothing. It gave defendant judgment on his cross-complaint for damages in the principal sum of $5,789.34 for breach of contract, $1,870.65 due him for his raisins delivered to plaintiff to equalize his payments with these made to other growers, and a total of $184.49 for sundry items.

The judgment contained the following: "It is further ordered, adjudged and decreed that defendant and cross-complainant have judgment against the plaintiff for the sum of $13,026.08, the value of the property wrongfully taken from the possession of defendant, to be held by defendant and cross-complainant until plaintiff shall have paid to defendant and cross-complainant the sum of $5,789.34, the amount of damages suffered by defendant for plaintiff's breach of contract; that said deposit need not be made if plaintiff shall pay said damages."

Plaintiff objected to the filing of any cross-complaint and to the introduction of any evidence in support of its allegations on the ground that it was not a proper pleading in a claim and delivery action. In support of this position it cites the cases of Lovensohn v. Ward, 45 Cal. 8; Hall v. Susskind, 109 Cal. 203, 41 P. 1012; Glide v. Kayser, 142 Cal. 419, 76 P. 50; Yraceburn v. Cape, 60 Cal.App. 374, 212 P. 938; Normart v. Safer, 67 Cal.App. 507, 227 P. 943, and, Steele v. Marlborough Hall Corp., 100 Cal.App. 491, 280 P. 380. These cases lend support to the argument.

[1] Since those cases were decided the scope of section 442 of the Code of Civil Procedure has been much broadened by amendments. Stats. 1923, p. 756. Now a defendant may file a cross-complaint "whenever the defendant seeks affirmative relief against any party, relating to or dependent upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, * * *." The relief sought in the cross-complaint is sufficiently related to the contract and transaction upon which plaintiff's action is based and involves the same property so that it is now a proper pleading in this action. Dobbins v. Horsfall, 58 Cal.App.2d 23, 136 P.2d 35.

[2] All during the trial plaintiff repeatedly attempted to introduce evidence to the effect that Biola and some of its members sought permission of defendant to get possession of the wet raisins so that they could be dried or dehydrated at no cost to defendant and thus rendered fit for processing and marketing. Objections were sustained to practically all of these questions so that plaintiff was prevented from producing evidence to support the follow-

ing which appears from the questions asked and proffer of proof made: That one and perhaps two growers requested that defendant permit him or them to remove the wet raisins and dry them at the grower's expense; that defendant was requested to act as Biola's raisin inspector when the raisins were received at the packing house; that he segregate the raisins into three lots, (1) properly cured raisins, (2) raisins too moist for immediate stemming but which would dry naturally when in the packing house, and (3) raisins so wet that they required dehydration or disposition to a winery; that defendant refused to do these things; that at a special meeting of the membership of Biola at which defendant was present, a resolution was unanimously passed instructing E. Randolph, president of Biola, to have the wet raisins dehydrated at the expense of the grower delivering them including cartage charges; that defendant refused to let Mr. Randolph get the raisins to be dehydrated and threatened him with bodily injury if he touched them; that he threatened Biola with a lawsuit to prevent the removal of the wet raisins for dehydration; that a few days later Mr. Randolph and Mr. Drenth, secretary and manager of Biola, again sought to get the wet raisins for dehydration and met with the same response from defendant; that defendant refused to let them inspect the raisins to determine their condition and refused both Biola and some of the growers permission to get possession of the wet raisins for curing.

The marketing agreement between Biola and its members required the growers to deliver raisins "properly cured and in good condition." Title to the raisins passed to Biola on delivery and acceptance at the packing house. See Olson case. Defendant received the wet raisins, knowing they were wet, without objection to any grower.

Defendant's packing contract with Biola ran until August 1, 1945, and under some circumstances until the next October 1st. No other time limit is in the agreement. He agreed to "perform said packing operations according to the instructions of the Association (Biola) and the specifications provided by the government in packing same." Thus it would seem that Biola reserved the right of general supervision over the packing operations and that the request of Biola for possession of the wet raisins for the purposes of dehydration was not unreasonable nor in violation of any contractual obligation existing between it and defendant. Biola should have been permitted to prove, if it could, that it attempted to protect itself and its members against serious loss by reason of wet raisins in the packing house.

Defendant alleged that he had fully performed all of the obligations of the contract on his part to be performed. The trial court found this allegation to be true and also found that on April 9, 1945, after defendant had stopped his packing operations on March 1, 1945, there were 70 tons of dry raisins in the packing house fit for processing and sale which defendant failed to process and pack. This fact together with the proffered evidence which was excluded would have had a very important bearing on the question of performance or breach of the contract by defendant. If the defendant did breach his contract in material particulars it would have an important bearing on the final determination of the case. Under these circumstances we cannot regard the error in excluding this evidence as inconsequential.

Further, if all the evidence bearing on the subject be received, and if that evidence should establish that defendant breached his contract in important particulars, and if it could be shown that defendant's refusal to let Biola or its members dry the wet raisins was without legal justification, a new and different aspect of the case would be presented. We are not informed in this case (except through findings in the Olson case) what was done with the wet raisins other than the finding in this case that Biola had disposed of them before the trial. If defendant had permitted Biola to properly cure the wet raisins, and if they had been returned to defendant for processing, he would have suffered no damage, or very little damage, as he could have then packed them under his contract.

The cause must be returned for retrial when competent evidence bearing on these problems should be received and fully considered. A party should not be permitted to recover damages resulting from his own wrong if such a situation be established at the next trial.

As the case must be retried it is desirable to comment on one question upon which counsel differ, namely, the legal effect of the report of the arbitration described in the Olson case. The fact of arbitration and a summary of the report of the arbitrators was pleaded by defendant as was its approval by the trial judge. He argues that this order approving the report was a judgment which became final when no appeal was taken from it. Plaintiff argues that the order was interlocutory and that as no appeal could be taken from it plaintiff was not estopped from disputing the effect of the finding.

[3] The stipulation under which the arbitrators were appointed only empowered them to determine the quality of the raisins delivered by the respective growers, that is, the quantity of dry and of wet raisins delivered. It did not empower the arbitrators to fix damages or loss to any one from the delivery of wet raisins and they did not attempt to do so. The only thing that was determined was that eight growers had delivered wet raisins in varying amounts. This certainlly was not a final judgment from which an appeal could have been taken. Code Civil Procedure, Sec. 963; Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11; Heck v. Heck Bros., 57 Cal.App.2d 599, 134 P.2d 853. This matter is not too important at this time for we do not understand that Biola is maintaining that no wet raisins were delivered.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

30 Cal.2d 632

SPENDLOVE v. PACIFIC ELECTRIC RY. CO.

HARRISON v. SAME.

L. A. 20157.

Supreme Court of California, in Bank.
Oct. 1, 1947.

1. Appeal and error ⚷927(3)

In reviewing a judgment passing upon a motion for nonsuit, the evidence would be viewed in the light most favorable to plaintiffs.

2. Negligence ⚷93(1)

Negligence of driver of automobile, a minor, would be imputed to both owner of automobile and passenger who were occupants where driver was driving with their permission. Vehicle Code, §§ 352(b), 402(a).

3. Railroads ⚷330(2)

When a flagman or a mechanical warning device has been provided at a railway crossing, a motorist is not required to exercise the same quantum of care as would otherwise be necessary.

4. Railroads ⚷330(2)

In considering right of motorist at inter-urban railway crossing to rely on mechanical wigwag signal to show safety in crossing railway tracks, whether failure of wigwag signal to operate is due to negligence of railway is immaterial.

5. Railroads ⚷350(28)

Cessation of mechanical wigwag signal at inter-urban railway crossing after passage of a train was tantamount to an "all clear" signal to motorist desiring to cross tracks, and whether motorist who had come to a halt at crossing and who did not start to cross tracks until wigwag came to rest and bell stopped ringing was contributorily negligent in crossing in that motorist could have seen approaching inter-urban car from point at which he stopped, or by reasonable care should have seen car, was for jury.

6. Railroads ⚷350(28)

Contributory negligence of motorist struck by inter-urban railway car at four-track crossing in not looking after starting to cross right of way for approaching railway car until automobile was only five feet from track on which motorist was struck was for jury where motorist had stopped at crossing while another train crossed after which mechanical wigwag signal which had been operating, ceased to give danger signal and had looked in direction from which the car that struck the automobile was approaching, but had failed to see car and then started to cross tracks.

7. Railroads ⚷350(30)

Whether motorist crossing inter-urban railway tracks was negligent in failing to stop when he saw approaching inter-urban car was for jury where automobile was then approximately five feet from point of collision and the car was traveling at 40 miles an hour and was 25 or 30 feet away and the automobile was traveling five or six miles an hour and could be stopped within one foot.

SCHAUER, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Actions by Leonard Roy Spendlove and Oleda Harrison against the Pacific Electric Railway Company to recover for personal injuries sustained when defendant's electric interurban car struck an automobile in which plaintiffs were riding. The cases were consolidated for trial in superior court. From judgments in favor of defendant predicated upon granting of defendant's motions for nonsuit, plaintiffs appeal.

Judgments reversed.

Prior opinion, 177 P.2d 27.

Westover & Smith and Joseph D. Taylor, all of Los Angeles, for appellant.

C. W. Cornell, O. O. Collins and Malcolm Archbald, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiffs were injured when the automobile in which they were riding was struck by an electric car operated by defendant. The actions were consolidated for trial, and the appeal is taken from judgments of nonsuit.

The accident occurred in the afternoon of a clear day at a crossing where a public street running east and west intersected defendant's private right of way. There were four sets of tracks on the right of way; tracks one and two on the east carried northbound traffic, and tracks three and four to the west were used for southbound traffic. A wigwag signal was maintained at the crossing to warn vehicles of approaching trains.

The automobile was traveling west, and when it reached the right of way the wigwag was operating and a southbound car was standing on track four. The driver stopped to allow the southbound car to pass. At this point he could see 300 to 400 feet northward, but there was a trolley pole with a switch box on it directly opposite the driver which partially obstructed the view in that direction. When the wigwag stopped operating, the driver looked to the north and to the south and saw no approaching trains, and he listened for but did not hear any whistles or bells. He then started to cross the right of way at five miles per hour, and when he reached the first tracks he looked to the south. He looked ahead to the west and noted that the wigwag was not operating. The automobile traveled about 35 feet before reaching track three where the collision occurred, and while moving this distance the driver's view to the north was unobstructed. When the automobile was approximately five feet from track three he looked to the north and then for the first time saw a southbound car on that track 25 to 30 feet away from the point of collision. It was traveling about 40 miles per hour and sounded no warning as it approached the intersection.

[1, 2] The evidence, viewed in the light most favorable to plaintiffs, is clearly sufficient to support a conclusion by the jury that defendant was negligent in operating its car at an excessive speed and in failing to sound a warning. It is not claimed that defendant was negligent with respect to the failure of the wigwag to operate, and we need not determine this question. Defendant's sole contention on appeal in support of the judgments is that the conduct of the driver of the automobile showed contributory negligence as a matter of law. Plaintiff Spendlove was the owner of the automobile which was being driven by plaintiff Harrison's 19-year-old son, who had the permission of both plaintiffs to drive, and any negligence on the driver's part would be imputed to plaintiffs. Milgate v. Wraith, 19 Cal.2d 297, 300, 121 P.2d 10; Vehicle Code, §§ 352(b), 402(a).

[3] When a flagman or mechanical warning device has been provided at a railroad crossing, the driver of an automobile is thereby encouraged to relax his vigilance, and, in using other means to discover whether there is danger of approaching trains, he is not required to exercise the same quantum of care as would otherwise be necessary. Startup v. Pacific Electric Ry. Co., 29 Cal.2d 866, 871, 180 P.2d 896; Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848; Will v. Southern Pacific Co., 18 Cal.2d 468, 474, 116 P.2d 44; Sheets v. Southern Pacific Co., 212 Cal. 509, 513, 299 P. 71; Gregg v. Western Pac. R. Co., 193 Cal. 212, 222, 223 P. 553. In the Startup case we held that it was error for the court to instruct the jury that the driver of an automobile was negligent as a matter of law where it appeared that he stopped at a railroad crossing, waited for two trains to pass and a wigwag signal to stop operating, and then, without again looking, started to cross four sets of tracks and was struck by a train which was on the third set of tracks and had sounded no warning.

In the present case a southbound car, referred to in the testimony as the "Watts local," was standing at the intersection. The wigwag was operating and the driver stopped the automobile and "waited for the Watts local to go by." The driver could not see the wigwag while the car was crossing in front of him but he noticed that "as the rear of the Watts car cleared the intersection, the wigwag came to rest and the bell stopped ringing." He did not start into the right of way until the cessation of the wigwag indicated that it was safe for him to proceed across the tracks. The driver was asked, "Now, after starting across, after the wigwig had stopped and you started across, you looked west again, did the wigwag start again?" He answered, "No, it didn't."

[4] It could reasonably be inferred that the driver stopped in response to the warning given by the wigwag, that he relied upon the wigwag to indicate when it was safe to proceed before starting, and while proceeding across the intersection he relied upon it to give warning of approaching trains. To hold otherwise would do violence to the elementary rule that on appeal from a judgment of nonsuit we must view the evidence in the light most favorable to plaintiff, drawing all reasonable inferences in his favor and disregarding all conflicting or contradictory evidence. The driver did not start until "the wigwag came to rest and the bell stopped ringing," and the fact that he also looked before he started to cross the tracks does not negative the inference of reliance on the wigwag. In looking he may have acted automatically from force of habit and looked less carefully because of reliance on the warning device. When he started he looked straight ahead, and while crossing the right of way he observed that the wigwag did not start again. The cessation of the wigwag was tantamount to an "all clear" signal, a sign that there was no imminent danger from oncoming trains, and since such danger was in fact impending the wigwag by ceasing to function and failing to resume operation acted as a trap. In considering the right of the driver to rely on the wigwag, it is, of course, immaterial whether the failure of the warning device to operate was due to defendant's negligence.

The case of Koster v. Southern Pac. Co., 207 Cal. 753, 279 P. 788, is not in point. There the driver of an automobile was killed at an unguarded crossing. Although a flagman was stationed at the crossing during certain hours of the day, he was not present when the accident occurred, and decedent knew that he was not customarily on duty at that hour. The court held that he was guilty of contributory negligence inasmuch as the physical facts demonstrated that had he stopped, looked and listened he would have been warned at a safe distance of the approach of the train. When the driver in the Koster case approached the intersection, he was not invited to proceed by the cessation of a warning signal given by a warning device or a flagman. If, however, the flagman had been present giving a warning of danger and the driver had stopped and waited until the flagman by ceasing to signal had indicated that it was safe to proceed, it would have been a question for the jury whether, under the circumstances, he was guilty of negligence. See Startup v. Pacific Elec. Ry. Co., 29 Cal.2d 866, 180 P.2d 896. The case of Jones v. Southern Pac. Co., 34 Cal.App. 629, 168 P. 586, is distinguishable for the same reasons. Heroux v. Atchison, T. & S. F. R. Co., 28 Cal.App.2d 401, 82 P.2d 620, does not involve a guarded crossing. In the case of Guyer v. Pacific Electric Company, 24 Cal.App.2d 499, 75 P.2d 550, the driver crossed in defiance of an operating signal.

[5] Whether the driver in the present case could have seen the car from the point at which he stopped and whether by the exercise of reasonable care he should have seen it were questions for the jury. His failure to see the car may have been due to partial obstruction of his view by the pole and box, or the car may not then have come within his area of vision. It is also possible, as we have seen, that because of his reliance on the wigwag, he looked less carefully than he otherwise would have.

[6] It was likewise a question for the jury whether the driver was guilty of negligence in failing to look to the north after starting to cross the right of way until the automobile was only five feet from track three. The driver's view was unobstructed as the automobile entered the right of way, and, if he had looked to the north then, he could have seen the train approaching. Instead he looked straight ahead. He observed that the wigwag was not operating, and just as he started to look to the north his mother "shrieked." He then saw the car for the first time. In the Startup case the driver did not look to the right or left before or after he started into the intersection, and we held that since the wigwag had ceased to give the danger signal it became a question for the jury whether the driver was guilty of negligence in failing to look. 29 Cal.2d 866, 180 P.2d 896.

Here the jury could have found that the driver relaxed his vigilance in reliance upon the wigwag, and we cannot say as a matter of law that he was negligent in failing to look to the north sooner than he did. He took more precautions for his safety and that of his passengers than did the driver in the Startup case, and we held there that "where it is shown that a [driver] has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury." 29 Cal.2d 866, 871, 180 P.2d 896, 899; Koch v. Southern Cal. R. Co., 148 Cal. 677, 680, 84 P. 176, 4 L.R.A.,N.S., 521, 113 Am.St. Rep. 332, 7 Ann.Cas. 795.

[7] It was also a question for the jury whether the driver was guilty of negligence in failing to stop when he saw the approaching car. The automobile was then approximately five feet from the point of collision, and the car was traveling at 40 miles an hour and was 25 or 30 feet away. The automobile was going five or six miles an hour as it crossed the intersection and plaintiff Spendlove testified that at that speed the automobile could be stopped within one foot. It is argued that since the automobile was five feet from track three when the driver saw the car he was guilty of negligence as a matter of law in not stopping the automobile before it reached the path of the oncoming car. The driver testified, however, that he did not have time "to do anything" after he saw the car. He said, "It hit us just about the time I saw it." Under the circumstances we cannot say as a matter of law that the driver was guilty of contributory negligence.

The judgments are reversed.

SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. It has heretofore been the established law of this state that, in the absence of extraordinary circumstances such as existed in Toschi v. Christian (1944), 24 Cal.2d 354, 149 P.2d 848, and in Startup v. Pacific Electric Ry. Co. (1947), 29 Cal.2d 866, 180 P.2d 896, a person who approaches railroad tracks with a substantially unobstructed view, who sees such tracks, looks for traffic thereon, and then endeavors to cross them immediately before an approaching train which is not only an actual hazard but which also is plainly visible and obviously an imminent peril, is guilty of negligence as a matter of law. (See Guyer v. Pacific Electric Ry. Co. (1938), 24 Cal.App. 2d 499, 502, 75 P.2d 550; Heroux v. Atchison, T. & S. F. Ry. Co. (1938), 28 Cal.App. 2d 401, 405, 82 P.2d 620; Jones v. Southern Pacific Co. (1917), 34 Cal.App. 629, 631, 168 P. 586; Koster v. Southern Pacific Co. (1929), 207 Cal. 753, 761 et seq., 279 P. 788.)

In Toschi v. Christian the circumstances showed a six-track railroad-yard crossing, switching operations progressing almost constantly, the employment by the railroad of two flagmen whose duties involved traffic control on the railroad as well as on the highway and a practical necessity for persons using the highway to rely on the flagmen's signals; it was further shown that the plaintiff driver of the truck was familiar with the crossing, that one of the flagmen was absent from his usual station, that the other was present with his stop signal under his arm and was playing with a hand mirror by flashing sunlight from it, that the plaintiff immediately before making a left turn to cross the tracks could not have seen the approaching engine by looking to his left and could not, perhaps, by reason of the size and shape of his vehicle, have seen it by looking to the rear. Where it further appeared that the driver stopped on the tracks when he was temporarily blinded by a flash of sunlight from the flagman's mirror and was there struck by the engine, we held that under all the circumstances it was a question of fact whether such driver was contributively negligent in driving his vehicle into the position of peril in front of the approaching locomotive. Certainly that case distinguishes itself factually from the case at bar.

In Startup (29 Cal.2d 866, 180 P.2d 896, 898), another crossing case, "the signaling system was so constructed that when one train followed another on track three within 600 feet the wigwag would cease to operate when the first train cleared the crossing thereby indicating that traffic could cross the tracks in safety, notwithstanding the existence of imminent danger from the following train. * * * There was evidence that the wigwag was not working as the three-car train approached the intersection on track three, and that the single car which passed the intersection shortly ahead of the three-car train was also traveling on track three. It could be inferred that the wigwag stopped because the three-car train was following the single car on the same track and within the distance in which the wigwag would not operate." The driver of the automobile relied exclusively upon the wigwag signal and when it ceased operating proceeded to cross the track without looking further for railroad traffic and was struck by the following train on track three. As stated at page 870 of 29 Cal.2d at page 899 of 180 P.2d, "He started across the tracks without again looking only, when *in reliance on the cessation of the wigwag,* it appeared to him that he could do so in safety." (Italics added.) Upon the above state of facts it was held not to be contributory negligence as a matter of law for the driver to attempt to cross the tracks *without looking.* The essential elements of the proposition, in my estimation, are reliance upon the signal system, with its entrapment possibility and consequently induced failure to look. The crucial question, which I thought in that case was a proper one under our concept of negligence law to be resolved by the jury, rather than by the court, was this: Was the *failure of the driver to look,* under all the circumstances related, consonant with ordinary care?

But here we have a case which I feel to be materially different rather than substantially the same as implied in the majority opinion. Here there is no showing of entrapment of the driver. The driver, by his own testimony*, did not rely upon the signal system and because of such reliance fail to look. He does not claim either to have failed to look at all or to have looked less carefully because of the signal or its operation. According to his testimony, when the Watts local car had cleared the crossing, he "looked to the south and to the north," then "straight ahead," and proceeded on to the tracks. The physical facts and uncontradicted evidence established that for at least the last 35 feet of the automobile's approach the defendant's car was plainly open to the view of the driver, unless his view was obscured by the persons (the two plaintiffs) in the front seat with him, and was approaching in such proximity and at such speed that it constituted an imminent and obvious peril. Plaintiff Spendlove testified, "I looked up and saw it coming and it looked like the side of a mountain." He also testified, concerning the driver and himself, "We were both in a hurry." The automobile, immediately preceding the collision, was traveling 5 to 6 miles an hour and, according to plaintiff Spendlove's testimony, could have been stopped within one foot.

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* The driver testified that: "We turned into 60th and pulled up a little incline there; then we waited for the Watts local to go by, and as it pulled away we started up onto the track * * * [After stopping about 6 feet east of the most easterly track and waiting for the local Watts car to clear the crossing] I looked to the south, then to the north, then pulled on up onto the tracks. Then I looked straight ahead at that time as we started up. Then, as we were about to enter the southbound line I looked again to the north, and that is when I saw the mail car that hit us * * * [It was then] Approximately 30 feet or 35 feet" away. The automobile at that time "was approximately five feet from the easterly track, rail, of the southbound interline track * * * [traveling] Not more than five miles an hour." The witness repeated: "I looked to the south and then to the north, and then we pulled up, starting across the tracks * * * As I said before I looked to the south and then to the north; then we pulled up * * * [The mail car was traveling] Approximately, I would say around 25 miles an hour or more. * * * [J]ust as I started to look to the north again was when Mrs. Harrison, my mother, shrieked; and that was the first time I saw the mail car. It hit us just about the time I saw it * * * I did not see it [the wigwag] in motion or hear any wigwag * * * [By way of explanation, on redirect] I didn't see any motion or hear any bells from the wigwag after the Watts local had passed the crossing." He said that his vision was not "interfered with in any way by Mr. Spendlove or Mrs. Harrison, who were sitting in the front seat" with him.

At first thought it may seem incongruous to suggest that one may rely upon a signal and not look at all and have it a question of fact whether his failure to look was consonant with reasonable care (as was held in Startup), but that one who observed the signal and nevertheless looked, should be guilty of contributory negligence as a matter of law. But is it necessarily incongruous? Reliance upon the signal seems to me to be the pivotal fact. If, in the Startup case, to all of its circumstances narrated, we add the further or different fact that the driver *looked and saw* the approaching train and, notwithstanding ample opportunity to stop, still continued on into its path, we must have reached a different result. If he had not relied upon the signal but had looked and failed to heed that which was plainly visible and which, according to judicially established standards, a person exercising ordinary care must have seen and noted, would the result be different? No signal device yet invented can constitute a more obvious or significant warning than is inherent in the close approach of a speeding and plainly visible train. To disregard that warning is, within the bounds of reason and human experience, essentially negligent.

If railroad, in the exercise of caution, should install two wigwags side by side at a crossing and one should fail to function but the other flashed and swung its red light and sounded its bell, would we hold that a driver could look at the still one and in reliance on its assumed invitation disregard the warning of the other? To pose the question seems absurd. And surely an approaching speeding train, plainly visible, has a portent of warning equivalent to a second wigwag. Under the circumstances of the Startup case the driver was possibly misled into justifiably not looking at all for the second warning signal—the approaching train—but in this case he says he did look. The plaintiffs are bound by his testimony. He makes no claim that he relied upon the signal or was misled by it or looked any the less carefully by reason of the presence of the signal device. It is inconsistent with the driver's own testimony for us to assume that he did rely in any degree on the signal. The second warning here—in the shape of the speeding 103,800 pound car—was plainly visible and an imminent hazard. The uncontroverted evidence, including the physical facts reflected by the photographs, establishes that for at least the last 35 feet of plaintiffs' approach to the point of collision the defendant's car was visible to any person of normal eyesight in the position of the plaintiffs' driver who looked in the direction from which the car came. The automobile, as previously mentioned, was traveling at approximately five miles an hour; the driver could stop it in one foot; he looked and yet proceeded in the inevitable path of that car. There is no claim—or evidence to support a claim—that the driver, having seen the approaching car, misjudged its distance and speed and was struck because of its excess speed.

The majority apparently rest their decision upon the proposition, quoted in the Startup case (29 Cal.2d 866, 871, 180 P.2d 896, 899,) from Koch v. Southern California Ry. Co. (1906), 148 Cal. 677, 680, 84 P. 176, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795, that "where it is shown that a [driver] has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury." If that proposition is to be strictly adhered to it means that in practically no case whatsoever can we hold that as a matter of law a man's conduct (be he plaintiff or defendant) amounts to negligence. But I do not think that such proposition will be strictly followed. Actually, it was not followed in the Koch case. The very next sentence of the opinion there (page 680 of 148 Cal., page 177 of 84 P.) continues, "But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury. If it is so submitted, it can only be upon the theory that the open gates were an absolute warranty of safety, justifying the plaintiff in proceeding without any heed or caution. It is for this proposition that appellant contends. But such we do not understand to be the law. A railway crossing is, itself, a place of danger and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company, itself, to exercise reasonable care. [Citations.] Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the *quantum* of care which will be reasonable may be less where the gates are provided *and are relied upon* by the traveler, still the gates, themselves, are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance." (Italics added.)

The rule which I think we should continue to follow has been stated in 19 Cal.Jur. 735 et seq. (§ 141) as follows: "Contributory negligence, like defendant's negligence, becomes a question of law * * * when the evidence is such that the court is impelled to say that it is not in conflict on the facts and that from these facts reasonable men can draw but one inference, namely, an inference pointing unerringly to or against contributory negligence upon the part of the plaintiff. Thus contributory negligence may be declared as a matter of law where the standard of conduct required under the circumstances is obvious, or where the conduct required under the circumstances has been settled by judicial decision." It seems to me that here not only has the standard of conduct been settled by judicial decision but that we are impelled to say that the undisputed evidence, or all of the evidence regarded in any light, is such that reasonable men can draw but one inference, namely, an inference pointing inescapably to contributory negligence of the driver of the automobile. (See Toschi v. Christian (1944), supra, 24 Cal.2d 354, 360, 362, 149 P.2d 848.) Such negligence, if any, it is conceded, is on the facts of this case imputable to the plaintiffs.

Under the circumstances of this case, as above pointed out, it seems inescapable that, contrary to the situation deemed possible in Startup, the driver was not the not the victim of a trap, he was not misled, and since he did look and since he had a wholly unobstructed view of the obvious peril for at least the last 35 feet of his approach, the rules of law hereinabove referred to should be followed as controlling unless the majority see fit to squarely overrule them. Those rules, which were followed by trial judge, and by the District Court of Appeal in its unanimous opinion (authored by Mr. Justice McComb, reported at 177 P.2d 27), unless overruled, require that the judgments be affirmed.

30 Cal.2d 610

KAISER CO., Inc., v. REID, County Tax Collector, et al. (UNITED STATES, Intervener).

S. F. 17377.

Supreme Court of California.

Sept. 29, 1947.

As Modified Oct. 16, 1947.

1. Taxation 🔑80, 88

The interest of taxpayer in shipbuilding facilities owned by United States and used by taxpayer without payment of rent under contracts calling for progressive construction and delivery of vessels in war time for period of more than a year was classifiable as an "estate for years" and constituted a "possessory interest in lands or improvements" for tax purposes. Revenue and Taxation Code, § 107; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate for Years" and "Possessory Interest in Land or Improvements".

2. Taxation 🔑80, 88

Where taxpayer was using shipbuilding facilities owned by United States under contracts calling for construction of vessels in war time for period of more than a year, provisions in contracts for cancellation under certain circumstances did not establish that taxpayer's interest was a mere "permit" or "license" which would not be subject to property tax on possessory interest in land or improvements. Revenue and Taxation Code, § 107; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "License" and "Permit".

3. Licenses ⚷44(2)

Whether agreement for use of realty is a "license" or a "lease" depends upon whether contract gives exclusive possession of premises against all the world, including owner, in which case it is a "lease", but, if it confers a mere privilege to occupy under owner, it is a "license".

See Words and Phrases, Permanent Edition, for all other definitions of "Lease".

4. Taxation ⚷375(1)

Where corporate taxpayer was using shipbuilding facilities owned by United States under contracts calling for progressive construction of vessels to be delivered up until August and November, 1944, taxpayer's continued possession of shipyards was reasonably estimated as of March 1, 1943, to be one year for purpose of assessment of tax on taxpayer's possessory interest in the facilities, in view of taxpayer's established ability to perform work under contracts and probability that the war would continue for at least another year. Revenue and Taxation Code, § 107; Const. art. 13, § 1.

5. Taxation ⚷88

The fact that taxpayer using government shipbuilding facilities for construction of vessels for government in war time was without right to transfer possession of shipyards to another did not remove taxpayer from status of a "lessee" subject to tax on its possessory interest in the shipbuilding facilities. Revenue and Taxation Code, § 107; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Lessee".

6. Taxation ⚷80, 88

A taxpayer's right to use and possess shipbuilding facilities belonging to United States under contracts calling for construction of vessels in war time constituted taxable "property", in view of contract provisions correlating taxpayer's occupancy of shipyards with its possession of a "usufructuary right" therein pursuant to its performance of the scheduled work. Revenue and Taxation Code, § 107; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Property" and "Usufructuary Right".

7. Taxation ⚷347

Although for purpose of taxation the "full cash value" of property is commonly construed to mean its "fair market value", which is value a willing purchaser will pay to a willing seller in an open market, absence of actual market does not mean that property may escape taxation as having no value. Revenue and Taxation Code, §§ 110, 401; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Fair Market Value" and "Full Cash Value".

8. Taxation ⚷348

A taxpayer's possessory right in government shipbuilding facilities used by taxpayer for construction of vessels in war time was not without taxable value on ground that taxpayer could not sell such right. Revenue and Taxation Code, §§ 110, 401.

9. Taxation ⚷348

The possessory interest of taxpayer in government shipbuilding facilities used by taxpayer in construction of vessels in war time was not without taxable value because of restrictions requiring use only for construction of vessels, since property was specially designed for that purpose. Revenue and Taxation Code, §§ 110, 401.

10. Taxation ⚷348

The possessory interest of taxpayer in government shipbuilding facilities used by taxpayer for construction of vessels in war time was not without taxable value because of risks arising from termination clauses in government contracts, in view of consideration given by assessors to probable term of taxpayer's interest. Revenue and Taxation Code, §§ 110, 401.

11. Taxation ⚷348

A taxpayer could not avoid tax on its possessory interest in government shipbuilding facilities used by it in construction of vessels in war time on ground that its profits had no relation to value of shipyards, but came from its services in operation of shipyards for government benefit. Revenue and Taxation Code, §§ 110, 401.

12. Taxation ⚷543(7)

In taxpayer's action for refund of taxes levied upon its possessory interest in property, record sustained findings and conclusions that taxpayer's property interest was not assessed improperly or in excess of its cash value, but only in proportion to value of the possessory right. Revenue and Taxation Code, §§ 107, 110, 401, 5138.

13. Taxation ⚷6

The assessment of tax on taxpayer's possessory interest in shipbuilding facilities belonging to United States and used by taxpayer under government contracts for construction of vessels in war time was not unconstitutional under 14th Amendment as an assessment upon property owned by the United States, even though government would bear burden of tax under agreement to reimburse taxpayer for taxes paid. Revenue and Taxation Code, § 107; U.S.C.A. Const. Amend. 14.

14. Fixtures ⚷27(1)
Taxation ⚷80, 88

The taxpayer could not avoid liability for tax on its possessory interest in government shipbuilding facilities used by it in construction of vessels for government, on ground that a portion of facilities constituted personal property because lease of land upon which they were erected stated that they should remain property of government with right to remove, since terms of lease could not govern classification for tax purposes. Revenue and Taxation Code, §§ 105, 107.

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Appeal from Superior Court, Contra Costa County; Mervin C. Lernhart, Judge Assigned.

Action by the Kaiser Company, Inc., against J. M. Reid, County Tax Collector of the County of Contra Costa, and others, to secure a refund of taxes levied upon its possessory interest as a tenant of two shipyards and paid by it under protest for the tax year 1943–44, wherein the United States of America intervened. From judgments sustaining each of the challenged tax levies, the plaintiff and the intervenor appeal.

Judgments affirmed.

Frank J. Hennessy, U. S. Atty., and William E. Licking, Asst. U. S. Atty., both of San Francisco, Sewall Key, Acting Asst. Atty. Gen., and J. Louis Monarch and Berryman Green, Sp. Assts. to Atty. Gen., for appellants.

Francis W. Collins, Dist. Atty., of Martinez, Thomas M. Carlson, City Atty., of Richmond, Frederick Bold, Jr., of San Francisco, and Fred N. Howser, Atty. Gen., and Daniel N. Stevens, Deputy Atty. Gen., for respondents.

SPENCE, Justice.

Plaintiff seeks by this action to secure the refund of taxes levied upon its possessory interest as a tenant of Richmond Shipyards Nos. 3 and 3–A and paid by it under protest for the tax year 1943–1944. Rev. & Tax. Code, sec. 5138. There are two causes of action involved: the first concerns the payment of the tax levied by the County of Contra Costa in the sum of $25,136.06, and the second concerns the payment of the tax levied by the City of Richmond in the sum of $18,083.20. The United States has intervened in support of plaintiff by reason of its agreement to reimburse plaintiff for all taxes paid in connection with the operation of the shipyards. The case was heard upon an agreed statement of facts, findings were made relative to the respective causes of action, and separate judgments were entered sustaining each of the challenged tax levies. It is from these judgments that this appeal is prosecuted.

The levies were computed as ad valorem taxes upon possessory interests in real property, and the sole point here in controversy is the legality of such levies. Each of the assessments is premised upon the same concept of tax liability—plaintiff's possessory interest in the two shipyards—and each recognizes this distinction in the status of plaintiff's occupancy of the property. As to Shipyard No. 3, the United States owned both the fee and the shipbuilding facilities erected thereon; but as to Shipyard No. 3–A, only the facilities were owned by the United States while the land was owned by a private corporation and leased to plaintiff for the express benefit of the United States as part of the national wartime shipbuilding program. The facilities in both shipyards were constructed by plaintiff in pursuance of a "Facilities Contract" executed with the United States. With respect to Shipyard No. 3, plaintiff's assessment was computed in relation to its possessory interest in both the land and the improvements; but with respect to Shipyard No. 3–A, the entire value of the leased land was assessed to the fee owner and plaintiff's assessment was limited to its possessory interest in the improvements. The record herein and applicable legal considerations stemming therefrom in the light of the pertinent tax statutes of this state sustain the propriety of these tax levies and plaintiff's liability therefor.

In 1942 plaintiff contracted with the United States Maritime Commission to build certain cargo vessels at Richmond Shipyards Nos. 3 and 3–A. As above stated, the former was owned by the United States while the latter was owned by a private corporation, the Sante Fe Land Improvement Company, and was leased to plaintiff. Under the terms of the "Vessel Construction Contracts," plaintiff operated the shipyards as a contractor on a cost-plus-a-fixed-fee basis and "without payment of rent," had the right of "exclusive use and possession of the Facilities owned by the Commission and any land owned by the Commission on which such Facilities or any part thereof may be situated for the sole purpose of constructing the Vessels" for the United States pursuant to the Emergency Cargo Ship Construction Program. U.S. Stats. at Large, Vol. 55, Part I, Public Laws, ch. 5, p. 5, 46 U.S.C.A. §§ 1119a, 1119b, 1125a, 1214. The contracts called for the progressive construction and delivery of vessels; the specified delivery date for the building of the last vessel in Shipyard No. 3 being August 8, 1944, and in Shipyard No. 3–A being November 16, 1944. Payment of the fixed fee for one type of vessel, upon launching and delivery, was scheduled at $150,000 and for another type of vessel at $35,000, with bonuses in both cases if the costs of construction were less than the agreed amounts, and with bonuses or penalties of $200 per day for each day by which the dates of delivery preceded or followed the specified delivery dates. Plaintiff was to be reimbursed for all costs directly or indirectly attributable to the maintenance of the shipyards and the construction of the vessels. The contracts were not transferable. Provision was made for termination of the contracts if plaintiff failed to "use due diligence" in the performance of the work, or upon plaintiff's insolvency; and in the event of such default the United States Maritime Commission was given the right of re-entry in the shipyards. The contracts also contained an optional cancellation clause in favor of the Commission, upon written notice to plaintiff.

On the first Monday of March, 1943, plaintiff was occupying the two shipyards and using the facilities thereon in the performance of its "Vessel Construction Contracts." Accordingly as of that date, the County Tax Collector of Contra Costa County and the City Tax Collector of Richmond each assessed plaintiff upon its possessory interest in Richmond Shipyard No. 3, both as to land and facilities, and in Shipyard No. 3—A as to the facilities only. Similar valuation factors were used in both cases in arriving at the assessment figure of $806,200 for the possessory interest in the facilities and $13,900 for the possessory interest in the land.

The computation schedule for the Government-owned facilities in the two shipyards shows the following items: The actual book cost of labor and materials used in construction was ascertained at $11,735,625, to which was added 14% for cost of overhead expenses, or $1,642,987.50, giving a total of $13,378,612.50; from such total

20% thereof, or $2,675,722.50, was subtracted on the premise that wartime conditions made the costs abnormally high, giving $10,702,890 as the value of the facilities new on March 1, 1943; then a depreciation allowance for a one-year use period was made by depreciating each improvement (by groups of like construction and use) at rates varying from 3% to 20% for a total of $1,067,110, which, when subtracted from the above figure of $10,702,890, gave $9,635,780 as the value of reversion as of March 1, 1944, and multiplying this latter sum by .9434 (the present value factor at 6%) resulted in $9,090,394 * as the present value of the reversion as of March 1, 1943; next there was subtracted from the aforesaid sum of $10,702,890, the value of the facilities on March 1, 1943, the sum of $9,090,394, the present value of the reversion on March 1, 1943, to give the sum of $1,612,500* as the present value of plaintiff's one-year possessory interest; and 50% of this amount, or $806,200.00,* was fixed as the assessment figure.

The computation schedule for the Government-owned land in Shipyard No. 3 shows the following items: The cash value of 125.365 acres of land, in fee, was fixed at $3,000 per acre, or $376,095; from this sum 5% thereof, or $18,804.75, was deducted because the use of the land was restricted, giving $357,290 * as the base value of the land; then this latter figure was multiplied by 8½% (6% as proper investment return value and 2½% being roughly one-half of the combined county and city rates of 3.065 plus 2.205, or 5.27%) to give the sum of $30,369 * as the annual worth of the land; next this latter figure was discounted by multiplying it by .9174 (the present worth of one deferred one year at 9% discount), giving $27,860 * as the present value of plaintiff's one-year possessory interest; and 50% of this amount, or $13,900.00,* was fixed as the assessment figure.

Plaintiff appealed to the Board of Supervisors of the County of Contra Costa and to the Council of the City of Richmond, each sitting as a board of equalization for the respective governmental units, for an elimination of the assessed valuations on its possessory interest in the aforesaid land and improvements. After hearing all the evidence that was offered, the respective boards denied plaintiff's applications. Thereupon, and on August 31, 1943, plaintiff paid against the total assessment of $820,100 ($806,200 for the improvements and $13,900 for the land) the county tax of $25,136.06, computed at the rate of $3.065 per $100 of assessed valuation, and the city tax of $18,083.20, computed at the rate of $2.205 per $100 of assessed valuation, for the tax year 1943–1944 upon its possessory interest in the aforesaid property. Within six months thereafter this action was commenced.

Upon the trial of the case the court, after considering the agreed facts as above outlined and reviewing the proceedings before each of the aforesaid boards of equalization, made findings and entered separate judgments sustaining the respective county and city tax assessments against plaintiff. It found, among other things, that at the respective board hearings, "plaintiff was afforded an opportunity to offer all the evidence it desired with reference to the alleged overvaluation of its possessory interest in said land and improvements and facilities"; that "after receiving all the evidence," each board "found and determined that the assessed valuation of plaintiff's said possessory interest in said [property] was the full cash value thereof, and * * * was not arbitrary, excessive, exorbitant, discriminatory or inequitable"; that on the assessment date "plaintiff had a substantial and taxable possessory interest in said land, improvements and facilities"; that "in arriving at [the] assessed valuation of said possessory interest, [each] Assessor intended to and did include only such possessory interest as plaintiff had in and to said land and improvements owned by the United States and intended to and did exclude from said assessment any and all rights, title and interest of the United States in and to said property"; that each "Assessor exercised an honest, fair and impartial judgment as to what should be included as improvements to the land for the purpose of assessing the value of plaintiff's possessory interest therein, and what should be excluded therefrom as personal property"; that "the method used by [each] Assessor * * * was calculated to result in a valuation fairly representing the net worth on the first Monday in March, 1943, of the annual benefits over the estimated term of plaintiff's possessory right to and interest in said land and improvements known as Shipyards No. 3 and 3–A"; that "the method used by [each] Assessor was reasonable and fair," and that "the refusal of [each] Board of Equalization to grant the plaintiff's application and protest does not constitute actual or constructive fraud or anything equivalent to fraud," but that each "brought its honest judgment to bear upon the question and denied plaintiff's application without fraudulent, discriminatory or arbitrary action."

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* In round figures.

Plaintiff and the United States as intervenor unavailingly urge these points in their appeal from the judgments entered herein: (1) That plaintiff's right to use and possess the two shipyards was not "property" within the meaning of the California Constitution and tax statutes; (2) that even if such right were properly regarded as "property" under the law of this state, it was without taxable value; (3) that the tax levies were invalid under the Fourteenth Amendment of the Federal Constitution because they amounted to an assessment upon property owned by the United States; and (4) that the facilities in Shipyard No. 3–A were personalty and a possessory interest therein was not subject to assessment under California statutes. These points will be discussed herewith in their order of presentation as above stated.

"Possessory interests" in "land or improvements" are taxable under section 107 of the Revenue and Taxation Code and in pursuance of the constitutional mandate that "all property * * * shall be taxed." Const., art. XIII, sec. 1. Illustration of this class of taxable estate is found in cases involving possessory interests in property which is tax exempt by virtue of ownership in the federal government (State of California v. Moore, 12 Cal. 56; People v. Shearer, 30 Cal. 645; L. E. White Lumber Co. v. County of Mendocino, 177 Cal. 710, 171 P. 799), by virtue of ownership in the state government (San Pedro, Los Angeles & Salt Lake Railroad Co. v. City of Los Angeles, 180 Cal. 18, 179 P. 393; Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 49 Cal.App. 120, 193 P. 137) or by virtue of ownership in a city government. Hammond Lumber Co. v. County of Los Angeles, 104 Cal.App. 235, 285 P. 896. Thus, in declaring possession of an agricultural claim upon public lands to be taxable, this court early said in the Shearer case at pages 655, 657 of 30 Cal.: "The possession itself of the public lands and the improvements thereon, whether by naked trespassers, or those who claim in addition a right of pre-emption, as to everybody except the United States, have always in California, and in most, if not all of the new States, been regarded as valuable property interests. * * * These possessions, then, are recognized as a *species of property* subsisting in the hands of the citizens. It is not the land itself, nor the title to the land, nor is it the identical estate held by the United States. It is not the pre-emption right, but is the possession and valuable use of the land subsisting in the citizen. *Why should it not contribute its proper share, according to the value of the interest, whatever it may be, of the taxes necessary to sustain the Government which recognizes and protects it?*" (Emphasis added.)

[1] Plaintiff's possessory interest in the shipyards under the "Vessel Construction Contracts" was properly classifiable as an "estate for years" in that it was "to continue for a fixed or determinable period" though subject to earlier termination upon certain conditions. Burby on Real Property (Hornbook Series, 1943) sec. 112, pp. 149-150. Thus, plaintiff had the right to "exclusive use and possession" of the property "until the last of the Vessels shall have been completed" according to the schedule of delivery dates. Consistent with the interests of the Government in its shipbuilding program were the two grounds specified for termination of plaintiff's tenancy of the shipyards: (1) Its failure to "use due diligence in proceeding with the performance of the work" and (2) its insolvency; and the provision giving the

Maritime Commission the right of re-entry upon the occurrence of either of the "events of default." Likewise appropriate to the Government's purpose was the optional cancellation clause, permitting the Commission "at any time prior to the completion of the work to be performed" to "cancel" the contracts "upon written notice to" plaintiff, and so protect the Government in case of a short war or plaintiff's inability to construct vessels properly. So pertinent in this regard is the testimony of the Regional Counsel for the Commission before the boards of equalization: "In fighting a war, of course, the only reason for changing a contractor—that is, that would be justifiable—would be that the contractor wasn't doing his job."

[2, 3] Such provisions for cancellation and termination, however, did not establish plaintiff's right to use the shipyards as no more than a permit or license which could not be responsible for a "property" tax. As stated in Von Goerlitz v. Turner, 65 Cal.App.2d 425, at page 429, 150 P.2d 278, at page 280: "The test * * * 'whether an agreement for the use of real estate is a license or a lease is whether the contract gives *exclusive possession of the premises against all the world, including the owner,* in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument.'" (Emphasis added.) Here, as above noted, plaintiff's "use and possession" of the shipyards under the contracts was "exclusive" even as against the United States in the light of the provision for the Maritime Commission's "right of re-entry" upon the default contingencies. So significant is the language in Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. 235, at page 240, 285 P. 896, at page 898: "While the instrument executed between the plaintiff and the city of Los Angeles is denominated a 'permit,' it is not, as plaintiff asserts, a mere license. *It grants* to plaintiff *for a fixed period the right to the exclusive use of the premises on prescribed terms.* It embodies an agreement having all of the characteristics and qualities of a lease, and entitles plaintiff to the exclusive control and enjoyment of the premises for the full term specified, subject only to fulfillment of the terms and conditions expressed. On the termination of the tenancy, improvements constructed by the occupant are to become the property of the city, but so long as plaintiff complies with its covenants, plaintiff remains secure in its possession throughout the agreed term." (Emphasis added.)

[4] In line with these principles, plaintiff's continued possession of the shipyards was reasonably estimated as of the first Monday in March, 1943, to be one year. These possibilities presented themselves: (1) Plaintiff's right of possession might have been terminated immediately by action of the Maritime Commission due to plaintiff's failure to perform properly its part of the contracts; (2) plaintiff's right of possession might continue until delivery of the last of the ships as scheduled—August 8, 1944, for Shipyard No. 3 and November 16, 1944, for Shipyard No. 3–A; or (3) plaintiff's right of possession might continue for the duration of the war. Plaintiff's shipbuilding records established its ability to perform the work in question and negatived the happening of the first possibility as ground for cancellation of the contracts; and general views prevailing in early 1943 as to the war's prolongation for at least another year or two and the continued need of the United States for ships during such period would justify the one-year base period of the 1943 assessments upon plaintiff's possessory interest in the shipyards. Under such circumstances the duration estimate governing the assessments does not warrant objection.

[5, 6] It is true that plaintiff did not have the right to transfer its possession of the shipyards to another, but such prohibition did not remove plaintiff from the status of a lessee, for it is common practice for leases to include clauses forbidding assignment or subletting. The cases of City and County of San Francisco v. Anderson, 103 Cal. 69, 36 P. 1034, 42 Am.St.Rep. 98, and Board of County Commissioners of Arapahoe County v. Rocky Mountain News Printing Co., 15 Colo.App. 189, 61 P. 494, wherein non-transferable memberships in

voluntary associations (the San Francisco Stock and Exchange Board and the Associated Press, respectively) were discussed as a *species of personal right,* present no analogy to considerations with regard to a possessory interest in land and improvements, which historically have been regarded as "property" for tax purposes. Nor, as plaintiff urges, is this case "indistinguishable" from the situation in Douglas Aircraft Co., Inc., v. Byram, 57 Cal.App.2d 311, 134 P.2d 15, 16, wherein was involved a contract with the War Department for the manufacture, sale and delivery of airplanes for a fixed total sum; partial payments were to be made as the work progressed; and "title to all property upon which any partial payment [was] made prior to completion of [the] contract [was to] vest in the Government in its then condition forthwith * * *." After noting at page 316 of 57 Cal.App.2d at page 17 of 134 P.2d, decisions in this state "where possessory interests in exempt real property were held (or said) to be taxable," the court stated at page 317 of 57 Cal.App.2d, at page 18 of 134 P.2d, that the company did not have in the federal government's property "a usufructuary right, that is, 'the right of using and enjoying the profits of a thing belonging to another, without impairing the substance' * * *"; that "the use which the [company] was permitted to make of the partial planes and parts was entirely for the benefit of their owner, the federal government, and not for [its own] benefit * * *"; that "the fact that the [company] was to be paid for fabricating a plane out of the government's material does not change its use of the material from a use for the government to a use for the [company]"; and accordingly, "the [company] had no possessory interest arising to the dignity of taxable property * * *." But here no comparable assessment was levied upon plaintiff with regard to its possession of the vessels and the materials which it was fabricating into ships for the Maritime Commission. Rather, plaintiff's assessment stemmed from its use of the land and facilities in the shipyards as essential to its production of ships at a profit, a right of possession consistent with its operation as an entrepreneur in business on it own account, and not simply as a bailee or agent of the Government. Under the "Vessel Construction Contracts," plaintiff was not given merely the right to perform services for the Government, but it was required "as independent contractor and not as agent" to construct and deliver the scheduled vessels "at [its] own risk," to "make good, at its expense, any * * * defects" occurring "within 6 months after [the Commission's] acceptance of each Vessel," to bear part of the liability for loss or destruction of any vessel during construction through "replacement" without "adjustment * * * in the contract price," and to "be responsible for any and all claims made against the Commission or the Vessels for infringement of patents or patent rights * * *." Such contract provisions correlated plaintiff's occupancy of the shipyards with its possession of a "usufructuary right" therein pursuant to its performance of the scheduled work under an independent profit-earning arrangement for its own benefit— a "possessory interest arising to the dignity of taxable property" under California law.

The next matter to be noted is the claim that plaintiff's possessory interest in the shipyards was without taxable value. The Revenue and Taxation Code requires that "all taxable property shall be assessed at its full cash value" (sec. 401), which means "the amount at which property would be taken in payment of a just debt from a solvent debtor" (sec. 110). The state Constitution authorizes local boards of equalization "to equalize the assessment of the property contained in [the] assessment roll, and make the assessment conform to the true value in money of the property contained in said roll * * *." Art. XIII, sec. 9. But the precise method to be used in calculating "full cash value" is not prescribed by law. To this point it was said in Utah Construction Co. v. Richardson, 187 Cal. 649, at pages 652, 653, 203 P. 401, at page 402: "As a general rule, it is not essential that the Legislature prescribe the method of valuation to be employed, but it may delegate to its taxing officers the power to adopt a suitable method, and, in the latter case, the assessors must value the property according to their best judgment and with honest purpose. (Citing authorities.) The general requirement in the state Constitution that the Legislature fix the 'manner' in which the assessment is to be made does not limit the power of the Legislature to invest the taxing board with the right to choose a rule of valuation. * * * ' "No principle of valuation of property for purposes of taxation is prescribed by the laws of this state. The statutes define the different species of property, and provide that every species shall be assessed at its 'actual cash value.' But, as to the mode of ascertaining the cash value, our law is silent. No subsidiary principles of valuation are laid down to guide the owner in making his statement in those cases where he is required to specify values; and the assessor is left equally unrestricted in making his estimates. *It follows that owners and assessors must be guided by those general principles which everywhere determine the valuation of property,* independently of statutory rules." ' * * *" (Emphasis added.)

[7] While for the purpose of taxation the "full cash value" of property is commonly construed to mean its "fair market value"—the value a willing purchaser will pay to a willing seller in an open market (Crocker v. Scott, 149 Cal. 575, 592, 87 P. 102; City of Los Angeles v. Western Union Oil Co., 161 Cal. 204, 206, 207, 118 P. 720)—the absence of an "actual market" for a particular type of property does not mean that it has no value or that it may escape from the constitutional mandate that "all property * * * shall be taxed in proportion to its value" (Art. XIII, sec. 1) but only that the assessor must then use such pertinent factors as replacement costs and income analyses for determining "valuation." Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 474, 478, 479, 14 P.2d 512, 84 A.L.R. 1304; Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal. App. 235, 244, 245, 285 P. 896. That situation frequently exists with respect to industrial properties, where their special purposes in use or their mammoth size preclude the creation of an "active market" for their disposition. So it was said in Underwood Typewriter Co. v. City of Hartford, 99 Conn. 329, 122 A. 91, at page 94, with reference to the tax assessment of a large "factory plant," which was "adapted especially to the * * * business of manufacturing typewriters" and to which the market-comparison approach to value was not feasible: "* * * the law never requires the impossible. * * * if the [market value method] cannot be followed, other means must and may be found by which the assessors can perform the duty the law has put upon them. One of the means which have been approved and sometimes used is to ascertain the original cost of construction and improvements, deducting therefrom depreciation, and adding the increase in cost of materials and labor, if at the time of valuation there is such increase over the cost at the time of construction." To like effect, see Essex Co. v. City of Lawrence, 214 Mass. 79, 100 N.E. 1016, 1018, and People ex rel. Wangelin v. St. Louis Bridge Co., 357 Ill. 245, 191 N.E. 300, 303. Similarly, "market value is an unsatisfactory test of the value to a tenant of a leasehold interest * * * because a lease rarely has any market value * * * [usually] it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth." James McMillin Printing Co. v. Pittsburg, C. & W. R. Co., 216 Pa. 504, 65 A. 1091, 1094. Likewise here plaintiff's nontransferable possessory interest in the shipyards had no "market value" in conformity with ordinary concepts of valuation premised on the "sales comparison" method, and it was necessary to follow some other means of ascertaining assessment values for the property in question. See North American Telegraph Co. v. Northern Pac. Ry. Co., 8 Cir., 254 F. 417, 418, 419.

[8-10] The computation process used by the assessors in their valuation of plaintiff's possessory interest in the shipyards, both as to the land and improvements, is outlined above and need not be detailed with greater particularity at this point, except to note that the respective valuation methods followed have been judicially approved in cases presenting analogous considerations. Blinn Lumber Co. v. County of Los Angeles, supra, 216 Cal. 474, 478, 479, 14 P.2d 512, 84 A.L.R. 1304; Ham-

mond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. 235, 244, 245, 285 P. 896; Underwood Typewriter Co. v. City of Hartford, supra, 99 Conn. 329, 122 A. 91, 94. The assessments are not challenged here upon the basis of an overcharge in the sense that some stated but lesser amount of tax would be proper, but it is argued that plaintiff's possessory right in the shipyards was without *any* value for these reasons: "(1) The plaintiff may not sell it; (2) it is so restricted that a purchaser could derive no benefit from it even if it could be transferred; (3) the risks attached would prevent a purchaser from buying it." The first point has already been noted as without significance by reason of the character of plaintiff's property interest. The second point relates to the fact that the "Vessel Construction Contracts" correlated possession of the shipyards with a single use—"constructing * * * vessels"—and so the property was not available for general commercial purposes. But restrictions on the use of leased premises are not uncommon and such matters are taken into consideration in determining the value of the possessory right. Thus, in Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. 235, 285 P. 896, the limitation upon "the use of the land to the purposes of a lumber business instead of extending a privilege for any sort of commercial use" was a factor affecting the valuation and the assessment was sustained. Pages 243, 244 of 104 Cal. App., page 900 of 285 P. Likewise here, as above stated, a deduction of 5% of the "cash value" of the land was made by the respective assessors because of the restriction of the possessory use to shipbuilding. But no such deduction was made from the value of the improvements inasmuch as they were new and were specially designed for shipbuilding, thus serving for their highest and best use. In the light of these observations as to limitation in the use of the property, plaintiff's possessory interest appears to have been fairly evaluated. Nor does the third point of objection relating to the "risks attached" to the continued performance of the work by virtue of the cancellation and termination clauses of the contracts nullify the taxable value estimate for plaintiff's possessory interest in the shipyards. As above analyzed, these contract provisions were correlated with the whole purport of the national emergency shipbuilding plan and designed to protect the Government in that program; and the possible bases for estimating the probable term of plaintiff's possessory right were factors which the assessors considered in fixing the duration period at one year. As was said in Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. 235, at page 246, 285 P. 896, at page 901: "Different minds may be expected to differ honestly in their judgments. But after considering all the circumstances and the various factors influencing value, it is the assessor's duty to exercise a prudent discretion in reaching conclusions."

[11, 12] The "Vessel Construction Contracts" provided for plaintiff to be paid stated sums for each ship built and delivered to the Government, and to be reimbursed for specified costs. Nevertheless, it is contended that plaintiff's earning of profit under such arrangements has no relation to the value of the shipyards, and its right to the "exclusive use and possession" thereof, but represents simply "the fair value of [its] managerial services and organization" in the operation of the shipyards for the Government's benefit. To support this theory of payment, reference is made to certain testimony offered in the trial court and rejected because not presented to the respective boards of equalization as affecting the issue of taxable value. Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 341, 212 P. 711; Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. 235, 247, 285 P. 896. But even assuming that plaintiff did not make any "profit" out of the shipyards as such, but only out of its "services" in performing the construction work, that fact would not negative the propriety of an assessment based on its "beneficial use" of the property as an entrepreneur engaged in the management of a business enterprise. Plaintiff had a property interest in the shipyards by virtue of its "exclusive use and possession" thereof, and after a full hearing on the issue of value, the respective boards of equalization determined that

the method pursued by the assessors was a correct mode of calculation, and that each assessment was a fair and just valuation for purposes of taxation. In reviewing the decisions of the boards, the trial court made the findings summarized above and concluded that there was evidence of sufficient substantiality before the boards to justify their finding that plaintiff's property interest was not assessed improperly, or in excess of its cash value, but only in proportion to the value of the possessory right. The record sustains such findings and conclusions, and it is therefore clear that plaintiff failed to make the showing required to entitle it to relief in this action. Universal Consolidated Oil Co. v. Byram, 25 Cal.2d 353, 356, 357, 153 P.2d 746; Eastern-Columbia, Inc., v. County of Los Angeles, 61 Cal.App.2d 734, 745, 143 P.2d 992.

[13] The third contention to be noted is the claim that the assessments were invalid under the Federal Constitution by virtue of the settled rule that "federal property is immune from state and local taxation." As illustration of this rule, there are cited cases such as Van Brocklin v. State of Tennessee, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845, where the United States had complete title to the land upon the assessment date as a purchaser at a tax sale and persons subsequently acquiring title to the land were not liable for state taxes thereon during the period the United States held title; cases such as Clallam County v. United States, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328, and Maricopa County v. Valley National Bank of Phoenix, 318 U.S. 357, 63 S.Ct. 587, 87 L.Ed. 834, involving a state tax upon the property of federal instrumentalities, or Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504, 147 A.L.R. 761, involving a state inspection fee upon an activity of the United States in its governmental capacity; and various land grant cases such as Wisconsin Central Railroad Co. v. Price County, 133 U.S. 496, 10 S.Ct. 341, 33 L.Ed. 687; United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532, and Irwin v. Wright, 258 U.S. 219, 42 S.Ct. 293, 66 L.Ed. 573, declaring that alienation of United States property does not pass an interest to the vendee taxable by a state until there has been compliance with all conditions precedent for the delivery of the deed. While it cannot be disputed that "the public policy of national development and federal tax collection justify the limitation on state taxing power announced by" such cases (S.R.A., Inc., v. Minnesota, 327 U.S. 558, 569, 66 S.Ct. 749, 756, 90 L.Ed. 851), they have no pertinency here with respect to a totally different factual situation as above recited.

Nor is plaintiff's position strengthened by reason of the decision of United States v. Allegheny County, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209, cited as the "latest" example of the application of the immunity rule. In that case Mesta Machinery Company, a Pennsylvania corporation, was engaged in the manufacture of heavy machinery at its plant in Allegheny County. In October, 1940, the War Department desired to produce a quantity of large field guns. Mesta's plant was not equipped for the manufacture of such ordnance; so Mesta and the Government agreed that certain additional equipment should be furnished at Government cost, that title to such equipment should vest in the Government upon delivery at the site of work and inspection and acceptance, and that it should remain the property of the United States. Thereupon the required equipment was obtained, inspected and accepted upon behalf of the United States, which thereupon compensated Mesta as agreed. The machinery was then bolted on concrete foundations in Mesta's plant, on real property owned by it; and was capable of removal without damage to the building. The Government leased the machinery to Mesta for an indeterminate period at the nominal rental of one dollar a year, and Mesta was permitted to use it only for the purpose of manufacturing ordnance. Mesta could not remove any of it without permission, and at all times it was under Government inspection and supervision. The agreement designated Mesta as "a bailee under a mutual benefit bailment" and obligated the United States to reimburse Mesta for any tax it should have to pay by reason of its arrangement with the Government.

After the installation of the machinery, the assessing authorities of Allegheny County revised Mesta's previously determined assessment for ad valorem taxes, and added onto the value of the real estate a sum equivalent to the value of the machinery in question. The tax was sustained by the Supreme Court of Pennsylvania upon the premise that under the state law regardless of who held title to the machinery, it constituted a part of Mesta's mill for purposes of assessment and was properly assessed as real estate. The Supreme Court of the United States reversed upon the ground that since the machinery in question belonged to the United States, the assessment was improper, for "Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee." 322 U.S. 189, 64 S.Ct. 916, 88 L.Ed. 1209. But pertinent to note in that opinion is the following language at page 185, of 322 U.S., at page 915 of 64 S.Ct., limiting the scope of the decision to the factual situation at hand: "The assessors made no claim that the temporary presence of the Government's machinery actually enhanced the market value or the use value of Mesta's land. The assessors simply and forthrightly valued Mesta's land as land, and the Government's machines as machinery, and added the latter to the former. * * * [The machinery's] full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school, and poor purposes. * * * the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States." Then the court significantly continued at pages 186, 187 of 322 U.S., at page 915 of 64 S.Ct.: "The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity but without impairing the immunity of the State or the Nation itself. Benefits which a contractor receives from dealings with the Government are subject to state income taxation. (James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318.) Salaries received from it may be taxed. (Graves v. [People of State of] New York ex rel. O'Keefe, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927, 120 A.L.R. 1466.) The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor. (State of Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3, 140 A.L.R. 615.) * * * in all of these cases what we have denied is immunity for the contractor's own property, profits, or purchases. * * * The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country. Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. * * * But * * * here * * * the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment."

Implicit in this language is the proposition that had there been an attempt by the assessing authorities of Allegheny County to segregate Mesta's possessory interest in the machinery from that of the United States, the tax on Mesta's interest would have been upheld. Such is the precise situation here where the assessments in question were premised upon the valuation of plaintiff's possessory interest in the shipyards as distinguished from any property interest of the United States therein. Thus as of March 1, 1943, according to the computation schedule as above outlined, the value of the improvements was estimated as $10,702,890 and the value of the land as $376,095, or a total of $11,078,985, but plaintiff's possessory interest therein was evaluated at $1,612,400. In so segregating the separate interests of the owner and the possessor of the property and not resting the assessments against the latter upon "the full value of the property," a "proper appraisal" of plaintiff's right to "exclusive use and possession" of the shipyards for the year in question appears to have been made; and the fact that the economic burden of the tax will be borne ultimately by the Government does not invalidate it. James v. Dravo Contracting Co., 302 U.S. 134, 160, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318; State of Alabama v. King & Boozer, 314 U.S. 1, 14, 62 S.Ct. 43, 86 L.Ed. 3; United States v. Allegheny County, supra, 322 U.S. 174, 189, 64 S.Ct. 908, 88 L.Ed. 1209. The "immunity rule" therefore furnishes no justification for exempting plaintiff's private possessory interest in the shipyards from bearing its fair share of taxes for the support of local government.

[14] Finally, challenge is made of the validity of that portion of the assessments relating to plaintiff's possessory interest in the facilities in Shipyard No. 3–A, upon the premise that such facilities, according to the terms of the lease of the land on which they were erected, constituted personal property and a possessory interest therein would not be taxable under California law. Accordingly, reference is made to the statutory definition of "possessory interests" as embracing the "possession of, claim to, or right to the possession of land or improvements" (Rev. & Tax. Code, sec. 107) and the provision that "improvements" include "all buildings, structures, fixtures, and fences erected on or affixed to the land" (Rev. & Tax. Code, sec. 105). But the record does not show that the possessory interest in the facilities in question was assessed upon any other basis than as a possessory interest in improvements to realty, and such classification is not open to dispute under the psysical facts.

The facilities in Shipyard No. 3–A, like those in Shipyard No. 3, included property of a substantial nature such as concrete basins, piping and wiring, corrugated iron buildings, frame buildings, concrete buildings, gates and fences, ways, docks and piers, lean-to sheds and portable buildings, platforms, tracks and runways, utility buildings, machinery and equipment, paving and railroad tracks. Plaintiff did not produce either before the respective boards of equalization or the trial court any specific testimony bearing on the nature of this property—its size and manner of attachment to the land—and refuting its classification according to outward appearances and physical considerations as "improvements" to realty. On the contrary, it appears from the evidence before the boards of equalization that one of plaintiff's own witnesses, the executive assistant to its general manager, admitted that all of the equipment included as improvements for tax purposes was "an integral part of the operation of the" shipyards, thus constituting "a unit for use together" and giving to it the character of "improvements to realty" for tax purposes. Southern California Telephone Co. v. State Board of Equalization, 12 Cal.2d 127, 138, 82 P.2d 422. The sole basis of the argument for tax exemption of plaintiff's possessory interest in the facilities in Shipyard No. 3–A, as distinguished from substantially identical facilities erected on the Government-owned land of Shipyard No. 3 and assessed as "improvements to realty," is plaintiff's leasing arrangement with Santa Fe Land Improvement Company, owner of the land of Shipyard No. 3–A. The lease provided that the facilities in Shipyard No. 3–A should "remain the exclusive property of the Government, with full right to construct, extend, alter or remove * * * at will" and that the Government should have the right to remove them at any time within ninety days after termination of the lease. The lease was recorded prior to the first Monday in March, 1943, and the assessors were so advised before the assessments were made.

But the terms of the lease relative to the Government's right to remove the facilities in Shipyard No. 3–A did not fix their status as personalty for tax purposes and preclude the assessors, though having knowledge of such private arrangement of the parties, from classifying such property as "improvements to realty" in accordance with the physical facts of their annexation to the land. It was so held by this court in the recent case of Trabue Pittman Corporation, Ltd., v. County of Los Angeles, 29 Cal.2d 385, 175 P.2d 512, where the taxable status of banking fixtures installed by the lessee bank on the leased premises was considered. The lease provided that the lessee had the right to "remove all or any part of the [trade] fixtures * * * business equipment and all other improvements * * * placed * * * on [the] premises" (page 389 of 29 Cal.2d, page 515 of 175 P.2d) and prior to the fixing of the assessment in question, "the bank had notified the county assessor in writing of its claim that the vault door and other banking equipment were personal property belonging to it and should not be assessed to plaintiff landlord as constituting a part of the improvements." Page 390 of 29 Cal.2d, page 516 of 175 P.2d. In holding that such property was nevertheless properly classifiable as "improvements to the realty" for tax purposes, this court stated at page 397 of 29 Cal.2d, at page 520 of 175 P.2d: "* * * the agreement of the parties whether express or implied, is not binding upon the taxing authorities. (Citing cases.)" That decision is premised upon "the interest of uniformity of taxation," which can prevail "only to the extent that there is a uniform classification of real and personal property" (page 392 of 29 Cal.2d, page 517 of 175 P.2d), and the same considerations operate here to sustain the assessments upon plaintiff's possessory interest in the facilities in Shipyard No. 3–A. To the extent that the case of Oroville-Wyandotte Irrigation District v. Ford, 47 Cal.App.2d 531, 118 P.2d 340 (no petition for hearing filed in this court), though involving a distinguishable factual situation, contains language to the effect that when recorded, a private agreement fixing the legal character of property is binding upon the assessor, it must be disapproved.

The judgments are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and TRAYNOR, JJ., concur.

* * *

30 Cal.2d 643

Ex parte BLANEY.

Cr. 4733.

Supreme Court of California.

Oct. 3, 1947.

1. Constitutional law 🔑90, 91

The right to publicize labor disputes or problems through the medium of picketing, boycotting, and otherwise is guaranteed by the Constitution as an incident of the right of "free speech, press, and assembly."

See Words and Phrases, Permanent Edition, for all other definitions of "Free Speech, Press, and Assembly".

2. Torts 🔑10

The right of workmen to combine to exert economic pressure on an employer in seeking betterment of labor conditions is not dependent on existence of a labor controversy between the employer and his employees.

3. Constitutional law 🔑90

Various means of economic suasion, such as picketing, the primary and secondary boycotts, and refusal to work together, may be performed in the exercise of civil liberties guaranteed by both federal and state Constitutions.

4. Constitutional law 🔑90

The protection afforded by the free speech guaranty of the right to publicize a labor dispute by picketing, boycotting, or otherwise is not absolute or necessarily controlled by the clear and present danger test, which is the accepted test in the ordinary free speech case.

5. Master and servant 🔑10

The rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.

6. Torts 🔑10

The purpose of economic pressure exerted by a labor union and the means used to exert it must be lawful.

7. Injunction 🔑101(3)

Restraint on picketing by labor unions may be laid by the state where the past conduct of the pickets is so characterized by extreme violence and riotous conduct that peaceful activity is inescapably connected therewith and cannot be separated, and there is an unravelable enmeshment of the peaceful with the unlawful conduct.

8. Torts 🔑10

Information disseminated by pickets must be truthful, but the use of such words as "unfair" or "unfair to organized labor" is not a falsification of facts, and to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies is not a falsification of facts.

9. Constitutional law ⚷90
Injunction ⚷101(1)
Statutes ⚷47

The Hot Cargo and Secondary Boycott Act is unconstitutional because it is too sweeping, vague, and uncertain, because it permits prior censorship of matters undeniably protected by constitutional guarantee of free speech and press, and because it makes enjoinable the mere combination or agreement resulting in the refusal by employees to handle goods for their employer because of a dispute between some other employer and his employees or a labor organization. Labor Code, §§ 1131–1136.

10. Statutes ⚷64(2)

The unconstitutional provisions of the Hot Cargo and Secondary Boycott Act are not mechanically severable from the constitutional provisions and therefore the severability clause of the act does not save constitutional portions of the act from those that are unconstitutional. Labor Code, §§ 1131–1136.

11. Constitutional law ⚷258

A criminal statute repugnant on its face to the due process clause may not be validated by a mere specification of details of offense intended to be charged.

12. Constitutional law ⚷258

Persons may not be required at peril of life, liberty, or property to speculate concerning meaning of penal statute, but all are entitled to be informed as to what the state commands or forbids.

13. Statutes ⚷64(1)

In considering issue of severability of void portions of a statute, the general presumption of constitutionality fortified by the express statement of a severability clause normally calls for sustaining any valid portion of the statute where the language of the statute is mechanically severable, but, if the statute is not severable, the void part taints the remainder and the whole becomes a nullity.

14. Constitutional law ⚷90

Where an entire statute in general terms infringes on the constitutional right of free speech, the statute will be stricken down in its entirety.

15. Constitutional law ⚷258

Where, by reason of invalidity of some applications of a criminal statute, it fails to state definite criteria of guilt, the whole constitutes an unconstitutional denial of due process of law.

16. Constitutional law ⚷81

The actual existence of an emergency, and not the limitation of the law to a prescribed period, gives validity to the exercise of police power, and, when the emergency ceases, the valid operation of the statute ends if it can be supported only by reason of the emergency.

17. Constitutional law ⚷90
Injunction ⚷101(1)

The urgency created by the economic and social problems which are the aftermath of war is insufficient to support the broad restraint on freedom of speech and press embraced in the Hot Cargo and Secondary Boycott Act. Labor Code, §§ 1131–1136.

18. Constitutional law ⚷90
Master and servant ⚷10

A labor union which aims its power of secondary boycott against businesses not connected with industrial dispute goes beyond the limits of constitutional protection and is subject to regulation by the state, but the state cannot confine the concerted action of labor to steps against the unfair employer alone, and somewhere between the two extremes the line for legislative regulation may be drawn.

SHENK, J., dissenting.

◆

Proceeding in the matter of the application of W. T. Blaney for a writ of habeas corpus to secure the petitioner's release from county jail, where he had been admitted for contempt.

Petitioner order discharged.

Clarence E. Todd, of San Francisco, and John C. Stevenson and Huston T. Carlyle, both of Los Angeles, for petitioner.

Robert W. Gilbert and Hildebrand, Bills & McLeon, all of Los Angeles, Robert W. Kenny, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Tobriner & Lazarus, of San Francisco, amici curiae on behalf of petitioner.

Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

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CARTER, Justice.

Prior to the commencement of this proceeding, one H. C. Ramser, doing business as the Upholstery Supply Company, hereinafter referred to as Ramser, prosecuted an action for damages and injunctive relief in the Superior Court of Los Angeles County against various labor unions, W. T. Blaney, a member and business representative of Van Storage and Furniture Drivers, Packers and Helper's Local Union No. 389 (hereinafter referred to as Van Storage Union), one of the unions. Various business firms who employed labor, and who were either suppliers, carriers or customers of Ramser (hereinafter referred to as dealers), were made parties defendants. Ramser manufactures and assembles commodities that go into furniture and sells furniture supplies. The members of Van Storage union were picketing Ramser and demanding a closed shop contract. A temporary restraining order was issued generally forbidding Blaney from doing various acts which were aimed at persuading the dealers to refrain from dealing with Ramser. It is disputed whether most of Ramser's employees were members of the union and whether Ramser is engaged in interstate commerce, but those matters are of no significance here in view of the limited scope of the restraining order. The restraining order commanding Blaney and his union to refrain from attempting to do or doing any of the following:

"(a) Combining or agreeing to cease performing or to cause any employee of [the dealers] to cease performing any service or services for said [dealers], or any of them, or causing or agreeing to cause or threatening to cause any loss or injury to such [dealers] or any of them, for the purpose of inducing or compelling such [dealers] or any of them to refrain from doing business with [Ramser] or furnishing any supplies to [Ramser] in his business, or purchasing any supplies from [Ramser], or carrying, shipping, or receiving any freight or merchandise for [Ramser]; or

"(b) In any way carring out or effectuating any such combination or agreement, or in any way giving any notices or making any threats intended or tending to effectuate or carry out any such agreement;

"(c) Provided, however, that nothing herein is intended or shall be construed to prohibit peaceful picketing when the same is not done pursuant to or for the purpose of carrying out any combination or agreement herein restrained or enjoined."

After application therefor an order to show cause why Blaney should not be punished for violation of the restraining order was issued and he was found guilty of contempt and committed to the county jail. The judgment of contempt recites that Ramser's action was to secure injunction relief against the violation by Blaney of the legislative act (approved by a referendum of the people November 3, 1942) commonly referred to as the "hot cargo law." Labor Code, §§ 1131–1136, as added by Stats. 1941, ch. 623. He seeks relief by way of habeas corpus. In the judgment the court found six counts of violation of the restraining order as follows: (1) That Blaney stated to a customer of Ramser that if it accepted merchandise from him the union would picket and boycott its plant and products; (2) that similar statements were made to another of Ramser's customers and also that the public and labor would be informed that the customer was selling "unfair" products and a picket line was established; (3) that Blaney told a supplier of Ramser he must not supply him because there was a strike at Ramser's place of business and all products of Ramser were to be picketed. The supplier complied with Blaney's demand; (4) that conduct similar to the above was followed as to another of Ramser's customers; (5) that the Railway Express Agency, Inc. that if it accepted for shipment products of Ramser it would be picketed; (6) that the Southern Pacific Company, a common carrier, was informed that if it permitted Ramser to unload from its freight cars, products which had been shipped to him, it would be picketed. Thus it appears that Blaney agreed with the other members of his union to cause and threaten to cause employees of the dealers to cease performing services, and the dealers from doing business with Ramser; that on certain dates Blaney in furtherance of the agreement stated to Ramser's dealers that if they accepted Ramser's merchandise they also would be picketed and "tied up" by picketing and boycotting; that some dealers were picketed, the pickets claiming that dealing with Ramser was unfair to organized labor and the like.

The "hot cargo act" reads: "The 'hot cargo' and 'secondary boycott' are hereby declared to be unlawful." Labor Code, sec. 1131. "As used in this chapter, 'hot cargo' means any combination or agreement resulting in a refusal by employees to handle goods or to perform any services for their employer because of a dispute between some other employer and his employees or a labor organization or any combination or agreement resulting in a refusal by employers to handle goods or perform any services for another employer because of an agreement between such other employer and his employees or a labor organization.

"(b) 'Secondary boycott.' As used in this chapter, 'secondary boycott' means any combination or agreement to cease performing or to cause any employee to cease performing any services for any employer, or to cause any loss or injury to such employer, or to his employees, for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of any other employer because of a dispute between the latter and his employees or a labor organization or any combination or agreement to cease performing, or to cause any employer to cease performing any services for another employer, or to cause any loss or injury to such other employer, or to his employees, for the purpose of inducing or compelling such other employer to refrain from doing business with, or handling the products of any other employer, because of an agreement between the latter and his employees or a labor organization.

"(c) 'Labor organization.' As used in this chapter, 'labor organization' means any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(d) 'Employer.' As used in this chapter, the term 'employer' includes any person acting in the interest of an employer, directly or indirectly and any association of employers, including growers and other hirers of labor.

"(e) 'Employee.' As used in this chapter, the term 'employee' includes any natural person who works for any person for compensation." Labor Code, sec. 1134.

"Any act, combination or agreement which directly or indirectly causes, induces or compels a violation of any of the provisions of this chapter, or inflicts any loss, injury or damage on anyone because of his refusal to violate any of the provisions of this chapter shall be unlawful." Labor Code, sec. 1132. Provision is made for injunctive relief and damages to a person injured by a violation of the statute. Labor Code, sec. 1133.

[1-8] The identification of the constitutional protection of the right of free speech, press and assembly, with the publicizing of labor disputes or problems through the medium of picketing, boycotting and otherwise has been established. Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Cafeteria Employees Union, Local 302, v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58; Hotel & Restaurant Employees' International Alliance, Local v. Wisconsin Employment Relations Board, 315 U.S. 437, 62 S.Ct. 706, 86 L.Ed.

946; Bakery & Pastry Drivers & Helpers Local, etc., v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178; Carpenters and Joiners Union, etc., v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143; A. F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Carlson v. People of State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; In re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675; Park & Tilford Import Corporation v. International, etc., of Teamsters, 27 Cal.2d 599, 608, 165 P.2d 891, 162 A.L.R. 1426; James v. Marinship Corporation, 25 Cal.2d 721, 729, 730, 155 P.2d 329, 160 A.L.R. 900; Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 154, 161, 143 P.2d 20, 150 A.L.R. 916; People v. Dail, 22 Cal.2d 642, 651, 140 P.2d 828; Magill Bros. v. Building Service, etc., Union, 20 Cal.2d 506, 511, 127 P.2d 542; In re Bell, 19 Cal.2d 488, 497, 122 P.2d 22; Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 123 P.2d 20; McKay v. Retail Auto S. L. Union No. 1067, 16 Cal.2d 311, 319, 333, 106 P.2d 373; In re Lyons, 27 Cal.App.2d 182, 80 P.2d 745. It has been phrased by this court in various ways. "It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. (Citations) This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, (citations) [and it is not] dependent upon the existence of a labor controversy between the employer and his employee." Steiner v. Long Beach Local No. 128, supra, 19 Cal.2d at page 682, 123 P.2d at page 24. "Various means of economic suasion such as picketing, the primary and secondary boycotts, and refusal to work together, often go to make up concerted efforts to induce nonmember employes to join a particular union. Such conduct may be performed in the exercise of civil liberties, guaranteed by both federal and state Constitutions." In re Porterfield, supra, 28 Cal.2d at page 114, 168 P.2d at page 720, 167 A.L.R. 675. It has been indicated, however, that the protection afforded by the free speech guarantee of the right to publicize a labor dispute by picketing, boycotting or otherwise is not absolute or necessarily controlled by the clear and present danger test. (That test is the accepted one in the ordinary free speech cases. Thomas v. Collins, supra.) Generally, as stated in Thornhill v. State of Alabama, supra, 310 U.S. at page 103, 60 S.Ct. at page 745, 84 L.Ed. 1093: "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants." And the purpose of the economic pressure and the means used to exert it must be lawful (Park & Tilford Import Corporation v. International, etc., of Teamsters, supra; James v. Marinship, supra), but that proposition poses the question in terms of results. Rather it is merely stating the problem in other words. The question still remains as to what purposes or what means may be declared unlawful by the Legislature or the courts without violating the provisions of the Constitution. Specifically, restraint may be laid by the state where the past conduct of the pickets is so characterized by extreme violence and riotous conduct that peaceful activity is inescapably connected therewith and cannot be separated, and there is an unravelable enmeshment of the peaceful with the unlawful conduct. Milk Wagon Drivers Union of Chicago, etc., v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200; Steiner v. Long Beach Local No. 128, supra. It has been held that the information disseminated by the pickets must be truthful. Magill Bros. v. Building Service, etc., Union, supra; Park & Tilford Import Corporation v. International, etc., of Teamsters, supra. But in that connection the use of such words as "unfair" or "unfair to organized labor" is not a falsification of facts and "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist' is not to falsify facts.'" Cafeteria Employees Union, Local 302, v. Angelos, supra [320 U.S. 293, 64 S.Ct. 127]; see, Park & Tilford Import Corporation v. International, etc. of Teamsters, supra. It has been held that a state may validly declare that its welfare will not be served if "in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder." Carpenters and Joiners Union, etc., v. Ritter's Cafe, supra, 315 U.S. 726, 62 S.Ct. 809, 86 L.Ed. 1143. The Court there stated that it was not "confronted here with a limitation upon speech in circumstances where there exists an 'interdependence of economic interest of all engaged in the same industry.'" Carpenters and Joiners Union, etc., v. Ritter's Cafe, supra, 315 U.S. 727, 62 S.Ct. 809, 86 L.Ed. 1143. And in Bakery & Pastry Drivers & Helpers, etc., Local, etc., v. Wohl, supra, the court held that a labor union of drivers of bakery wagons was constitutionally protected in picketing the customers and bakery suppliers to advise those persons of its grievance against peddlers of such commodity who obtained it from the bakeries and sold it to the customers, all in order to induce the peddlers to work only 6 days a week and to hire a union member one day a week. And A. F. of L. v. Swing, supra, holds that the constitutional guarantee is infringed by the state's limitation of peaceful picketing by labor unions to cases in which the controversy is between the employer and his employees.

[9] Regardless of the area to which the concerted labor activity, such as picketing or boycotting, may be constitutionally limited, and the facts of the case at bar as above disclosed, the statute here involved cannot stand. It and the restraining order issued pursuant to it are too sweeping, vague and uncertain. It permits the prior censorship of matters undeniably protected by the constitutional guarantee of free speech and press. See Near v. State of Minnesota, infra. It makes enjoinable the mere combination or agreement resulting in the refusal by employees to handle goods for their employer because of a dispute between some other employer and his employees or a labor organization. Labor Code, § 1134(a). Under that provision should a group of employees or a union merely agree to give publicity to their disputes with their employers by radio or newspaper, if that agreement and publicity results in persuading the employees of some other employer to withhold services from their employer an injunction will lie. In other words their freedom to publicize their labor disputes or even to agree to do so is penalized. This result is made even more likely by the provision that any agreement which *indirectly induces* the withholding of services amounts to an unlawful act. Labor Code, sec. 1132. Likewise under the secondary boycott provision (Labor Code, sec. 1134(b)) a mere agreement to cause any employee to cease performing services for an employer or to cause an employer not in the dispute to cease dealing with the employer in the dispute for the purpose of bringing pressure upon the latter is denounced. There is also encompassed within its terms the mere agreement to publicize a labor dispute with the purpose of persuading other employees to cease dealing with the employer in the dispute. The inducement or persuasion to refrain from dealing may be accomplished merely by advising the dealer of the controversy and requesting him to refrain from dealing, a matter beyond doubt within the realm of the right of free speech. Merely because the object, the intermediate object (the main objective being to correct a grievance against the employer with whom the dispute exists), is to induce third persons (the dealers) to assist in exerting the economic pressure does not create an unlawful aim. Nor is the communication of the facts of the existence of the dispute to them (the dealers) and persuading them to withhold their business, an unlawful means of furthering the campaign against the employer with whom the controversy exists. A statute so broadly and loosely

drawn—which places it within the power of a court to grant injunctive relief which by its terms may be used to strike down the right to freedom of speech—is a prior restraint upon that right and falls squarely within the rule recently declared by this court. In Re Bell, 19 Cal.2d 488, 122 P.2d 22, the ordinance made it a crime "for any person to loiter, stand, or sit upon any public highway, alley, sidewalk or crosswalk so as to in any manner hinder or obstruct the free passage * * * of persons or vehicles * * *." 19 Cal.2d at page 496, 122 P.2d at page 27. The court stated the rule to be that (19 Cal.2d at page 495, 122 P.2d at page 27):

"The ordinance must be judged on its face to determine whether it unconstitutionally prohibits acts that fall within the category of peaceful picketing. Thornhill v. [State of] Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. [People of] State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Hague v. C.I.O., 307 U.S. 496, 518, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State of New Jersey, 308 U.S. 147, 162–165, 60 S.Ct. 146, 84 L.Ed. 155; Lovell v. [City of] Griffin, 303 U.S. 444, 451, 58 S.Ct. 666, 82 L.Ed. 949; Stromberg v. [People of State of], California, 283 U.S. 359, 369, 370, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; see Near v. [State of] Minnesota, 283 U.S. 697 51 S.Ct. 625, 75 L.Ed. 1357; Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. *If certain of its provisions operate to prohibit peaceful picketing, they are invalid even though they also prohibit acts that may properly be made illegal.* A penal statute that 'does not aim specifically at evils within the allowable area of State control but, on the contrary, *sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech* or of the press * * * lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' and 'results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.' Thornhill v. [State of] Alabama, supra, 310 U.S. at page 97, 60 S.Ct. at page 742, 84 L.Ed. 1093. *It is not the function of the court to determine whether the restrictions imposed by the legislation can be validly applied to the facts of a particular case.* 'Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.' Thornhill v. [State of] Alabama, supra, 310 U.S. at page 97, 60 S.Ct. at page 741, 84 L.Ed. 1093; Hague v. C.I.O., supra; Lovell v. Griffin, supra; Schneider v. State of New Jersey, supra. *Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonable ascertainable standard of guilt* and is therefore too uncertain and vague to be enforced. Stromberg v. [People of State of] California, supra, 283 U.S. 369, 370, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; Herndon v. Lowry, 301 U.S. 242, 261–263, 57 S.Ct. 732, 81 L.Ed. 1066; Lanzetta v. [State of] New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L.Ed. 888; De Jonge v. [State of] Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; Hague v. C.I.O., supra; Schneider v. State [of New Jersey], supra; In re Harder, 9 Cal.App.2d 153, 155, 49 P. 2d 304; Territory of Hawaii v. Anduha, 9 Cir., 48 F.2d 171." [Emphasis added.] Likewise it is said in Thornhill v. State of Alabama, 310 U.S. 88, 96, 60 S.Ct. 736, 741, 84 L.Ed. 1093, concerning a statute denouncing picketing: "The State urges that petitioner may not complain of the deprivation of any rights but his own. It would not follow that on this record petitioner could not complain of the sweeping regulations here challenged.

"There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. (Citations.) The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. (Citation) One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. (Citations) A like threat is inherent in a penal statute, like that in question here, which *does not aim specifically at evils within the allowable area of State control* but, on the contrary, *sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.* The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. (citation) Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." [Emphasis added.]

See, also, Carlson v. People of State of California, 310 U.S. 106, 112, 60 S.Ct. 746, 84 L.Ed. 1104; Cantwell v. State of Connecticut, 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Hague v. C.I.O., 307 U.S. 496, 518, 59 S.Ct. 954, 83 L.Ed. 1423; Lanzetta v. State of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949; Stromberg v. People of State of California, 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; In re Porterfield, supra, 28 Cal.2d 115, 168 P.2d 706, 167 A.L.R. 675.

[10-15] The statute in question contains the provision that "If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall be not affected thereby." Labor Code, § 1136. That separability clause cannot save it. As stated in Lanzetta v. State of New Jersey, supra, 306 U.S. at page 453, 59 S.Ct. at page 619, 83 L.Ed. 888: "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. * * * *No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.*" [Emphasis added.] While the instant statute does not directly impose criminal penalties, it does provide for injunctive relief in the event of its violation and the penalty for disobeying an injunction is contempt of court. It is a coercive measure and a person does not know in advance whether its application to his conduct will be constitutional or unconstitutional. He should not be required at his peril to make that determination, or as stated in In re Porterfield, supra, at page 120 of 28 Cal. 2d, at page 724 of 168 P.2d, 167 A.L.R. 675: "The potential severability of the ordinance, however, can have no effect upon the instant matter. As far as petitioner is concerned the existence of the statute as a whole was an operative fact. The consequences of its existence as such cannot be ignored. In order for petitioner to have secured a license he would have had to have complied with the terms of the ordinance as written. In Smith v. Cahoon (1931), 283 U.S. 553, 563-565, 51 S.Ct. 582, 75 L.Ed. 1264, a private carrier for hire was convicted of the charge of operating

vehicles upon the highways without having obtained the certificate of public convenience and necessity and without having paid the tax required by a statute of the State of Florida [Acts 1929, c. 13700]. Upon habeas corpus defendant successfully contested the constitutionality of certain provisions of the statute as applied to private carriers. It was contended in support of the conviction, however, that a savings clause removed the infirmity of the statute. In denying the efficacy of the contention and holding that defendant was entitled to assert his constitutional right by virtue of the invalidity of the statute upon its face, the United States Supreme Court stated (page 563 of 283 U.S., page 586 of 51 S.Ct., 75 L.Ed. 1264): 'The effect of this savings clause is merely that, if one provision is struck down as invalid, others may stand. But, until such separation has been accomplished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left.'" Such a statute, in the language of the Supreme Court of the United States in Thornhill v. [State of] Alabama, supra [60 S.Ct. 742], "Lends itself to harsh and discriminatory enforcement by local prosecuting officials, [in the instant case the trial court is granting temporary restraining order and preliminary and permanent injunctions] against particular groups deemed to merit their displeasure," and "results in a continuous and pervasive restraint on all freedom of discussion [of the labor controversy] that might reasonably be regarded as within its purview." It is true that if the statute is severable, that is, if the void part described above can be eliminated, then the court is faced with the necessity of determining whether the portion which remains, or any part of such remainder, which was violated by Blaney, is valid and enforceable. But if the statute is not severable, then the void part taints the remainder and the whole becomes a nullity. It is also true that in considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. This is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. See, In re Bell, 19 Cal.2d 488, 498, 122 P.2d 22; Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv.L.Rev. 76, 79. On the other hand, where there is no possibility of mechanical severance, as where the language is so broad as to cover subjects within and without the legislative power, and the defect cannot be cured by excising any word or group of words, the problem is quite different and more difficult of solution. It is the latter situation which is presented by this case. As we have seen the hot cargo act applies generally to "any combination or agreement" which has the result of causing third parties to refuse to deal with or handle the goods of the employer involved in the dispute. Its provisions are not segregated in such a way as to differentiate between peaceful publicizing of the facts of a labor dispute, and secondary boycotts involving economic pressure against third parties directly or indirectly connected with the dispute. The only way in which such segregation could be made would be by judicial interpretation, first holding that the act as it stands is wholly unconstitutional, but then determining that, by inserting qualifications and exceptions in the statutory language, a judicially reformed statute might be given some effect. Such a step seems to have been contemplated by the Legislature in enacting the unusual form of severability clauses in the act heretofore quoted. Labor Code, sec. 1136. By this type of provision, the Legislature has in effect sought to delegate to the courts the task of rewriting the statute, directing them to set forth, in a succession of judicial opinions upholding or annulling judgments enforcing the provisions of the act, thus determining in advance the extent to which the Legislature may go in providing regulations in this field. It is an inescapable result that, in the meantime, those individuals who guess correctly will be released by the courts, and those who guess incorrectly will be punished; but that no one, employer, employee, union or any one will know what the law is until, after violation of the statute, and judgment thereon, a higher court is given an opportunity to pass on the question of its validity as applied to the particular "person or circumstance." Such a theory of judicial construction cannot be supported on either practical or legal grounds, and two well settled propositions condemn the legislation under review here in toto: First, where an entire statute in general terms infringes upon the constitutional right of free speech, it will be stricken down in its entirety; and second, where, by reason of invalidity of some applications of a criminal statute it fails to state definite criteria of guilt, the whole constitutes an unconstitutional denial of due process of law. Similar legislation was held void on these grounds in the Bell case, 19 Cal.2d 495, 497, 122 P. 22, and in other decisions as heretofore stated. The Legislature manifestly sought, in the instant case, to prohibit every form of boycott, including some kinds which are occasionally characterized as "primary." The deliberately chosen language, covering all such activities in general terms, with no attempt at segregation or classification, leaves this court with no alternative but to nullify the act.

[16, 17] The statute provides that it shall be in "effect until May 1, 1943, and thereafter: (A) During the continuance of the existence of the National emergency declared by the President of the United States to exist, by his proclamation issued under date of September 8, 1939. (B) During any period of war between the United States of America and any foreign power, legally declared to exist." Labor Code, sec. 1135. And further, that "This act is enacted for the purpose of preserving tranquillity among the citizens of this commonwealth and to insure during this present critical period of National emergency and intensive armament the unobstructed production and distribution of the products of our factories and fields, for the continued protection and preservation of our democratic way of life and for the general welfare of the people of this State." Stats. 1941, ch. 623, sec. 2. In view of the result we are compelled to reach herein it is unnecessary to decide whether or not the statute is still in force. Nor are we concerned with whether it would be a valid measure during actual hostilities of war. The proceedings herein and all acts of which complaint are made occurred after the cessation of the actual warfare or hostilities in which this country was engaged at the time of the enactment of the statute, although legally speaking a state of war may be said still to exist. The emergency presented since the cessation of hostilities is not one of getting sinews of war to the battlefields but is one of economic and social concern only. The possible clear and present danger existing during hostilities ceases to exist once they cease. The actual existence of the emergency and not the limitation of the law to a prescribed period gives validity to the exercise of police power, and when the emergency ceases, the valid operation of the statute ends if it can be supported only by reason of the emergency. Hourigan v. Township of North Bergan Tp., 113 N.J.L. 143, 172 A. 193, 785. It is true that the urgency created by the economic and social problems which are the aftermath of war still remain. Such urgency is clearly insufficient to support the broad restraint on freedom of speech and the press embraced in the instant statute. It was aptly said by Mr. Justice Holmes, in his dissenting opinion in Abrams v. United States, 250 U.S. 616, 627, 40 S.Ct. 17, 21, 63 L.Ed. 1173, in amplifying the rule stated in the majority opinion written by him in Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (dealing with the statutes concerning the obstruction of the war effort in the first world war):

"I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war then in time of peace because war opens dangers that do not exist at other times.

"But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. * * * Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"

It is urged that from the record it appears that picketing was done which barred ingress and egress to and from Ramser's place of business and that compulsion was exerted on common carriers to violate their lawful duty as such carriers to accept goods for transportation, which acts constitute unlawful picketing and unlawful purpose or object respectively, but the restraining order and judgment of contempt are clearly predicated upon a violation of the "hot cargo act" as seen from the initial recitation therein and we do not decide whether Blaney could have properly been found guilty of contempt for his acts in connection with common carriers.

[18] The above considerations dispose of the essential issue in the proceeding before us, and it is both unnecessary and undesirable to venture into a discussion of the permissible limits of legislative regulation of secondary boycotts. This subject is difficult, highly controversial, and has engendered conflicting decisions by the state courts, without any sure guide in the decisions of the United States Supreme Court. Only the most general principles have been laid down by that court. We know that when a union aims its power of secondary boycott against businesses not connected with the industrial dispute, it goes beyond the limits of constitutional protection and is subject to regulation by the state (Carpenters & Joiners Union, etc., v. Ritter's Cafe, supra), and we know also that the state cannot confine the concerted action of labor to steps against the unfair employer alone (Cafeteria Employees Union, etc., v. Angelos, supra; Bakery & Pastry Drivers & Helpers Local, etc., v. Wohl, supra). Somewhere between these extremes, the line may be drawn, but it should be drawn in a case wherein the issue is directly presented, and is necessary for the decision, in order that an authoritative and binding pronouncement may be made by this court and, perhaps, by the United States Supreme Court.

The Legislature manifestly sought, in the instant case, to prohibit every form of boycott, including some kinds which are occasionally characterized as "primary." The deliberately chosen language, covering all such activities in general terms, with no attempt at segregation or classification, leaves this court with no alternative but to nullify the act. Only by a carefully drawn statute which separately treats the various forms of concerted action loosely termed "secondary boycotts," can the Legislature hope to accomplish the object of regulating those forms which may ultimately be held to be within its constitutional power.

It is therefore ordered that petitioner be discharged.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

SPENCE, Justice (concurring).

I concur in the judgment.

In the present proceeding the parties have discussed grave constitutional questions in the determination of which this court is bound by the decisions of the United States Supreme Court. With respect to some of those questions the decisions of the United States Supreme Court offer no certain guide, but upon the single question which appears to be decisive of this controversy, the decisions of that court clearly indicate that the statute before us (Labor Code, secs. 1131 to 1136) and the restraining order issued thereunder (which restraining order follows the wording of section 1134 of the Labor Code in its essential provisions) must be declared invalid as trenching upon fundamental rights guaranteed by the Constitution of the United States.

Much is said in the briefs, as well as in the majority and dissenting opinions herein, regarding the power of a state to prohibit picketing. The majority opinion stresses the decisions of the United States Supreme Court which tend to identify the right to picket with the constitutional rights of freedom of speech, of the press, and of assembly. The dissenting opinion stresses the recent decisions of that court which indicate that such rights are not identical, and that picketing may be declared unlawful and may be enjoined under various circumstances. The question here, however, is not the general one of whether picketing, in its relation to that which is commonly termed "hot cargo" or "secondary boycott," may be constitutionally proscribed. The precise question for determination is whether the statute before us, defining "hot cargo" and "secondary boycott" in a particular manner (sec. 1134, subds. (a) and (b)) and declaring them to be unlawful and enjoinable (secs. 1131 and 1133), infringes upon constitutional guarantees. Having determined that the answer to the last question is that said statute does infringe upon constitutional guarantees, it may be assumed in this discussion that such picketing can be constitutionally proscribed by an appropriate statute drawn for the accomplishment of that purpose.

It should be emphasized that this particular statute is not merely an anti-picketing statute. While the prevention of picketing may well have been one of the primary purposes of the framers of this legislation (despite the fact that the word "picketing" does not appear therein), the statute goes much further and covers a multitude of other activities. It will be sufficient to mention but a few. The broad language of section 1134, subdivision (a), makes unlawful and enjoinable the mere agreement on the part of the employees engaged in the primary labor dispute to publish the facts of that dispute if such agreement and publication result in a refusal by the employees of another employer to perform any services for such other employer; and the broad language of section 1134, subdivision (b), makes unlawful and enjoinable any agreement on the part of such employees engaged in the primary labor dispute to publicize the facts of such dispute even among their fellow-employees for the purpose of inducing such employees to withhold patronage from other employers and for the ultimate purpose of inducing such other employers to refrain from doing business with the employer engaged in the primary dispute. Thus it appears that the language of said section 1134, subdivisions (a) and (b), purports to make unlawful and enjoinable certain acts, not involving such coercive methods as picketing, which acts are clearly protected by the guarantees of freedom of speech and of the press as found in our federal Constitution (U.S.Const., Amendments 1 and 14) and as construed by the United States Supreme Court in numerous cases cited in the majority opinion.

That which has been said regarding the infringement upon constitutional guarantees made by the provisions of section 1134, subdivisions (a) and (b) of the Labor Code, may likewise be said with greater force with respect to the provisions of section 1132. The last-mentioned section is not confined to any "combination or agreement" but it further declares unlawful "any *act* * * * which *directly or indirectly* * * * *induces* * * * a violation of any of the provisions of this chapter." (Emphasis added.) Thus under that section a single individual might be doing an unlawful and enjoinable act if he should merely voice or otherwise publicize the facts of a labor dispute under certain circumstances. It cannot be seriously contended that section 1132 can stand the constitutional tests laid down by the United States Supreme Court. While it is true that the provisions of that section were not made the basis of the restraining order in the present case, it is perhaps significant to note that the dissenting opinion makes no attempt to defend those provisions. They are mentioned here only to demonstrate further the wide range of activities which the statute purports to declare unlawful.

This court reviewed certain decisions of the United States Supreme Court in James v. Marinship Corporation, 25 Cal.2d 721, at page 730, 155 P.2d 329, at page 334, 160 A.L.R. 900, and, in recognizing both the legislative power and its limitations, said: "Thus a state may impose limitations upon picketing or other concerted action if the 'end sought' is not permissible under state law and public policy, though any such limitations are subject to review by the United States Supreme Court, and will be annulled if they unreasonably interfere with labor's right to publicize the facts of a labor dispute." Under any view of the controlling decisions of the United States Supreme Court, it is clear that the above-mentioned provisions of the statute do "unreasonably interfere with labor's right to publicize the facts of a labor dispute," and that they must be declared unconstitutional for that reason. It is immaterial that a constitutional statute might have been drawn proscribing the specific acts which Blaney was found to have done in violation of the broad terms of the restraining order. Here both the restraining order and the section of the statute upon which it was based (sec. 1134) cover acts which cannot be constitutionally proscribed as well as those which can, and I agree with the conclusion reached in the majority opinion that the provisions of said section are not mechanically severable so as to permit reliance upon the severability clause (Labor Code, sec. 1136) to save the statute or to sustain the judgment of contempt which is under attack. It therefore follows that petitioner is entitled to his discharge.

EDMONDS, J., concurs.

SHENK, Justice (dissenting).

I dissent.

This court has repeatedly said, in accord with prevailing judicial opinion elsewhere, that conflicts in labor-management relations can best be controlled, not by the courts, but by the legislature. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 599, 610, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 400, 403, 106 P.2d 414; Magill Bros. v. Building Service, etc., Union, 20 Cal.2d 506, 510, 127 P.2d 542; James v. Marinship Corporation, 25 Cal.2d 721, 729, 730, 155 P.2d 329, 160 A.L.R. 900; Park & Tilford Import Corporation v. International, etc., of Teamsters, 27 Cal.2d 599, 609, 165 P.2d 891, 162 A.L.R. 1426. Since those decisions were rendered the Legislature has acted, not once but twice in declaring the "hot cargo" and "secondary boycott" unlawful labor practices and has provided redress by civil action.

The first act was passed in 1941 (Stats. 1941, p. 2079). The referendum was invoked against it and the effective date of the act was postponed until its approval by the electors of the state at the general election in November, 1942. During the campaign for and against it the terms of the enactment were extensively discussed, and its meaning and effect were thoroughly understood. That act contained a provision limiting its effective duration until May 1, 1943, and thereafter during the period of war between the United States and any foreign power.

The last session of the Legislature (Stats. 1947, p. ——, ch. 278) eliminated the emergency provision but without changing the law as enacted in 1941. This was done after extensive discussion and hearings during the legislative session. Now, after the Legislature has twice so acted and the electors of the state have approved the law, this court proceeds to strike it down for reasons which I deem insufficient and not compelled by any constitutional provision or by any decision of the Supreme Court of the United States.

The petitioner, W. T. Blaney, sought his release from restraint under a commitment for contempt of an injunctive order issued in an action for damages and injunctive relief brought in the superior court in Los Angeles County pursuant to sections 1131–1136 of the Labor Code commonly called the "Hot Cargo and Secondary Boycott Act" (Stats.1941, p. 2079). The action had been brought by one Ramser, doing business as the Upholstery Supply Company, against specified drivers' and teamsters' unions affiliated with the American Federation of Labor, various freight lines, and other defendants including the petitioner individually and as business representative of one of the unions. I will refer to the parties in that action as "plaintiff" and "defendants."

The plaintiff's plant was being picketed because of a strike by his employees. The order, dated April 18, 1946, restrained the unions and their affiliates from making any combination or agreement which would cause or attempt to cause employees of any supplier or customer or carrier of the plaintiff to cease performing services for any such employer for the purpose of causing the latter to refrain from furnishing supplies to or purchasing supplies from the plaintiff, or carrying or shipping freight or merchandise for the plaintiff. The order excepted from its operation peaceful picketing when not done pursuant to the prohibited combination or agreement. The court thereby sought to enjoin combinations or agreements in aid of threatened "hot cargo" operations or "secondary boycott" of the plaintiff's business by which the employees of his carriers, suppliers and customers might be induced by picketing or otherwise to prevent their employers from carrying out their contracts with the plaintiff, without affecting the peaceful picketing of the plaintiff's plant by his employees. After hearing on a citation for contempt, the court found that the petitioner, in combination with others, had committed acts in violation of the order, and imposed both fine and imprisonment.

The acts restrained and found to have been committed were within the definition of "hot cargo" and "secondary boycott" declared unlawful by sections 1131 et seq. of the Labor Code. This proceeding therefore presented for determination certain questions concerning the constitutionality of the Hot Cargo and Secondary Boycott Act.

By section 1131 of the Labor Code the "hot cargo" and "secondary boycott" are declared to be unlawful. Section 1132 also declares unlawful any act, combination or agreement which directly or indirectly causes, induces or compels a violation of any provision of the act, or inflicts loss, injury or damage to anyone because of his refusal to violate any provision of the act. Section 1133 provides for recovery of damages and injunctive relief.

Section 1134 defines (a) "hot cargo" as "any combination or agreement resulting in a refusal by employees to handle goods or to perform any services for their employer because of a dispute between some other employer and his employees or a labor organization or any combination or agreement resulting in a refusal by employers to handle goods or perform any services for another employer because of an agreement between such other employer and his employees or a labor organization"; and (b) secondary boycott as "any combination or agreement to cease performing, or to cause any employee to cease performing any services for any employer, or to cause any loss or injury to such employer, or to his employees, for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of any other employer because of a dispute between the latter and his employees or a labor organization or any combination or agreement to cease performing, or to cause any employer to cease performing any services for another employer, or to cause any loss or injury to such other employer, or to his employees, for the purpose of inducing or compelling such other employer to refrain from doing business with, or handling the products of any other employer, because of an agreement between the latter and his employees or a labor organization." The remaining subdivisions of that section define labor organization, employer and employee.

Section 1135 states that the act shall be in effect until May 1, 1943, and thereafter "(a) During the continuance of the existence of the National emergency declared by the President of the United States to exist, by his proclamation issued under date of September 8, 1939. (b) During any period of war between the United States of America and any foreign power, legally declared to exist."

Section 1136 is a severability clause, providing that if any provision, or the application of such provision to particular persons or circumstances should be held invalid, the remainder of the act, or its application to persons or circumstances otherwise shall not be affected thereby.

There is no attack upon the findings of the court, nor upon their sufficiency to support the judgment in the contempt proceeding if the statute be deemed a valid exercise of legislative power. Since the acts (combinations and agreements) restrained and found to have been committed come within the definitions of "hot cargo" and "secondary boycott" contained in section 1134, the court is not confronted with the necessity of determining the effect of section 1132. The validity of that section is not involved under the facts in this case.

The question then is whether combinations and agreements in furtherance of "hot cargo" and "secondary boycott" operations as defined by section 1134 may be declared unlawful by the Legislature, and legal and equitable redress afforded for and to prevent injury therefrom. The petitioner contends that that legislative power does not exist because its exercise interferes with claimed freedom of speech in connection with a "secondary boycott," including peaceably conducted picketing. In other words the petitioner invokes the constitutional guarantee of free speech as an inherent right to pursue, in union disputes with an employer, secondary coercive measures against the employer's business including the picketing of his carriers, suppliers and customers if peaceably conducted. But, as stated in the early case of Pierce v. Stablemen's Union, 1909, 156 Cal. 70, at page 78, 103 P. 324, no sanctity attaches to a trade union which puts it above the law or which confers upon it rights not enjoyed by any other individual or association.

The alleged constitutional issue is provoked by judicial utterances that picketing is a form of free speech to be protected under constitutional guaranties. Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. People of State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; In re Bell, 19 Cal. 2d 488, 122 P.2d 22. It does not follow, and the courts have not declared, that peaceful picketing may never become actionable or enjoinable.

The present statute declares tortious (with appropriate legal and equitable redress) conduct which in the absence of statute courts generally have held to be tortious, but which in a minority of jurisdictions the courts have, in the absence of a permissive statute, regarded as non-actionable and non-enjoinable. See Vol. 1, Teller, Labor Disputes and Collective Bargaining, secs. 123, 150 and cases cited; see also article Teller, Picketing and Free Speech, 56 Harv.Law Rev. 180, reprinted in Teller, Labor Disputes and Collective Bargaining, April, 1947, Cumulative Supplement, p. 70, tracing the emergence and history of the identification of picketing with the right of free speech. Heretofore this court, in the absence of statute, has adopted the minority view in dealing with "secondary boycott" as a means of economic coercion in labor disputes. Parkinson Co. v. Building Trades Council, supra, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Pierce v. Stablemen's Union, supra, 156 Cal. 70, 103 P. 324. But as hereinbefore stated this court has repeatedly and uniformly declared that such a matter was one for legislative cognizance and that since the Legislature had not acted the courts were left without legislative guidance in the determination thereof.

Picketing for an unlawful purpose may be enjoined. James v. Marinship Corporation, supra, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343; Park & Tilford Import Corporation v. International, etc., Teamsters, supra, 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426.

Although generally, in the absence of statute, the court may not define the boundaries of an industrial dispute, the legislature unquestionably has the power in the interests of the public welfare to prescribe reasonable limits upon the use of economic weapons by either side in industrial controversy. In Re Porterfield, 28 Cal.2d 91, at page 101, 168 P.2d 706, 167 A.L.R. 675, it was definitely recognized that the constitutionally protected right of free speech is not an absolute right; that that right does not carry with it into the conduct of businesses and professions total immunity from regulation in the performance of acts as to which speech is a mere incident or a means of accomplishment; and that a right to speak for the purpose of profit may not be indulged in derogation of the police power of the state.

This court in approving "secondary boycott" or other coercive measures as lawful union activities has repeatedly recognized the legislative power to change the policy of the state. This is evidenced by the following quotations from our decisions: "[A]nd as with regard to other questions of economic or political aspect, the remedy, if a remedy is needed, must be found by the Legislature." Parkinson Co. v. Building Trades Council, supra, 154 Cal. 581, 599, 98 P. 1035, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165. And at page 610, of 154 Cal., at page 1039 of 98 P. per Sloss, J. concurring, "But if there be, in such combinations, evils which should be redressed, the remedy is to be sought, as to some extent it has been sought, by legislation. If the conditions require new laws, those laws should be made by the lawmaking power, not by the courts."

"It may very well be that combination and organization on one side or the other places in the hands of a few persons an immense power which, in the general welfare, ought to be limited and controlled. But these are considerations for the lawmaking power, not for courts." C. S. Smith Metropolitan Market Co. v. Lyons, supra, 16 Cal.2d 389, 400, 106 P.2d 414, 421. And at page 403, of 16 Cal.2d, at page 422 of 106 P.2d, "The fear that they [labor unions] have grown so strong as to endanger vital civil liberties and disrupt the functioning of our economic system is an argument exclusively for the consideration of the legislature."

"The basis for equity's intervention in cases such as this [enjoining untruthful statements in picketing] rests upon the fact that picketing is one of the forms of collective labor activity which seeks to exert economic pressure upon an employer. See Restatement, Torts, § 796, et seq. * * * Such collective labor activity is permissible only when conducted according to the requirements imposed by law, and if in violation of such requirements, picketing is subject under ordinary circumstances to the restraint of a court of equity. * * * The standards imposed for determining whether picketing is lawful and permissible, or unlawful and enjoinable, are matters of state law which have varied from time to time and from jurisdiction to jurisdiction." Magill Bros. v. Building Service, etc., Union, supra, 20 Cal.2d 506, 510, 127 P.2d 542, 544.

"Although recent decisions in the United States Supreme Court hold that a state cannot deprive labor unions of the right of free speech through peaceful picketing * * * these decisions do not deny a state the power to protect against abuses of the right. In two recent cases the court upheld the state's power to limit peaceful picketing both as to place and as to the economic relationship of the industry picketed (Allen-Bradley Local No. 1111 [etc.], v. Wisconsin E. R. Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154; Carpenters & Joiners Union [etc.], v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 * * *." James v. Marinship Corporation, 25 Cal.2d 721, 729, 155 P.2d 329, 334, 160 A.L.R. 900. And in the same case at page 730 of 25 Cal.2d, at page 334 of 155 P.2d, it was said: "Thus a state may impose limitations upon picketing or other concerted action if the 'end sought' is not permissible under state law and public policy, though any such limitations are subject to review by the United States Supreme Court, and will be annulled if they unreasonably interfere with labor's right to publicize the facts of a labor dispute."

Picketing involves more than speech. This was effectively demonstrated in Carpenters and Joiners Union, etc., v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143, where the union, endeavoring to obtain employment of union carpenters and painters in the construction of a building in Houston, Texas, picketed the "wholly unconnected" restaurant business of the owner of the building under construction. The Supreme Court, in upholding an injunction restraining the picketing in violation of a Texas anti-trust law, said (315 U.S. at page 727, 62 S.Ct. at page 810):

"It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

"In forbidding such conscription of neutrals in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. [Citing Teller and other writers.] We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' Thornhill v. [State of] Alabama, 310 U.S. 88, 103, 104, 60 S.Ct. 736, 745, 84 L.Ed. 1093.

"It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law."

I note without extended comment other cases in which that power of the state has also been recognized, such as Bakery & Pastry Drivers & Helpers, etc., v. Wohl, 315 U.S. 769, 775, 62 S.Ct. 816, 819, 86 L.Ed. 1178: "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual," and 315 U.S. at page 776, 62 S.Ct. at page 819, "Picketing by an organized group is more than free speech"; Allen-Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154, upholding the board's order to desist from mass picketing and other acts, under the Wisconsin Employment Peace (unfair labor practices) Act, as (315 U.S. at page 751, 62 S.Ct. at page 826), "not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes"; Duplex Printing-Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196, recognizing the legislative power to declare the public policy in regard to restraints or combinations engaging in secondary boycott operations; Dorchy v. State of Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248, upholding a statute of Kansas making it unlawful to conspire to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of mining, and making it a felony for an officer of a labor union wilfully to use the power or influence of his office to induce another to violate the act.

In Thomas v. Collins, 323 U.S. 516, 529, 530, 65 S.Ct. 315, 322, 89 L.Ed. 430, relied on by the petitioner, it was said: "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * * For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." That case involved what the majority considered to be the bare right to make a public address, purportedly restricted by a statute prohibiting solicitation of union membership by a labor union organizer without first obtaining an organizer's card. The "present danger" test may be deemed appropriate to such a situation because no more than free speech or free assembly was involved. The present case, involving something more than mere speech, is therefore not ruled by that test but is governed by the considerations dwelt upon in the Ritter's Cafe and other similar cases. For, as likewise said in the Thomas v. Collins case, supra, 323 U.S. at pages 537, 538, 65 S.Ct. at page 326, "When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed"; and, as Justice Douglas concurring, 323 U.S. at pages 543, 544, 65 S.Ct. at page 329, said: "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses."

The statute in the present case does not cut off other practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. It cannot be overemphasized that the act speaks against combinations and agreements as therein defined, and does not purport to include the activities of organized labor by direct attack and primary boycott (cf. In re Bell, supra, 19 Cal.2d 488, 122 P.2d 22), against the employer with whom a dispute is in progress. Many anti-trust and similar laws attest the constitutional power of legislatures to protect the public from acts pursuant to combination, conspiracy or agreement, which otherwise would be deemed lawful. "The great preponderance of judicial authority holds that individual blameless acts may become illegal if done in combination." Teller, Labor Disputes and Collective Bargaining, Vol. 1, pp. 37, 38, and cases cited. Thus the means essential to the securing of an informed and educated public opinion with respect to a matter of public concern are preserved and safeguarded by other modes of communication than the declared unlawful agreements and combinations (cf. Thornhill v. State of Alabama, supra, 310 U.S. 88, at pages 103, 104, 60 S.Ct. 736, 84 L.Ed. 1093); nor does the act prohibit peaceful picketing as such (cf. Carlson v. People of State of California, supra, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; In re Bell, supra, 19 Cal.2d 488, 122 P.2d 22.

No one will deny that the right to carry on a business is a right to be protected under fundamental law. Duplex Printing-Press Co. v. Deering, supra, 254 U.S. 443, 465, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196; Truax v. Corrigan, 257 U.S. 312, 327, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375. It is a right equally entitled to recognition under the law as the right of a worker to decide when and where and for what wages he will labor, and to organize with other workers for the protection of mutual interests. Those rights are corelative in the sense that neither may be carried on unbridled and without giving some heed to their effect upon the participants and upon the welfare of the community. The community has a direct and vital interest in the matter. The general principles were stated by Justice Brandeis in his dissenting opinion in Truax v. Corrigan, supra (257 U.S. at pages 355 et seq., 42 S.Ct. at page 138) in the following language: "Practically every change in the law governing the relation of employer and employee must abridge, in some respect, the liberty or property of one of the parties —if liberty and property be measured by the standard of the law theretofore prevailing. If such changes are made by acts of the Legislature, we call the modification an exercise of the police power. And, although the change may involve interference with existing liberty and property of individuals, the statute will not be declared a violation of the due process clause, unless the court finds that the interference is arbitrary or unreasonable or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end. Nor will such changes in the law governing contests between employer and employee be held to be violative of the equal protection clause merely because the liberty or property of individuals in other relations to each other (for instance, as competitors in trade or as vendor and purchaser) would not under similar circumstances, be subject to like abridgement. Few laws are of universal application. It is of the nature of our law that it has dealt, not with man in general, but with him in relationships. * * * That the relation of employer and employee affords a constitutional basis for legislation applicable only to persons standing in that relation has been repeatedly held by this court. * * * Nearly all legislation involves a weighing of public needs as against private desires, and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion, concerning the evils and the remedy is among the important facts deserving consideration, particularly when the public conviction is both deep-seated and widespread and has been reached after deliberation. * * * The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law."

It should not be concluded that the state lacks the power to select for its citizens that one of the conflicting views regarding "secondary boycott" and "hot cargo" which the Legislature considers will best meet conditions and promote the public welfare. As said in Milk Wagon Drivers Union of Chicago, etc., v. Meadowmoor Dairies, 312 U.S. 287, 296, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200, "That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy. * * * (312 U.S. at page 299, 61 S.Ct. at page 556.) Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution."

The direction taken by the Legislature, within its power as in this case, is not a matter with which this court should interfere. The courts are not absolute architects of public policy. That function resides primarily in the Legislature, whose enactments the courts may not override except in cases of clear violation of constitutional guaranties.

The foregoing discussion demonstrates that the Legislature may constitutionally adopt "the prevailing, and probably unanimous, policy of the states" (Carpenters & Joiners Union, etc., v. Ritter's Cafe, supra, 315 U.S. 722, 728, 62 S.Ct. 807, 86 L. Ed. 1143) when it determines that economic conditions point to the desirability of such a policy. Facts relating to the prevailing economic and social conditions and the desirability of the change in state policy to safeguard the welfare of the state, were presented to and fully considered by the Legislature. That this is so appears from the language of section 2 of the act which reads: "This act is enacted for the purpose of preserving tranquility among the citizens of this commonwealth and to insure during this present critical period of National emergency and intensive armament the unobstructed production and distribution of the products of our factories and fields, for the continued protection and preservation of our democratic way of life and for the general welfare of the people of this State." Both houses of the Legislature were so convinced of the necessity for the change that they passed the act of 1941 over the Governor's veto. That the change in policy represented the will of the people of the state is demonstrated by the fact that the act was adopted by referendum vote at the November, 1942, general election, after extensive public debate on the subject. The act is therefore clearly expressive of both the legislative and the popular determination. It is within common knowledge that the stopping of businesses which furnish vital services and essential commodities is adverse to the public tranquility, health and welfare. It would be anomalous indeed to hold that the Legislature had no power to regulate such matters because a labor dispute was involved. The

Constitution does not freeze the use of economic weapons in industrial warfare beyond legislative control.

The act was in effect in accordance with its terms (section 1135) at the time of the events occurring herein and the commitment of the petitioner, and until the expiration of the declared emergency (which may be deemed to have been July 25, 1947, when the President of the United States officially declared the termination of the wars which gave rise to the measure), prior to which the Legislature repealed section 1135 limiting the duration of the act to the war emergency and made the rest of the act permanent (Stats.1947, p. ——, ch. 278, Sen.B. 342). By section 2 of the repealing act it was declared: "This act is enacted for the purpose of permanently preserving tranquility among the citizens of this State and to insure the unobstructed production and distribution of the products of our factories and fields, for the continued and permanent protection and preservation of our democratic way of life and the public peace, health, safety and general welfare of the people of this State."

According to the majority view, the California enactment and the restraining order issued pursuant thereto are "too sweeping, vague and uncertain," with the main reliance on In re Bell, supra, 19 Cal.2d 488, 122 P.2d 22. That case states familiar rules applicable to the consideration of criminal ordinances and statutes. Here we are not dealing with a criminal statute. There is no more difficulty in determining what conduct will be considered a wrong pursuant to the definitions contained in the statute (section 1134) than is experienced in other cases involving a private actionable wrong. Difference of opinion as to whether facts amount in law to a breach of the duty or a standard set up by a statute are not infrequent. (See, for example, Truax v. Corrigan, supra, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375, and Milk Wagon Drivers Union of Chicago, etc., v. Meadowmoor Dairies, supra, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200, holding that violence could not be made lawful by statute and showing that disagreement may ensue as to whether facts alleged amounted to violence; United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788, and Hunt v. Crumboch, 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954, where there was disagreement as to whether the undisputed conduct constituted a violation of the Sherman Anti-Trust Law, 15 U.S.C.A. §§ 1–7, 15 note, or came within the exception of section 20 of the Clayton Act, 29 U.S.C.A. § 52, as redefined by the Norris LaGuardia Act, 29 U.S.C.A. § 101 et seq.) The difficulty asserted in this case is not a proper ground for holding the act unconstitutional. The recent decision of the Supreme Court of the United States in United States v. Petrillo, 1947, 67 S.Ct. 1538, 1541, is especially noteworthy in this connection. The defendant in that case was charged with the violation of section 506 of the Communications Act of 1934, 48 Stats. 1064, 1102, as amended, 47 U.S.C.A. § 506, providing punishment by the imprisonment or fine of anyone who by the use of force, violence, intimidation or duress should coerce a licensee to employ persons "in excess of the number of employees needed" to perform actual services. One of the grounds of alleged unconstitutionality was that the act defined a crime in terms excessively vague. The court said:

"Clearer and more precise language might have been framed by Congress to express what is meant by 'number of employees needed.' But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

"The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. Robinson v. United States, 324 U.S. 282, 285, 286, 65 S.Ct. 666, 668, 669, 89 L.Ed. 944. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, 162 A.L.R. 1330; United States v. Ragen, 314 U.S. 513, 522, 524, 525, 62 S.Ct. 374, 377, 378, 379, 86 L.Ed. 383. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

It may be noted that by the enactment of the Labor Management Relations Act of 1947, Ch. 120, Public Law 101, 29 U.S.C.A. § 141 et seq. including amendment of the National Labor Relations Act, the Congress has declared "secondary boycott" operations by concerted action to be an unfair labor practice with provisions for civil remedies. That legislation is cast in language the same in substance and effect as section 1134 here under consideration.

As stated the statute here involved is not a criminal statute. It defines "hot cargo" and "secondary boycott" combinations and agreements in language which fits those operations as they are commonly practiced. As so defined they are declared to be actionable civil wrongs and enjoinable. In the present proceeding the trial court apparently experienced no difficulty in arriving at its findings that the petitioner with others had actually caused "employees of suppliers, customers and carriers of the plaintiff to cease performing services" for their employers; and had prevented such employers "from doing any business with plaintiff or purchasing any supplies from plaintiff or carrying, shipping or receiving any freight or merchandise to or from plaintiff and his place of business." The court's findings and order show a clear understanding of the legislative definitions. Likewise here, as in the Petrillo case, no one has suggested how the draftsmanship of those definitions might be improved. No contention is made that the petitioner's acts as found by the court were not clearly embraced within the language of the definitions. There is therefore no such difficulty with the language as would prevent the administration of the act in accord with the legislative and popular intent. That intent is to prevent activities of persons in concert and combinations from bringing coercion to bear upon employees to stop work in so far as it would interfere with the rights of neutrals, that is, those who are not directly involved in the particular labor dispute. By the act the Legislature has determined, regardless of the prior declared emergency, and notwithstanding prior judicial declarations, that the carrying on of "secondary" operations by "combinations" of individuals as defined in section 1134 is contrary to the public interest and unlawful. In my opinion it was within the constitutional power of the Legislature so to determine. The language of sections 1131 and 1134, the sections pertinent to the facts of this case, is certain and is readily understood. Those sections clearly and fully disclose the legislative intent and purpose to prohibit the activities which were enjoined, and there is therefore no reason at this time to resolve any question of severability arising under section 1136.

The writ should be discharged and the petitioner remanded.

81 Cal.App.2d 707

In re KLINKER'S ESTATE.

KLINKER et al. v. CITIZEN'S NAT. TRUST & SAVINGS BANK OF RIVERSIDE.

Civ. 3493.

District Court of Appeal, Fourth District, California.

Oct. 7, 1947.

Executors and administrators 🔑158

Evidence sustained finding that executor, which was given the right by will to sell stock at any time, was authorized to sell 1,300 shares of stock for $125,500 in order to pay claims against estate and expenses of administration, over objection that a sale of only part of shares would have provided sufficient money to close the estate or that necessary money could have been borrowed on the security of the stock.

◆

Appeal from Superior Court, San Bernardino County; Martin J. Coughlin, Judge.

Proceeding in the matter of the estate of Rex A. Klinker, deceased, wherein the Citizens National Trust & Savings Bank of Riverside, as executor, sought an order confirming the sale by it of stock belonging to the deceased's estate, and wherein Rodney Klinker, by his guardian, Elizabeth M. Klinker, and Elizabeth M. Klinker, contestants, opposed confirmation of the sale. From an order confirming the sale, the contestants appeal.

Order affirmed.

Novack & Haberkorn, of San Bernardino, for appellants.

Russell A. Wickizer and Surr & Hellyer, all of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order confirming the sale by the executor of this estate of 1300 shares of stock in a certain corporation for $125,500. After a hearing, the court found that it was necessary to sell said 1300 shares in order to pay claims against the estate and the expenses of administration. From that order the son and a former wife of the deceased have appealed.

While the findings of the court are not directly attacked, the appellants argue that the court was not justified in approving this sale because a sale of a part of the shares would have provided sufficient money for the purpose of closing the estate, because certain litigation was pending, and because it would have been possible to borrow the money needed by the estate upon the security of the stock which was sold. The appellants point to no evidence supporting these contentions, and to no lack of evidence in support of the court's findings. The will gave to the executor the right to sell this stock at any time, and if it can be said that any conflict exists the evidence is sufficient to support the findings and conclusions made by the court.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

* * *

81 Cal.App.2d 616

HENNESSY v. GLEASON et al.

Civ. 13595.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1947.

Hearing Denied Nov. 24, 1947.

1. Prohibition 🔑6(1)

Prohibition will not lie against a sheriff, who is a ministerial, not a judicial, officer. Code Civ.Proc. § 1102.

2. Prohibition 🔑13

Prohibition will not lie against superior court or judge thereof to prohibit further proceedings in unlawful detainer suit after rendition of such court's judgment for restitution of premises and damages and issuance of writ of possession, as there are no further judicial acts to be performed by respondents.

3. Action 🔑37

The district court of appeal will not deny petitioner for writ of prohibition any relief to which he is entitled because he has mistaken his remedy.

4. Certiorari 🔑17

Certiorari would be proper remedy, if superior court exceeded its jurisdiction in rendering judgment for restitution of leased premises to lessor and damages for tenant's wrongful detention thereof and issuing writ of possession against tenant after trial de novo on appeal from justice's court judgment for restoration of premises and damages.

5. Landlord and tenant 🔑291(1)

Where landlord notified month-to-month tenant to vacate leased room within month after service of notice, additional three-day notice to quit was not required before filing of unlawful detainer suit. Civ. Code, §§ 789, 791, 1946; Code Civ.Proc. § 1161, subd. 1.

6. Landlord and tenant 🔑278½
War 🔑4

A landlord's filing of notice of pendency of unlawful detainer action against month-to-month tenant of living room in hotel, rooming house or office building with OPA area rent office is not jurisdictional. Code Civ.Proc. § 1161, subd. 1; Emergency Price Control Act of 1942, § 1 et seq., as amended by Stabilization Extension Act of 1944, 50 U.S.C.A.Appendix, § 901 et seq.; Housing and Rent Act of 1947, § 209, 50 U.S.C.A.Appendix, § 1899.

7. Landlord and tenant 🔑288

The primary purpose of unlawful detainer action by landlord against tenant is to recover possession of leased property, and recovery of rent is mere incident to main object. Code Civ.Proc § 1161, subd. 1.

8. Costs 🔑230

The trial in superior court on appeals from justice's court judgment on law and fact questions is trial de novo, and costs must follow prevailing party on such trial.

9. Costs 🔑227

The costs rules on appeals from superior court and of appellate division of superior court on appeals from municipal court are not applicable in awarding costs on appeal to superior court from justice's court judgment for plaintiff in landlord's unlawful detainer suit, as there is no trial de novo on appeal from superior court or to appellate division thereof. Code Civ.Proc. § 1161, subd. 1; Rules on Appeal, rule 26(a).

10. Costs 🔑228

In absence of express rule as to costs on appeal to superior court from justice's court judgment for plaintiff in landlord's unlawful detainer suit, costs must be awarded under statute applicable to other cases tried in superior court. Code Civ.Proc. § 1032; § 1161, subd. 1.

11. Costs 🔑230

The superior court, on rendering judgment for restitution of leased premises to landlord by tenant after trial de novo on appeal from justice's court judgment for such restitution in landlord's unlawful detainer suit, properly awarded costs to landlord, though superior court awarded him smaller amount of damages than that awarded by justice's court for wrongful detention of premises. Code Civ.Proc. § 1032; § 1161, subd. 1.

12. Landlord and tenant 🔑291(14)

Error, if any, in superior court's award of damages in landlord's unlawful detainer suit for time including period before giving of landlord's notice to vacate, was not jurisdictional. Code Civ.Proc. § 1161, subd. 1.

13. Courts 🔑2

The fact that complaint may be demurrable does not deprive court of jurisdiction of action.

14. Landlord and tenant 🔑278½
War 🔑4

In landlord's unlawful detainer suit, where no demurrer was filed to complaint alleging that plaintiff served on defendant tenant written notice that plaintiff sought in good faith not to offer leased room for rent, defendant answered and contended at trials in both justice and superior court that plaintiff did not so seek in good faith, proof was made on such issue, and court found in plaintiff's favor, failure of complaint to allege such fact positively did not deprive court of jurisdiction. Code Civ.Proc. § 1161, subd. 1; Emergency Price Control Act of 1942, § 1 et seq., as amended by Stabilization Extension Act of 1944, 50 U.S.C.A.Appendix, § 901 et seq.; Housing and Rent Act of 1947, § 209, 50 U.S.C.A.Appendix, § 1899.

◆

Proceeding by John Hennessy for a writ of prohibition to prohibit H. P. Gleason, sheriff of the County of Alameda, from executing a writ of possession for restoration of a rented room to petitioner's lessor, P. W. Harms, and to prohibit the Superior Court in and for such county and Leon E. Gray, judge thereof, from proceeding further in lessor's unlawful detainer suit against petitioner, or for a writ of certiorari.

Alternative writ of prohibition discharged, and petition for peremptory writ of prohibition or writ of certiorari denied.

F. H. Dam, of San Francisco, for petitioner.

Nathan G. Gray, of Berkeley, for Superior Court.

Ralph E. Hoyt, Dist. Atty., County of Alameda, for Sheriff.

Richard H. Chamberlain, Chief Asst. Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and Richard H. Klippert, Asst. Dist. Atty., all of Oakland, for respondent.

BRAY, Justice.

P. W. Harms, plaintiff in the original action, owns an office building in Berkeley. For some time he has rented rooms on the second and third floors for living quarters. Petitioner for several years past was a month-to-month tenant of room 22, which he used for living and sleeping purposes. About December 30, 1946, plaintiff received a letter from the city manager of Berkeley stating that plaintiff was operating a hotel in violation of state and local laws, and ordering him immediately to "vacate the second and third floors of the entire * * * building for any living or sleeping purposes." Thereafter plaintiff caused a notice to vacate to be served upon petitioner, and upon his failure to do so, filed suit in unlawful detainer in the justice's court of the city of Berkeley. That court, after a trial, rendered judgment against petitioner for restoration of the premises and damages in the sum of $88.40. Petitioner thereupon appealed to the superior court on questions of both law and fact. There, after a trial de novo, the superior court rendered its judgment for restitution of the premises, for damages in the sum of $60, and for $18.50 costs, and ordered a writ of possession to issue directed to the sheriff of the county of Alameda.

Thereupon, petitioner applied to this court for a writ of prohibition to prohibit the respondent sheriff from executing said writ, and the respondent court from proceeding further in the matter, and has asked this court, in case petitioner has mistaken his remedy, to grant such relief as may be proper.

His contention is that the judgment of the superior court is void because it exceeded its jurisdiction, for the following alleged reasons:

1. No three-day notice to quit was given defendant before suit filed.

2. No proof of compliance by plaintiff with federal statutes and regulations.

3. The court awarded costs to plaintiff instead of to petitioner.

4. Excessive damages granted.

5. Complaint did not state cause of action.

All respondents have filed general demurrers to the petition. The respondent sheriff also answered.

[1-4] Petitioner, on argument, concedes that prohibition will not lie against the sheriff as he is a ministerial and not a judicial officer (23 Cal.Jur. 294, sec. 7; Sec. 1102, Code Civ.Proc.; Hobart v. Tillson, 66 Cal. 210, 5 P. 83), or against the superior court or the judge thereof as the court and judge have already acted and there are no further judicial acts to be performed. Big Jim Mines, Inc., v. Superior Court, 9 Cal.2d 503, 71 P.2d 67; Duke v. Justice's Court, 42 Cal.App.2d 178, 108 P.2d 707. However, if he is entitled to any relief, this

court will not deny it to him because he has mistaken his remedy. Certiorari would be the proper remedy, if the superior court, in its trial de novo, exceeded its jurisdiction. (Redlands etc. School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490.) An examination of the points raised by petitioner shows that the court did not exceed its jurisdiction.

1. No Three-Day Notice Required.

[5] It is conceded that no notice to the tenant was given other than the 30-day notice heretofore mentioned. Assuming, but expressly not deciding, that if a three-day notice was required, the failure to give such notice would be jurisdictional in the sense required here, we find no requirement for such notice. The notice given by plaintiff to defendant notified the latter that the plaintiff sought in good faith not to offer the premises for rent again for living or sleeping purposes, and notified the defendant to vacate within one month from service of the notice. It further called attention to the letter of the Berkeley city manager, a copy of which was annexed. While the form of the notice might be improved upon, it obviously was a notice terminating the month-to-month tenancy which had theretofore existed. As said in La Cava v. Breedlove, 77 Cal.App.2d 129, 132, 174 P.2d 880: "Appellants' contention that the trial court was without jurisdiction to try the instant case because no three-day notice to quit the premises had ever been served upon defendants is without merit and has been satisfactorily answered in Palmer v. Zeis, 1944, 65 Cal.App.2d Supp. 859, 151 P.2d 323. Section 791 of the Civil Code provides that no three-day notice is necessary 'where the hiring of real property is for a term not specified by the parties and where such hiring was terminated under and in accordance with the provisions of section 1946 of the Civil Code.' This latter section provides that unless the rental agreement itself provides for a shorter notice period, a month to month tenancy may be terminated by a month's notice. Thereafter, an unlawful detainer action may be maintained under subdivision (1) of section 1161, Code of Civil Procedure without the necessity of first serving an additional three-day notice. (Palmer v. Zeis, supra.)"

Petitioner has cited Martin v. Splivalo, 56 Cal. 128; Wagner v. Havard, 87 Cal.App. 310, 262 P. 47, and Ivory v. Brown, 137 Cal. 603, 70 P. 657, as requiring the three-day notice to be given. All of these cases, however, were decided prior to the amendment of section 791 of the Civil Code in 1931, eliminating this requirement. The Martin and Wagner cases were specifically referred to in Palmer v. Zeis, 65 Cal.App.2d Supp. 859, 151 P.2d 323, as being decided prior to the amendment. Colyear v. Tobriner, 7 Cal.2d 735, 62 P.2d 741, 109 A.L.R. 191, and Dorn v. Oppenheim, 45 Cal.App. 312, 187 P. 462, are quoted as holding that a notice to vacate under section 789 of the Civil Code is different from a notice terminating tenancy under section 1946 of the Civil Code. Whether the notice given here comes under either or both of these sections, there is no requirement of an additional three-day notice.

[6] 2. No Proof of Compliance with Federal Statutes and Regulations.

Petitioner states that the applicable statutes are Emergency Price Control Act of 1942, 56 U.S.Stats. 23, Stabilization Extension Act of 1944, 58 U.S.Stats. 632, 50 U.S.C.A.Appendix, § 901 et seq. Public Law 129, 80th Congress, Chap. 163, 1st Session H.R. 3203, sec. 209, 50 U.S.C.A.Appendix, § 1899. Petitioner points to no requirement of the statutes with which plaintiff should have complied. However, on argument he contended that certain regulations of the OPA concerning housing would apply. But the premises involved here do not come within the term "housing." The OPA regulations that apply are those set forth in section 1388.1231, Rent Regulation for Hotels, Rooming Houses Under subsection 6 (a) 5 of this regulation, a landlord may remove a tenant of a hotel or rooming house if the landlord "seeks in good faith not to offer the room for rent" for living purposes. In such case the only notice required by the regulations to be given is provided in subsection 6 (c), "*At the time of commencing any action to remove or evict a tenant* * * * the landlord shall give written notice thereof to the Area Rent Office stating the title and number of the case, the court in which it is filed, the name and address of the tenant and the grounds on which eviction is sought." (Emphasis added.) Admittedly this notice was not given.

Subsection 13, subdivision 14, states that a rooming house includes a building or portion thereof, other than a hotel, in which a furnished room or rooms not constituting an apartment are rented on a short time basis of daily, weekly, or monthly occupancy to more than two tenants not members of the landlord's immediate family. A hotel is defined in subdivision 13 as "any establishment generally recognized as such in its community, containing more than 50 rooms and used predominantly for transient occupancy." The court by its judgment impliedly found that the premises involved here came within the designation of rooming house, as plaintiff's testimony shows he did not operate a hotel.

Plaintiff set forth in his notice, in his complaint (although perhaps imperfectly as discussed hereafter), proved at the trial and the court found, that plaintiff in good faith sought not to offer the room again for living purposes.

At argument, counsel for petitioner made some contention that the premises came neither within the designation of housing, hotel or rooming house, but was an office building. Of course there are no OPA regulations applying to office buildings.

The only matter of any seriousness on this point is whether the failure to give the Area Rent Office a notice of the pendency of this action as required by subsection 6(c) was jurisdictional. It could not be jurisdictional as to the filing of the action, for its language "At the time of commencing any action" and its requirement that the notice give the title and number of the case precludes any possibility of such notice being a prerequisite to the filing of the suit. Petitioner has cited no case holding that the failure to give a notice of this type, which is not prerequisite to the filing of the action, is jurisdictional. Bauer v. Neuzil, 66 Cal.App.2d Supp. 1020, 152 P.2d 47, holds that to state a cause of action for the eviction of a tenant from a *dwelling* compliance with the rent regulations for housing must be alleged. But, as pointed out above, no such requirement exists, nor could exist in connection with a notice to be given after the complaint is filed.

The regulations provide no penalty for failing to give the notice of pendency of the action, nor do they provide for any action that can be taken by the OPA on receiving such notice. It is obvious that such notice cannot be jurisdictional in a proceeding of this character. At most, it is of the type of requirement which was held in Redlands etc. School Dist. v. Superior Court, supra, 20 Cal.2d 348, 125 P.2d 490, as not being restrictive of the power of the courts. In the Redlands case the plaintiff in an action against a school district for damages for personal injuries received by pupil while playing a game under the direction of the teacher, failed to file the claim required by section 2.801 of the School Code. It was there contended that on certiorari it should be held that the filing of the claim was a jurisdictional prerequisite to the commencement or maintenance of the action. The court said 20 Cal.2d at page 360, 125 P.2d at page 496: "The requirements of section 2.801 of the School Code, however, cannot be brought within the doctrine of those cases involving statutes which restrict the power of the courts. Under the provisions of that section, liability on the part of the school district (that is, the waiver of sovereign immunity) is made dependent upon the filing of a claim within ninety days. That requirement, however, is one which goes to the elements of the plaintiff's right to recover rather than to the power of the court. Judgment in favor of the plaintiff in the absence of such a claim is a grievous error of law and a violation of statute. But not every violation of a statute constitutes excess of jurisdiction on the part of a court. The doctrine relied upon by petitioners applies only where the clear purpose of the statute is to restrict or limit the power of the court to act and where the effective enforcement of such restrictions requires the use of the extraordinary writs of certiorari or prohibition. Where, as here, the statute does not restrict the power of the court but merely sets up a condition precedent to the establishment of the plaintiff's cause of action, we think the violation of the statutory provision constitutes an error of law rather than excess of jurisdiction. Cf. Karry v. Superior Court, 162 Cal. 281, 284, 122 P. 475, 128 P. 760; Estrin v. Superior Court, 14 Cal.2d 670, 674, 96 P.2d 340."

Certainly, if a statutory requirement of this character is not jurisdictional, a requirement of notice of the pendency of the action, after it is filed, cannot be jurisdictional.

There is nothing in Lord v. Superior Court, 27 Cal.2d 855, 168 P.2d 14; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A. L.R. 715, or Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, cited by petitioner, on the general principle that "acts which exceed the defined power of a court * * * are in excess of jurisdiction" that holds that a notice of this character is jurisdictional.

3. No Error in Awarding Costs to Plaintiff.

[7-11] **Petitioner** contends that he should have been awarded costs instead of plaintiff, because, he claims, he was the prevailing party on appeal. This claim is based on the fact that the superior court awarded damages in the sum of $60 while the justice's court had awarded them in the sum of $88.40. Plaintiff prevailed in the unlawful detainer part of the judgment, and as said in Markham v. Fralick, 2 Cal.2d 221, 227, 39 P.2d 804, 807, "The primary purpose of such an action is for the recovery of the possession of the property. The recovery of rent is a mere incident to the main object." Moverover, the trial in the superior court on appeals on questions of law and fact is a trial de novo, and costs must necessarily follow the prevailing party on that trial. Petitioner cites Rule 26 (a), Rules on Appeal, which, of course, applies only to appeals from, and not to, the superior court. He also cites the costs rule of the appellate division of the superior court on appeals from the municipal court. Neither of these rules apply, nor are they analogous, for the reason that on none of the appeals to which they refer is there a trial de novo. There is no express rule upon the subject, and in the absence of such, costs must necessarily be awarded under section 1032, Code of Civil Procedure, as in other cases tried in the superior court. It becomes unnecessary to determine whether any error in allowing costs would be jurisdictional, as there was no error.

4. Amount of Damages Awarded Not Jurisdictional.

[12] On argument, petitioner contended that the damages awarded by the superior court were improper in amount because some portion of them covered a period prior to the giving of the notice to vacate. It is unnecessary to consider the correctness of that claim, for, if true, such an error would not be jurisdictional. The court had the power to consider and award damages, and an error in the amount would come within the holding in Rio Grande Oil Co. v. Superior Court, 86 Cal.App. 187, 260 P. 557, where the court said: "If the superior court was wrong in its judgment, this was nothing other than an error committed within the exercise of its jurisdiction * * *."

[13, 14] On argument petitioner raised one other point: that the complaint failed to allege positively that plaintiff seeks in good faith not to offer the room for rent (the exception under the OPA regulations which permits a landlord to remove a tenant). The complaint alleged that the plaintiff had served upon defendant a written notice that he seeks in good faith not to offer said room for rent. The complaint is not a model of pleading on this point, but because a complaint might be demurrable does not deprive the court of jurisdiction. No demurrer was filed to the complaint, the defendant answered, and the case was tried, and one of the contentions made by petitioner at both trials was that plaintiff did not seek in good faith not to offer the room for rent. On this issue proof was made, and the court found in favor of plaintiff. It appears on the face of the complaint that plaintiff was contending for this proposition, and it would be absurd to hold that the imperfection in the pleading deprived the court of jurisdiction.

The demurrers of all respondents should have been sustained, as the petition, even as amplified by the additional objections made on argument, does not state facts showing a lack of jurisdiction in the superior court, and hence shows no cause for the issuance of a writ of prohibition or any other extraordinary writ.

The alternative writ of prohibition is discharged; the petition for a peremptory writ of prohibition or writ of certiorari is denied.

PETERS, P. J., and WARD, J., concur.

81 Cal.App.2d 647

HELVEY v. UNITED STATES BUILDING & LOAN ASS'N OF LOS ANGELES.

Civ. 15875.

District Court of Appeal, Second District, Division 2, California.
Sept. 30, 1947.

1. Building and loan associations 🔑42

The appointment of receiver for solvent building and loan association on ground of mismanagement, manipulation and embezzlement of funds by director, suspended association's right to do business during period of receivership, but did not terminate association's corporate existence, and on dissolution of receivership proceedings and discharge of receiver, association's right to transact business was reinstated in absence of prohibitory order.

2. Building and loan associations 🔑42

A solvent building and loan association for which receiver was appointed on ground of mismanagement, manipulation and embezzlement of funds by director could resume or continue business on dissolution of receivership proceedings without obtaining authority from building and loan commissioner who was not a party to proceeding and made no claim to association's assets and did not take steps to liquidate or wind up association's business and took no proceedings under Building and Loan Law. Gen.Laws, Act 986.

3. Corporations 🔑560(7)

A corporation for which a receiver has been appointed cannot be sued without consent of the court which appointed receiver.

4. Receivers 🔑204

Where plaintiff suing building and loan association to quiet title to judgments abandoned by association's receiver appointed by federal court did not join receiver as defendant, and case was tried without reference to receivership except allegation of receiver's appointment and his abandonment of judgments, and no claim was made that receivership was still in force, and no federal court order consenting to suit against receiver was alleged to have been made, presumption was that receiver had been discharged and that association was not in custody of federal court, in view of rule that corporation for which receiver has been appointed cannot be sued without consent of appointing court.

5. Evidence 🔑265(7)

A plaintiff suing building and loan association to quiet title to judgments abandoned by association's receiver without joining receiver as defendant, and without claiming that receivership was still in force and without asserting that court appointing receiver consented to the suit, admitted legal capacity of association, in view of rule that corporation for which receiver has been appointed cannot be sued without consent of appointing court.

6. Building and loan associations 🔑42(7)

A plaintiff claiming ownership of judgments abandoned by building and loan association receiver at direction of federal court appointing receiver did not thereby become owner of judgments, but title to judgments reverted to association.

7. Bankruptcy 🔑150
Receivers 🔑67

Assets abandoned by trustee or receiver are left as though trustee or receiver had never owned or claimed them and title stands as if no assignment had been made insofar as abandoner is concerned.

8. Gifts ⚷24

Where a gift is unaccepted or rejected, title is left as though gift had not been made.

9. Bankruptcy ⚷150

Upon abandonment of assets by a trustee in bankruptcy by leave of court, the title reverts to and remains in bankrupt, who can reassert ownership of such assets.

10. Bankruptcy ⚷118, 150
Corporations ⚷560(1, 4)
Receivers ⚷67, 81

A receiver or trustee appointed by court is officer of court subject to court's direction, and he takes charge of assets in order to preserve them for benefit of creditors of individual and of creditors and stockholders if the party be a corporation, and he can determine whether assets are so burdensome or of so little value as to render administration of them unprofitable, and if he so determines, court may upon his petition authorize abandonment of worthless property.

11. Waters and water courses ⚷151

Abandoned water rights may be claimed by other persons who are so situated as to use the water.

12. Mines and minerals ⚷24

An abandoned mining claim returns to the public domain.

13. Mines and minerals ⚷24
Waters and water courses ⚷151

Abandonment of water rights or mining claims is accomplished by affirmative acts of claimer or user without his failure to make use of that which he has claimed, when such abandonment leaves the property as though he had never owned or occupied it and it is subject to appropriation by any other person who desires to use it in the manner provided by law.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action to quiet title to abandoned judgments by A. C. Helvey against United States Building & Loan Association of Los Angeles, a corporation. From a judgment the plaintiff appeals.

Affirmed.

William M. Taylor, of Beverly Hills, for appellant.

No appearance for respondent.

WILSON, Justice.

From a judgment in favor of defendant plaintiff has appealed.

Defendant is a building and loan association organized under the laws of the State of California. In an action brought against it in the United States District Court a receiver of all property and assets of defendant was appointed. During the course of the administration of the receivership proceedings the receiver, by authority and direction of the federal court, abandoned the judgments that are the subject of this action. Plaintiff claimed title to the abandoned judgments and brought this action to quiet title to them.

The court found the facts as above stated and as conclusions of law found that upon the abandonment of the judgments title revested in defendant association; that the judgments were not abandoned insofar as the association is concerned; that the judgments did not become publici juris and were not subject to ownership by the first claimant.

[1] The action in the federal court was brought by a creditor of the association, as stated in the brief and which we take to be true, "because of its mismanagement, manipulation and the embezzlement of its funds" by a director of the association. It does not appear from the record before us that the association was insolvent. The appointment of the receiver in the action did not dissolve the corporation. Its right to do business was suspended during the period of receivership but its corporate existence was not terminated. Upon the dissolution of the receivership proceedings and the discharge of the receiver the corporation's right to transact business was reinstated in the absence of a prohibitory order. The record does not show and

appellant does not assert in his brief that such an order was made.

[2] It does not appear that the Building and Loan Commissioner of California was a party to the proceedings, and as far as the record shows he made no claim to any of the assets of the corporation and took no steps to liquidate it or to wind up its business. Consequently no proceedings having been taken under the building and loan act of the state, Gen.Laws, Act 986, and the building and loan commissioner having made no claim to the assets, it was not necessary to obtain authority from the commissioner in order to permit defendant association to resume or to continue its business.

[3-5] Plaintiff has sued the corporation without joining the receiver as a defendant. The corporation filed its verified answer and the case was tried without reference to the receivership except the allegation of his appointment and his abandonment of the judgments described in the pleadings. Since a corporation for which a receiver has been appointed cannot be sued without the consent of the court which appointed him and no such order is alleged to have been made, and since there is no claim that the receivership is still in force, it is presumed that the receiver has been discharged and that defendant corporation is no longer in the custody of the federal court. By instituting the action in this form plaintiff has admitted the legal capacity of defendant.

[6-8] Plaintiff's assertion that by his claim of ownership to the abandoned assets he became the owner of the judgments is without merit. When assets have been abandoned by a trustee or a receiver the property, insofar as the abandoner is concerned, is left as though he had never owned or claimed it and the "title stands as if no assignment had been made." The situation presented here is analogous to an unaccepted or a rejected gift—the title is left as though the gift had not been made. Brown v. O'Keefe, 300 U.S. 598, 602, 57 S.Ct. 543, 81 L.Ed. 827, 832; In re Webb, 4 Cir., 54 F.2d 1065; In re Moss, D.C., 21 F.Supp. 1019.

[9] Upon abandonment of assets by a trustee in bankruptcy by leave of court the title reverts to and remains in the bankrupt. He is entitled to reassert ownership of such assets. In re Ferribee, 7 Cir., 93 F.2d 262, 264; In re Moss, supra; Givens v. Louisville Property Co.'s Assignee, 258 Ky. 740, 81 S.W.2d 401, 402; Cripple Creek State Bank v. Russell, 74 Colo. 111, 219 P. 212, 213; In re Wattley, 2 Cir., 62 F.2d 828, 829; In re Webb, supra; Leach v. Bank of Vollmer, 47 Idaho 263, 274 P. 627, 628; Metz v. Emery, 110 Kan. 405, 204 P. 734, 735; Abo Land Co. v. Tenorio, 26 N.M. 258, 191 P. 141, 142; Kobrin v. Drazin, 97 N.J.Eq. 400, 128 A. 796.

[10] No cases have been furnished to us in which a receiver was appointed but the result would be the same as in the cases involving a trustee in bankruptcy. Whether it be a receiver or a trustee he is appointed by the court, he is an officer of the court subject to the court's direction, and he takes charge of the assets of the defendant or of the bankrupt, as the case may be, in order to preserve them for the benefit of the creditors of an individual and of the creditors and stockholders if the party be a corporation. Either a receiver or a trustee has the right to determine whether the assets are so burdensome or of such little value as to render the administration of the same unprofitable, and if he so determines the court may upon his petition authorize the abandonment of the worthless property.

When the federal court authorized its receiver to abandon the judgments described in the pleadings and he did abandon them, title reverted to defendant association and the claim of an interloper amounted to exactly nothing.

[11-13] The cases cited involving the abandonment of water rights by one who had been the user of the water and the abandonment of mining claims are obviously not in point. When water rights have been abandoned they may be claimed by other persons who are so situated as to use the water, and when a mining claim has been abandoned it returns to the public domain. In such cases the abandon-

ment is accomplished by the affirmative acts of the claimant or user or by his failure to make use of that which he has claimed. Such abandonment leaves the property as though he had never owned or occupied it and it is subject to appropriation by any other person who desires to use it in the manner provided by law. There is no contention in this action that defendant association itself ever abandoned the judgments or did any act indicating its intention to abandon or any act from which it may be inferred that it did not assert ownership immediately upon the procurement by the receiver of the order permitting him to abandon them as burdensome and valueless property.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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81 Cal.App.2d 564

In re REILLY'S ESTATE.

Civ. 13099.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1947.

1. Executors and administrators 🔑314(11)

Where, over two months after rendition of decree of final distribution which denied a motion by deceased's heir for disapproval of heir's assignment, probate court signed and filed what was purported to be its findings that sole consideration for assignment was assignee's time, effort, and expense in investigating and procuring proof of relationship of heir to deceased and information conveyed to heir by assignee, findings, even if sustained by evidence, could not lend any support to final judgment of distribution previously entered.

2. Attorney and client 🔑11, 136
Contracts 🔑108(2)

A non-lawyer's activities in soliciting decedent's heir for authorization to appear in administration proceeding and employing counsel to represent heir under power of attorney or assignment providing for payment of all expenses, including attorney's fees and court costs for agreed compensation of percentage of heir's distributive share, amounted to commercial exploitation of legal profession contrary to public policy and constituted unlawful "practice of law", so that assignment and power of attorney under which non-lawyer claimed such compensation were void. Code Civ.Proc. § 2009; Probate Code, § 1020.1.

See Words and Phrases, Permanent Edition, for all other definitions of "Practice of Law".

3. Executors and administrators 🔑314(12)

An assignee of heir's portion of distributive share under void assignment was precluded from claiming that affidavits were improperly used in support of motion to disapprove the assignment where assignee made no objection to their use in evidence, especially where invalidity of assignment appeared from its face and did not depend upon matters recited in affidavits.

4. Executors and administrators 🔑314(12)

Appeal was properly taken from portions of decree of final distribution complained of and not from order denying a motion to disapprove heir's assignment of portion of distributive share. Probate Code, § 1020.1.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Patrick Reilly, also called Patrick J. Reilly, also called Patrick Joseph Reilly, also called P. J. Reilly, deceased. From the portion of a decree of final distribution which approved an assignment made by Margaret Harnett in favor of Walter C. Cox, Margaret Harnett appeals.

Reversed with directions.

John B. Ehlen, of San Francisco, for appellant.

Elkins & Wright, of San Francisco, for respondent.

OGDEN, Justice pro tem.

This is an appeal by one of the heirs of decedent from those portions of the decree of final distribution which approve an assignment made by her in favor of Walter C. Cox, the respondent, of fifteen per cent of her interest in the estate, and distribute the assigned percentage directly to him.

Patrick Reilly died intestate in San Francisco on January 13, 1943. A petition for letters of administration was filed by the Public Administrator on January 18, 1943, the petition reciting that the names and places of residence of the heirs were unknown. On February 5, 1943, in Ireland, the appellant, a sister of decedent, executed the power of attorney and assignment under consideration. Both documents are on printed forms apparently prepared by respondent and, although executed by appellant alone, use the plural pronoun. The power of attorney appoints respondent her attorney in fact to represent appellant "in all proceedings whatsoever in the matter of the estate * * * to do and perform * * * any and all acts and things whatsoever that our said attorney in fact may deem necessary, convenient or proper for our interests; and particularly to ask, sue for, demand, collect, receive and receipt for all * * * distributive shares * * *; to petition for letters of administration or letters testamentary, to recognize, defend or contest wills, codicils and gifts * * *; to compromise and make adjustments and settlements with other claimants to said estate * * * before or after the commencement of legal proceedings, upon such terms as our said attorney in fact may deem best; * * * to institute, prosecute or defend suits and proceedings in law, equity or in probate, in any court or courts, to enter our and each of our appearances therein; to waive issuance or accept service for us and each or any of us of any summons, notice, citation or other process of any nature whatsoever in any proceedings * * *; to consent to all court orders and to the approval by any court of any and all accounts, including final accounts, to sign our and each of our names to any and all statements, pleadings, complaints, bonds, appeal bonds, and any and all other documents and papers incident to such suits and proceedings and to the prosecution or defense thereof * * *." The concluding paragraph provides that it shall be irrevocable; that "this power of attorney having been executed in connection with contract for services of the said Walter C. Cox and there being valuable consideration for such contract, and for the execution and delivery to the said Walter C. Cox of this power of attorney, and a beneficial interest in said estate and the assets thereof or other property having been assigned to the said Walter C. Cox * * *."

The "Agreement and Assignment" refers to the foregoing power of attorney and provides that Cox "shall personally pay any and all expenses incident to the doing of the things he is authorized to do by said power of attorney, including attorneys' fees and Court costs." It recites that the assignment is "in consideration of, and as full compensation for all services rendered and to be rendered by the said Walter C. Cox and in consideration of the information conveyed to us regarding this estate by him * * *."

Subsequently, on April 30, 1943, appellant executed another power of attorney in favor of Matthew Murphy, the Consul of Ireland at San Francisco, appointing the latter her attorney in fact in all matters affecting the estate and revoking any prior power of attorney executed by her. On May 20, 1943, the legal firm of Elkins & Wright, which represents respondent in this appeal, filed notice of appearance and request for special notice of proceedings in behalf of appellant. On November 20, 1944, appellant, after notice to respondent and by other counsel, the same who represent her in this appeal, moved the probate court for an order disapproving the assignment to respondent and for distribution of her full distributive share to her in disregard thereof. This motion was supported by the affidavit of Matthew Murphy to the effect that respondent is engaged in the heir hunting business with his principal place of business in Chicago, Illinois; that he is not an attorney at law; that, through his agents in Ireland, he solicited the power of attorney from appellant there and that he acted as a middleman between appellant and the legal firm of Elkins & Wright. Upon the hearing of the motion it was stipulated that respondent is not an attorney a law. A counter affidavit by Leo A. Elkins, Esq., was filed denying that respondent acted as an intermediary and admitting that respondent's principal business is in locating missing heirs to estates and missing persons.

Appellant's motion was denied and the decree of final distribution was rendered approving the assignment and distributing the assigned percentage of appellant's distributive share directly to respondent. The decree recites that the fees, charges and consideration for the assignment are reasonable; that it was fair, just and valid and not obtained by duress, fraud or undue influence, and that it is approved.

In Estate of Butler, 29 Cal.2d 644, 177 P.2d 16, the Supreme Court considered a power of attorney and assignment apparently identical in form and language, in favor of this same respondent. In that case the court, through Justice Spence, characterized the conduct of this respondent as being the commercial exploitation of the legal profession and the unlawful practice of the law. The assignment was held to be void and the probate court was directed to distribute to the heirs in disregard of the assignment, the court saying (29 Cal.2d at pages 647, 652, 177 P.2d at pages 18, 20): "The invalidity of respondent's claim stems from the nature of the agreements which he solicited from appellants, which agreements are typical of those used in his general practice of soliciting beneficiaries of decedents' estates. * * * Our decision is necessarily confined to the particular facts presented here, which admittedly show agreements for compensation and accompanying powers of attorney, obtained by an unlicensed person, under which he undertook to furnish legal services for his principals and to pay out of his agreed compensation 'any and all expenses incident to the doing of the things he is authorized to do by said power of attorney, including attorneys' fees and court costs.' Such is the nature of the undertakings which are here condemned as constituting the unlawful practice of the law and as contrary to the public policy of this state."

[1, 2] The Estate of Butler, supra, is obviously determinative of this appeal unless, as respondent contends, it can be distinguished therefrom. We do not see how it can be. No difference in the assignment and the power of attorney is suggested or appears, and we find no material distinction in the factual situations involved; on the contrary we do find a striking similarity. Respondent, however, contends that the instant case contains four important and distinct features which distinguish it from the Butler case.

He contends that appellant here was a lost or missing heir as distinguished from the heirs involved in the Butler case. This statement is based solely upon the recital contained in the petition for letters of administration that the names and places of residence of the heirs were unknown, a recital not only far short of one that they were lost or missing, but also far short of being competent evidence of even the fact stated. If appellant's discovery or whereabouts presented any problem of research, respondent had ample opportunity to present that fact to the probate court. That she was located in Ireland within eighteen days after the filing of the petition for letters of administration gives rise to an inference to the contrary.

Secondly, respondent asserts that there is no evidence that he employed counsel to represent appellant. The affidavit of Leo A. Elkins, Esq., fails to refute the fair inference of his being so employed, but, rather, we think significantly, merely denies that respondent is in the employ of that legal firm, a denial of something not even suggested. The first two asserted points of distinction are not only not supported by the record, but, even if so supported, present no basis for distinguishing this from the cited case.

Thirdly, respondent refers to written findings of fact and conclusions of law signed and filed by the probate court in connection with its order denying the motion of appellant for disapproval and disregard of the assignment. Over two months after the rendition of the decree of final distribution the probate court signed and filed what is purported to be its findings that the sole consideration for the assignment was respondent's time, effort and expense in investigating and procuring proof of relationship of appellant, and the information conveyed to her by respondent. Even if such findings were sustained by the evidence, and they are not, they could not lend any support to the final judgment of distribution previously made and entered.

The final point of distinction urged is that respondent was not promptly notified of the revocation of his power of attorney. He does not point out, and we can not understand, how an assignment and power of attorney, void because contrary to public policy, could gain validity because of delay in notification of their revocation. Moreover, the record does not disclose when such notification was first given and no suggestion of prejudice by reason of any such delay is made.

As he did in Estate of Butler, supra, respondent again urges the applicability of Estate of Cohen, 66 Cal.App.2d 450, 152 P.2d 485. There is no need for us to here point out the distinction between that case and this as that has been fully and adequately done in Estate of Butler, supra. There being no material distinction between the situation presented in this case and that in Estate of Butler, supra, that case is determinative here and the assignment in the present case must, as was its counterpart in that case, held to be void as contrary to public policy and not entitled to be respected in the decree of distribution.

Respondent urges that he should be allowed recovery, even under a void assignment, for services actually rendered. There is, however, no occasion for us in this case to decide whether section 1020.1 of the Probate Code authorizes the probate court, in disapproving an assignment invalid for reasons applicable here, to allow compensation for services actually and beneficially rendered in locating and bringing information to the heirs. The record before us is significantly silent as to any such service rendered by respondent. If respondent rendered any beneficial service to appellant he did not divulge it to the probate court. The only inference that can be deduced from the record is that he did not.

[3] His contention that affidavits were not properly used in support of the motion to disapprove of the assignment does not require serious consideration here. The record discloses that he made no objection to their use in evidence, a use in which he, himself, participated. The cases cited by him, Lacrabere v. Wise, 141 Cal. 554, 75 P. 185; Estate of Paulsen, 35 Cal.App. 654, 170 P. 855; People v. Thompson, 5 Cal.App.2d 655, 43 P.2d 600 and Oil Tool Exchange, Inc., v. Hasson, 4 Cal.App.2d 544, 41 P.2d 211, are not necessarily authority for the proposition that such a motion is not one upon which the use of affidavits is expressly authorized by section 2009 of the Code of Civil Procedure. Moreover, the invalidity of the power of attorney and assignment appears upon their face and does not depend upon any of the matters recited in the affidavits.

[4] This appeal was properly taken from the portions of the decree of final distribution complained of and not the order denying the motion to disapprove of the assignment. Estate of Butler, supra.

Those portions of the decree of final distribution which approve of the assignment and order distribution to respondent in accordance therewith are reversed with directions to the probate court to distribute appellant's entire interest in the estate to her, in disregard of the assignment made to respondent.

PETERS, P. J., and BRAY, J., concur.

81 Cal.App.2d 971

In re SEERY'S ESTATE.

Civ. 13100.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1947.

Attorney and client ⚷11

Heir of deceased was entitled to have distributed to her her entire interest in estate in disregard of her assignment and power of attorney, which were void as contrary to public policy because of their commercial exploitation of legal profession.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Josanna Seery, deceased. From the portion of a decree of final distribution which approved an assignment made by Mary Gillivan in favor of Walter C. Cox, Mary Gillivan appeals.

Reversed with directions.

John B. Ehlen, of San Francisco, for appellant.

Elkins & Wright, of San Francisco, for respondent.

OGDEN, Justice pro tem.

This appeal is a companion to that of Estate of Reilly, Cal.App., 184 P.2d 922. It is similarly brought by an heir of the decedent from those portions of the decree of final distribution which approve an assignment to the same respondent of one-third of her interest in the estate, and distributes the assigned portion directly to him. In both cases the powers of attorney and assignments are upon the same printed forms and are identical except as to the name of the estate and that of the assignor. There is no material variance in the circumstances of their execution.

The deceased died intestate in San Francisco on June 12, 1943. On June 15, 1943, the public administrator filed a petition for letters of administration stating therein that the heirs were unknown. On September 15, 1943, in Ireland, appellant, a niece of decedent, executed the assignment and power of attorney in favor of respondent. On February 2, 1944, she executed a power of attorney in favor of Matthew Murphy, Consul of Ireland, revoking all previous ones executed by her. Notice of the latter was given to respondent on May 24, 1944. On September 28, 1944, appellant moved the probate court for its order disapproving of the assignment and for distribution in disregard thereof. This motion was heard at the same time and upon the same type of showing as in the Reilly case. The motion was denied and subsequently a decree of final distribution was rendered approving the assignment and ordering distribution to respondent of the assigned share. As in the companion case, similar written findings of fact and conclusions of law were signed and filed some months after the rendition of the judgment.

The issues presented by this appeal and the manner of their presentation are identical, the same counsel appearing in both appeals. What has been said in our opinion in the Estate of Reilly, supra, and what was said in Re Estate of Butler, 29 Cal.2d 644, 177 P.2d 16, is all equally applicable and determinative here. For the reasons stated therein, those portions of the decree of final distribution which approve of the assignment and order distribution to respondent in accordance therewith are reversed with directions to the probate court to distribute appellant's entire interest in the estate to her in disregard of the assignment made to respondent.

PETERS, P. J., and BRAY, J., concur.

SEBRELL v. LOS ANGELES RY. CORPORATION.*

Civ. 15664.

District Court of Appeal, Second District, Division 3, California.

Oct. 3, 1947.

Hearing Granted Nov. 26, 1947.

1. Street railroads ⚷118(11)

In action for injuries sustained by motorist when automobile was struck by streetcar at intersection, testimony of motorist that she brought automobile to a stop before entering intersection and that she remembered nothing from that time until after collision justified instruction that plaintiff, in view of severe injuries depriving her of her memory, was entitled to presumption that she exercised reasonable care for her own protection.

2. Appeal and error ⚷1064(1)
Trial ⚷243

In action for injuries sustained by motorist when automobile was struck by streetcar at intersection, where court under evidence properly instructed that a grievously injured person losing her memory is entitled to presumption that she exercised reasonable care, a further instruction that jury should not consider question of injuries prior to determining issue of liability created a conflict in the instructions as to whether plaintiff's injuries could be considered in determining liability, and such conflict constituted prejudicial error.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Elizabeth Sebrell against the Los Angeles Railway Corporation to recover damages sustained in a collision between the plaintiff's automobile and the defendant's streetcar. From a judgment in favor of the defendant and an order denying the plaintiff's motion for a new trial, the plaintiff appeals.

Judgment reversed, and the appeal from the order denying the motion for new trial dismissed.

Forrest A. Betts and Gaines Hon, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover damages allegedly sustained by her as the result of a collision between her automobile, which she was driving, and a streetcar owned by the defendant. In a trial by jury the verdict and judgment were in favor of defendant. Plaintiff appeals from the judgment and the order denying her motion for a new trial.

Plaintiff contends that the court erred in instructing the jury that it should not consider the question of injuries or damages in determining the issue of liability.

On February 9, 1943, about 3:30 p. m., the streetcar, which was proceeding west on Sixth Street, and plaintiff's automobile, which was proceeding south on New Hampshire Avenue, collided at the intersection of those streets at a point approximately 2 to 5 feet west of the middle of the intersection. Plaintiff's automobile, a coupe, was crossing the westbound streetcar track and the front end of the streetcar struck the auomobile on its left side. The automobile "bounced" off the track, and then went over the curb and through a picket fence at the southwest corner of the intersection, and came to a stop against the front of the building on that corner. Plaintiff was thrown from the automobile to the pavement in the south part of the pedestrian crosswalk on the west of the intersection, and was severely injured. The streetcar, which is 47 feet long, traveled approximately 78 feet after the collision.

Sixth Street extends in an easterly and westerly direction, is paved, and is 46 feet wide. Streetcar tracks extend along the middle of the street. The outside rail of the westbound track is about 15 feet from the north curb of Sixth Street, and the outside rail of the eastbound track is about 15 feet from the south curb on Sixth Street. There are no boulevard stop signs on Sixth Street requiring traffic approaching New Hampshire Avenue from the east or the west to come to a stop. New Hampshire Avenue extends in a northerly and southerly direction, is paved, and is 42 feet wide. There is a boulevard stop sign on New Hampshire Avenue about 13 feet north of the north entrance to said intersection. There is a white line on the pavement on New Hampshire Avenue about 3 feet south of the boulevard stop sign, which line extends from the west curb to the middle of the avenue. About 5 feet north of this white line the word "Stop" is painted on the pavement in large white letters. Sixth Street, from the east, slopes downward toward the intersection. The sidewalk along the north side of Sixth Street, east of the intersection, is about 11 feet wide, and the buildings in this vicinity extend to the sidewalk. The building on the northeast corner of the intersection also extends along, and within a few inches of, a 4-foot sidewalk on New Hampshire Avenue. There is a lamp post on the north side of Sixth Street, about 8 feet east of the prolongation of the east curbline of New Hampshire Avenue, to which is attached a street sign bearing the words, "So. New Hampshire Ave." About 5 feet east of the lamp post, and in a direct line with it, is a telephone pole which leans toward the building on the northeast corner of the intersection.

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* Subsequent opinion 192 P.2d 898.

Plaintiff testified that she brought her automobile to a stop back of the white line on New Hampshire Avenue before entering the intersection; that she looked to the left and to the right carefully but she did not see the streetcar or any "moving traffic" on Sixth Street; that she did not know how far east on Sixth Street she could see; that she could not "tell" whether she pulled up close enough to the white line to have a clear view eastward; that the bumper (apparently front bumper) of the automobile was back of and almost to the white line; that the intersection is a very blind one; that the beauty shop on the northeast corner extends out close to the curbline and obscures the view, from the north side of the intersection, to the east; and that she remembers "nothing at all" from the time she brought her automobile to a stop until after the collision.

A witness, called on behalf of plaintiff, testified that she was manager of a library on Sixth Street (which library is approximately 67 feet east of the east entrance of the intersection); that on the day of the accident as she was about to enter the library she saw the streetcar approaching, and its bell was "clanging in an ordinary manner"; that she entered the library and as the streetcar was going past the door of the library she heard its bell ringing louder and rapidly; that she turned around to go outside again, and as she got to the door she heard the crash; that she turned back into the library, telephoned for an ambulance, and then ran to the scene of the accident; that when she arrived plaintiff was lying on the pavement beside the outside rail of the eastbound streetcar track; and that plaintiff's face was cut, and her right eye was "out of her face."

Another witness, called on behalf of plaintiff, testified that he was walking in an easterly direction on the south side of Sixth Street when he first saw the streetcar, which was then proceeding toward New Hampshire Avenue; that he continued walking and heard the bell "clanging" loudly, but he did not observe the streetcar again until he heard the collision; that he then turned around, and saw plaintiff lying on the pavement by the gutter on the south side of Sixth Street; and she was unconscious.

A police officer, called as a witness on behalf of plaintiff, testified that he arrived at the scene of the accident about 3:45 p.m., at which time plaintiff was lying on Sixth Street, at the side of the gutter and near the southwest corner, and her talk was incoherent; that there were "brush marks" on the pavement which indicated the point of impact; that he talked with the streetcar motorman who told him that he was traveling approximately 18 miles an hour when he first saw plaintiff's automobile; that it was then about 5 feet into the intersection, and traveling 25 to 30 miles an hour; that at that time the front of the streetcar was approximately even with the "easterly extension of New Hampshire" Avenue, and he was unable to avoid crashing into the side of the automobile; and that the motorman then told him it was his opinion, based upon the speed of plaintiff's automobile, that she did not make the boulevard stop before entering the intersection.

It was stipulated that another police officer, called as a witness on behalf of plaintiff, would testify in substance the same as the last witness, except that he did not interview anyone at the scene of the accident.

The motorman, called under section 2055 of the Code of Civil Procedure, testified that when he first saw plaintiff's automobile the front end of it was across the white line, and it was traveling 25 to 30 miles an hour; that at that time the front of the streetcar was 10 or 15 feet east of the east entrance to the intersection, and it was traveling 20 or 25 miles an hour; that he put his foot on the emergency brake as soon as he could get it on; that the brakes had just taken hold about the time of the collision, and he had to hold himself in his seat when the brakes took hold; that the front of the streetcar collided with the door of the automobile on the side where plaintiff was sitting; that plaintiff did not vary her speed after he first saw her; that she drove in a straight course, and did not "look up" before the streetcar struck the automobile; that there was nothing to obstruct his view; that in operating a streetcar, he looks straight ahead and from curb to curb or from sidewalk to sidewalk; that if he turned to "look up" a street, he might hit someone on the other side; that the only way he could explain the accident was that he did not look up and down New Hampshire Avenue; that the streetcar is known as a "streamliner," and he had been operating that type streetcar since 1937; that it is the most quiet type streetcar defendant owns; that it has greater "pick-up" and speed than the older type streetcars, and it has 3 kinds of brakes; that at a speed of 25 miles an hour, it would take from 110 to 120 feet to stop the streetcar from the time the brakes were applied; and that at the time of the accident there were 15 to 20 passengers in the streetcar. In testifying in defendant's behalf, the witness stated that he had stopped the streetcar at Vermont Avenue, and had waited through one signal because he was ahead of time.

A witness, called on behalf of defendant, testified that she was a passenger on the streetcar at the time of the collision; that she gave her name, as a witness, to the motorman; that she was seated in the fourth or fifth seat back from the front of the streetcar, on the right-hand side of the car next to the window, and facing the front; that she was sitting in a position about 16 feet east of the east entrance to the intersection when she first observed plaintiff's automobile; that at that time the automobile was moving and was approximately 10 feet north of the boulevard stop; that it looked "like it would come through the stop sign and strike" the witness; that the automobile did not come to a stop before entering the intersection, and she (the witness) prepared herself for an accident by grasping the bar on the back of the seat in front of her and bracing herself; that she felt the streetcar slow down a little, and she felt the impact of the collision; that she immediatly had a "pretty definite conclusion" that the plaintiff was at fault; that the witness's life was in danger and plaintiff was to blame; that she knows nothing about speed, but she would say plaintiff was traveling approximately 20 miles an hour. She later testified that she believed she could say plaintiff was traveling 30 miles an hour. She also testified that she did not pay any attention to where the streetcar came to a stop; and that she did not get out of the streetcar at the scene of the accident.

[1, 2] The court instructed the jury, at the request of defendant, "that it would be a violation of your duty as jurors to consider the question of injuries or damages, if any, prior to determining the issue of liability or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability." Prior to giving that instruction, the court had instructed the jury, at the request of plaintiff, as follows: "It is the testimony of the plaintiff in this case that she does not recollect any event related to the accident, and that her last recollection is that of having brought her

automobile to a stop with the front end of it approximately even with the boulevard stop sign, which is located at the northwest corner of the intersection. A person who has been so grievously injured in an accident as to be deprived of her memory is entitled to the presumption that she exercised reasonable care for her own protection. This is a rebuttable presumption, but is one to which the plaintiff is entitled to have you give consideration at all points in the case, and even unto the deliberation in the jury room." The evidence on behalf of plaintiff, under plaintiff's theory of the case that she was entitled to such presumption, was sufficient to justify the giving of the last quoted instruction. The effect of that instruction was that if the jury found that plaintiff had been injured to the extent that she had been deprived of her memory she was entitled to the presumption that she exercised reasonable care. In other words, the jury was directed that it should consider plaintiff's injuries in order to determine whether the presumption should be applied in plaintiff's behalf. Such a presumption is a form of evidence, and, if applicable herein, it would of course be evidence on the question of liability. It therefore appears that the jury was instructed in effect to consider the injuries of plaintiff in determining the question of liability. As shown by the other instruction, first above quoted, the jury was instructed that it should not consider the question of plaintiff's injuries in any way in determining the issue of liability. Those two instructions were conflicting. According to plaintiff's theory of the case, namely, that by reason of her personal injuries she did not remember what happened after she made the boulevard stop, the question as to whether the facts were such that she was entitled to the presumption that she exercised reasonable care for her own protection was an important and material issue concerning liability. The conflict in those instructions pertained to a material matter, namely, as to whether the personal injuries of plaintiff should have been considered by the jury in determining the question of liability. It cannot be ascertained, of course, which instruction was followed by the jury. The giving of those instructions was prejudicially erroneous.

In the case of Simmons v. Lamb, 35 Cal.App.2d. 109, 94 P.2d. 814, 816, it was held to be prejudicial error to give an instruction that "it would be a violation of your duty as jurors to discuss the nature and extent of plaintiff's injuries, if any, until you shall have first determined the question of whether or not the defendant is liable." In that case material questions were: (1) Whether the plaintiff or an alleged intoxicated person, who was also riding in the front seat, was driving plaintiff's automobile when it collided with defendants' parked truck from which oil pipe extended about 8 feet beyond the rear thereof, and (2) where the truck was standing at the time of the collision. As a result of the accident therein the plaintiff's throat was cut from ear to ear, and there was a large hole in the right side of the windshield, and a small hole in the windshield in front of the driver's seat. Plaintiff therein testified that she was driving the automobile, but defendants argued that she was not driving "because her throat was cut and because after the accident flesh, blood and hair were found on the broken windshield" in front of the place where a passenger would be sitting. There was other evidence therein that three of plaintiff's left ribs were broken at a place where the lower part of the steering wheel would touch her body if she were driving the automobile, and she testified that she was not cut by glass—her theory being that the oil pipe pierced the windshield in front of the driver's seat and cut her throat. There was also evidence that plaintiff's daughter, who was riding in the rear seat, was thrown into the front seat and received a cut in her scalp above the hairline; and that there was blood on the shoulder of the highway. The court said therein, 35 Cal.App.2d at page 114, 94 P.2d at page 816: "It was therefore necessary for the jury to consider all of this evidence with reference to respondent's injuries in order to determine whether or not she was driving her car at the time of the collision." It was also said on that page: "The instruction as given, [referring to the instruction that the jury should not consider plaintiff's injuries] * * * withdrew from the consideration of the jury certain facts which they should have had before them when they fixed the liability for the accident." In that case, as above stated, plaintiff's injuries were material upon the questions as to who was driving the automobile and where the truck was standing, and those questions, of course, were material in determining liability. In the present case, as above stated, plaintiff's injuries were material upon the question as to whether she suffered a loss of memory to the extent that she would be entitled to the presumption that she exercised reasonable care, which question, of course, was material in determining liability.

Appellant herein argues that the instruction in Simmons v. Lamb, supra, is distinguishable from the instruction herein in that the instruction herein states that the jurors should not consider "the *question* of injuries or damages" in determining liability, whereas the instruction in the Simmons case states that they should not consider "the nature and extent of plaintiff's injuries." Appellant argues further that the instruction given herein, that the jurors should not consider the *question* of injuries or damages in determining liability, "is far different from instructing the jury that they should not consider the injuries or damages in determining liability," and that under the instruction given herein "the jury would certainly be at liberty to give consideration to the injuries or damages in determining the *question* of liability." The difference in meaning between the expression "the *question* of injuries," and "the nature and extent of injuries" is not significant.

As to the matter of liability, the court instructed the jury: "In determining how the accident happened * * * you are entitled to take into consideration those physical facts as are established by the evidence to have existed, insofar as they are pertinent to the accident. Such matters as the measurement of the highways * * * the surface thereof * * * the comparative sizes of the vehicles, the physical damage done to the vehicles * * * the distances which the vehicles traveled or were knocked as a result of the accident * * * also, all of such other physical facts as are established to your satisfaction, are matters which you may take into consideration in arriving at what the facts were." It therefore appears that the court instructed the jury specifically that in determining liability the jury might consider the physical damage to property. Such instruction is a further indication that the court withdrew from the jury a consideration of plaintiff's personal injuries in determining liability.

The judgment is reversed. The appeal from the order denying the motion for a new trial is dismissed.

SHINN, Acting P.J., and KINCAID, Justice pro tem., concur.

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81 Cal.App.2d 651

BOWATER v. TASSEY et al.

Civ. 15887.

District Court of Appeal, Second District,
Division 2, California.

Sept. 30, 1947.

Hearing Denied Nov. 24, 1947.

1. Appeal and error 🔑1061(3)
Trial 🔑139(1)

Where there was substantial evidence in record that would have supported verdict for plaintiff, judgment of nonsuit was reversible error.

2. Landlord and tenant 🔑169(11)

Whether painter engaged by owner to paint house was an employee of owner or an independent contractor as respects liability of owner on theory of respondeat superior for injuries sustained by plaintiff as invitee of tenant on ground of negligence of painter was under evidence, a question for jury.

3. Landlord and tenant 🔑164(1), 167(8)

Tenant and his invitee are entitled to exercise of ordinary care on part of owner of leased premises.

4. Landlord and tenant 🔑169(11)

Where vines which were removed from wall of residence by painter to enable him to paint wall as ordered by owner, were permitted to remain extended into pathway covered with dead leaves for approximately nine months during which time they continued to grow, and pathway led from driveway to back door of house, whether either owner or painter or both were guilty of negligence so as to be liable for injury sustained by invitee of tenant whose foot was caught by vine on pathway, was a question for jury.

5. Landlord and tenant 🔑164(3)

Landlord is liable for negligence resulting in making repairs or improvements on premises irrespective of whether they are made gratuitously or not.

6. Evidence 🔑5(2)

It is common knowledge that it is necessary to paint a house at frequent intervals in order to preserve woodwork and to make the premises habitable.

7. Landlord and tenant 🔑167(8)

Where removal of vines from wall was essential in order to paint wall of house ordered by landlord, landlord would be responsible for negligence of painter in removing vine so as to be liable to tenant's invitee who fell when her foot caught in one of the vines.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Lavinia Bowater against Ethel B. Tassey and another for personal injuries allegedly sustained by plaintiff in a fall on premises owned by named defendant. From an adverse judgment, plaintiff appeals.

Reversed.

Laurence B. Martin and William P. Camusi, both of Los Angeles, for appellant.

Jones, Thompson & Kelly, of Los Angeles, for respondent Ethel B. Tassey.

H. S. Farrell, of Alhambra, for respondent G. S. Deyo.

WILSON, Justice.

[1] Since there is substantial evidence in the record that would have supported a verdict in favor of appellant, the judgment of nonsuit from which the appeal is taken must be reversed.

In Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d ——, 181 P. 2d 935, we set forth at length the rules governing the granting of nonsuits and motions for directed verdicts and they need not be repeated here.

[2] The facts disclosed by the evidence are as follows: Respondent Tassey was the owner of a dwelling house which she leased to Mr. and Mrs. Wallich, son-in-law and daughter of appellant. Miss Tassey employed respondent Deyo to paint the residence inside and outside. There is a question as to whether Deyo was an employee of Miss Tassey or an independent contractor. The evidence on this point is conflicting and the answer should have been left to the determination of the jury. Deyo began his work in September, 1943, but because of ill health did not complete it until May or June, 1944. There is evidence that the work was not completed until about June 1st but Deyo claims that his work was finished on April 16, 1944. The accident causing appellant's injuries occurred on May 16, 1944.

At the rear of the house there was a gravel or dirt pathway leading from the edge of the driveway to the back door of the house. The pathway was about one and one half feet from the wall and was separated from the house by a row of plants. On the rear wall of the house ivy vines extended from the ground to the roof, a distance of eight or nine feet. Miss Tassey testified that when Deyo began his work she did not specifically mention to him the removal of the vines but told him to paint the house and took it for granted that he would take the vines from the wall and do whatever was necessary to complete the work. Before beginning the painting Deyo removed the vines from the side of the house and placed them in the narrow space between the wall and the pathway. Some of the vines extended into the path. Apparently the roots were not disturbed since it is in evidence that the vines continued to grow between the time of their dislodgment from the wall in September, 1943, and the date of the accident in May, 1944. The pathway was partially covered by dead leaves and the vines in some places grew under the leaves where they could not be observed.

On the day of the accident appellant visited her daughter and son-in-law and while walking along the pathway toward the rear door of the house her foot was caught by one of the vines and she fell to the ground, causing the injuries for which she seeks to recover. After she fell a vine was found to be wrapped around her foot—it was over one foot and under the other. There were no tenants in the house other than appellant's son-in-law and daughter.

[3] In Gerard v. Wilson Holding Co., 79 Cal.App.2d 553, 180 P.2d 380, we affirmed a judgment in favor of a tenant's invitee against the owner of the premises and held that the tenant and her invitee were entitled to the exercise of ordinary care on the part of the owner of the leased premises.

[4] In the instant case the vines were at least eight feet long, extending from the ground to the roof, and were placed on the ground where the path was one and one half feet distant from the wall; the vines were permitted to remain extended into the pathway for approximately nine months, during which time they continued to grow. Dead leaves covered the vines where they extended into the pathway. Whether or not either or both of the respondents exercised ordinary care for the protection of the tenants and their invitees or were guilty of negligence in allowing the vines to remain for so long a time extending into the path were questions which should have been left to the jury

[5] Respondents concede that a landlord is liable for negligence resulting in making repairs or improvements whether the same be made gratuitously or not, but claim that the evidence does not show that any repair to the property caused appellant to fall. They make the tenuous argument that the removal of the vines from the house and placing them on the pathway so that the walls could be painted did not constitute the making of a "repair" as that term is used in the rule that a landlord is liable for negligence in making repairs to the premises, and that the term is limited to structural changes when negligently made.

[6, 7] It is common knowledge that it is necessary to paint a house at frequent intervals in order to preserve the woodwork and to make the premises habitable. While the painting does not necessarily require any change in the structure of a building it is deemed to be a repair. The removal of the vines was essential in order that paint could be applied to the wall and is in the same category as a structural change insofar as the rule requiring the exercise of ordinary care is concerned.

We do not express an opinion as to whether or not respondent Deyo was an employee or an independent contractor. There is evidence from which the jury might have determined that he was an employee, to wit, that he worked by the hour and was provided with funds by Miss Tassey with which to purchase the paint; she decided the color and the number of coats of paint that should be applied; Deyo had not given her an estimate as to the cost of the work involved. If the case had been submitted to the jury and, upon the foregoing evidence, it had found that Deyo was Miss Tassey's employee she would have been liable for his negligence under the doctrine of respondeat superior. On the other hand, if the jury had found that Deyo was an independent contractor it might also have rendered a verdict against Miss Tassey on the ground that she was responsible for injuries to a tenant or to the tenant's invitee resulting from the negligence of an independent contractor. Bailey v. Zlotnick, 80 U.S.App.D.C. 117, 149 F.2d 505, 506, 162 A.L.R. 1108; 32 Am.Jur. p. 618, sec. 741. Furthermore, if Deyo should be found to be an independent contractor he would nevertheless be liable for his own negligent act in leaving the vines for a period of nine months where some of them extended into the pathway that was in use for access to the door at the rear of the house, knowing that as long as the roots were undisturbed they would continue to grow and extend further into the path.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; SCHAUER, J., dissentnig.

81 Cal.App.2d 667

KNAPP v. ELLIOTT et al.

Civ. 3442.

District Court of Appeal, Fourth District, California.

Oct. 2, 1947.

Rehearing Denied Oct. 29, 1947.
Hearing Denied Nov. 24, 1947.

1. Fraudulent conveyances 🔑299(11)

The execution of deed by mother-in-law to daughter-in-law during trial of action in which judgment against mother-in-law was anticipated, making the mother-in-law insolvent, was strong evidence supporting finding that deed was executed in order to defraud creditors, though daughter-in-law testified without contradiction that she had given consideration for the property, since inference of fraud was reasonable. Civ.Code, § 3439.04.

2. Fraudulent conveyances 🔑159(1)

A deed, even though supported by consideration, may be set aside as fraudulent where there was knowledge on part of grantee of fraudulent intent of grantor and an intent on grantee's part to assist grantor in a fraudulent purpose and to hold land as a secret trust for grantor.

3. Appeal and error 🔑1008(1)

In suit to enjoin sheriff from selling realty under execution and to quiet title, wherein defendants contended that plaintiff had been deeded the realty by her mother-in-law in order to defraud creditors, question of fraudulent intent was a question of fact for trial court.

4. Fraudulent conveyances 🔑298(2)

In suit to enjoin sheriff from selling realty under execution and to quiet title, wherein defendants contended that plaintiff had been deeded the realty by her mother-in-law in order to defraud creditors, evidence sustained trial judge's finding that conveyance was made with intent to defraud creditors.

5. Adverse possession 🔑63(5)

In suit by alleged fraudulent grantee to enjoin sheriff from selling under execution realty which had been conveyed to the grantee by judgment debtor, grantee could not prevail on ground of adverse possession for over five years, where the possession was prior to execution sale. Code Civ.Proc. §§ 318, 319, 321–323.

6. Fraudulent conveyances 🔑295(4)

Evidence sustained finding that assignee of judgment was not guilty of laches in seeking to enforce judgment against alleged fraudulent grantee and in levying on realty conveyed to her by judgment debtor who was her mother-in-law.

7. Execution 🔑170

In suit by alleged fraudulent grantee against sheriff to enjoin him from selling realty under execution, sheriff had right to act upon defense that conveyance to grantee by judgment debtor was in fraud of creditors.

8. Limitation of actions 🔑102(1)

Where plaintiff sought to quiet title to property allegedly fraudulently conveyed to her and to enjoin the sale under execution by judgment creditor of the debtor and amended answer denied plaintiff's title and alleged that she held the property as trustee of judgment debtor and prayed that plaintiff be declared such a trustee, the three-year statute of limitations was not applicable. Code Civ.Proc. § 338, subd. 4.

◆

Appeal from Superior Court, Orange County; Andrew J. Schottky, Judge.

Action by June Knapp against Jesse L. Elliott as sheriff of the County of Orange, California, Maurice Rose and others, to enjoin the sheriff from selling a certain realty under execution, and to have plaintiff's title quieted against all defendants as to certain realty. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

John N. Helmick, of Los Angeles, Preston Turner, of Santa Ana, and Oliver O. Clark, of Los Angeles, for appellant.

Alexander L. Oster and Marion P. Betty, both of Los Angeles, for respondents.

GRIFFIN, Justice.

June Knapp, plaintiff and appellant, filed this action on November 25, 1942, against the sheriff of Orange County and sought to enjoin him from selling certain real property under execution. Maurice Rose and others were named defendants. Rose was an assignee of a judgment for $3,000, plus interest and costs, obtained by L. H. Betty in Los Angeles County against Ellen B. Crowder, plaintiff's mother-in-law, and one E. W. Knapp, plaintiff's husband.

Defendant Rose, in his answer, alleged that the real property (Parcels 1 and 2) levied upon, were standing in the name of plaintiff June Knapp; that parcel 1 was transferred to her by Mrs. Crowder, through E. W. Knapp, her attorney-in-fact, without consideration, and with intent to defraud the creditors of Mrs. Crowder; that this and other similar transfers rendered Mrs. Crowder insolvent.

By consent, the complaint was later amended to seek, in addition to an injunction, to have plaintiff's title quieted against all defendants as to both parcels 1 and 2.

Defendant Rose further answered and specifically set forth his claimed interest by virtue of his judgment and levy and asked that it be adjudged that he has a judgment and execution lien on the property free of any interest of plaintiff and that it be established that plaintiff is a trustee of said property for Mrs. Crowder and E. W. Knapp, and that the sheriff be permitted to proceed with the sale.

The trial court found that as to parcel 2 (property deeded to plaintiff from the Orange County Building & Loan Association subsequent to 1929), plaintiff was the legal and rightful owner, but as to parcel 1, it was found that that parcel was transferred to plaintiff by Mrs. Crowder in 1929, to avoid payment of an anticipated judgment in an action then pending against her in Los Angeles County; that the transfer was without consideration and made for the purpose of making the grantor insolvent, and that a deed was accepted by plaintiff with that knowledge and with intent to defraud defendant Rose's assignor, L. H. Betty, a creditor, who was plaintiff in the action then pending; that at the time of the levy of the execution herein mentioned, title to parcel 1 was vested in Mrs. Crowder, although the record title appeared to be in plaintiff; that plaintiff had no title or interest therein; that plaintiff was and is holding said property as trustee; and that the defendant Rose had a valid execution lien on said parcel 1. It dissolved the restraining order as to that parcel and held that plaintiff had not established her title to that parcel by adverse possession; that Rose's right to attack the conveyance from Crowder to plaintiff is not barred by the statute of limitations and that such a statute cannot be invoked by plaintiff as trustee against the beneficiary, defendant Rose, and that Rose and his predecessors in interest are not guilty of laches, as claimed. Judgment was entered accordingly.

It is first contended that there is no contradiction of plaintiff's testimony as to the manner in which she acquired the property and the consideration given for it; that therefore the evidence is insufficient to support the finding in this respect.

In Fitz-Patrick v. Osborne, 57 Cal.App. 2d 226, 134 P.2d 297, it was stated that where the trial court had some misgivings as to the truth of the testimony of appellant the trial judge was not bound to believe his testimony and that it did not follow that because no other witness testified to the contrary his testimony remained unrefuted. In this connection it was held that the relationship of the parties, together with the other circumstances surrounding and incident to the transactions constituted evidence which of itself warranted inferences in direct conflict with the testimony of the appellant and that the court may properly take such evidence into account where the testimony is inherently improbable. See, also, Adams v. Bell, 5 Cal.2d 697, 702, 56 P.2d 208, where the chief witnesses for the plaintiff were defendants called under section 2055 of the Code of Civil Procedure. They testified to a consideration growing out of an agreement between them whereby one defendant had improved the property in return for his mother's promise to deed it to him. It was held that the trial court was privileged to discredit that testimony.

From the transcript of the testimony it appears that on May 3, 1929, during the trial of the action (Betty v. Crowder and Knapp) Mrs. Crowder deeded to her daughter-in-law, June Knapp, about 47 parcels of property in Los Angeles County. At the same time, she deeded the property here in question to her. These deeds were acknowledged before her then attorney, acting as notary public. The deeds were recorded September 7, 1929. Later, an action was filed in Los Angeles County, between these same parties, to set aside the Los Angeles County deed on the grounds that the conveyance was fraudulent and made for the purpose of hindering and delaying the creditor Maurice Rose. After the trial, according to the judgment roll, that conveyance was set aside. The Los Angeles County property consisted of flats, rental residences, and vacant property, and was heavily burdened with delinquent taxes as well as mortgages.

Plaintiff testified that she had some sort of an oral agreement with her mother-in-law to take over those properties and assume the burden of paying the taxes, etc., to maintain the household and help support and care for a granddaughter as consideration for their purchase price. No internal revenue stamps were attached to either deed. Some of the Los Angeles County property was levied upon and sold under the execution which only partially satisfied the judgment. At that time parcel 1 (in Newport Beach) had been sold to the State for taxes and was not assessed to plaintiff on the records. Plaintiff has negotiated for redemption under the 10-year plan. That property consisted of eight one-room bungalow courts and a three-room cottage.

Plaintiff then testified that she agreed to purchase parcel 1 in 1925; that she gave Mrs. Crowder about $600 in cash in three separate payments prior to the time she executed the deed to her; that she agreed to assume the taxes and assessments and upkeep of the property; that there were about $700 in delinquent taxes due; that she estimated its value at approximately $2,700 to $3,000 when she orally agreed to purchase it.

She further testified that part of the consideration for the purchase price was the value of her personal services in helping to manage it, in conjunction with Mrs. Crowder, during the summer seasons and over a period of approximately 5 or 6 years prior to the agreement to purchase it; that the agreement was that she was to have one-third of the net income which would approximate $150 per summer season of 4 months. She then testified that at the time she was married to E. W. Knapp (1920) she had about $750 in the bank which she had saved from her employment at $35 per week; that all of the money she paid to Mrs. Crowder on the purchase price of the property was from her "separate funds"; that since that time she has paid all back taxes and has expended over $3,500 by way of repairs and improvements to the court, $2,000 in new furnishings; that the reasonable value of the property on October 22, 1942, the date of the levy, was $9,500; that its present value is $12,500; that the net income from rentals prior to 1941 for the three summer months was about $600; and that since 1941 that income doubled by reason of all-year rentals. She then said that she never asked Mrs. Crowder for any pay for her services in managing the property because she knew she "would get it sometime"; that she would "give me something or compensate me in some way for my efforts".

She was asked in her deposition in reference to the income from the bungalow courts: "Q. What was done with the money that came from the place? A. I don't know, I wouldn't be able to say just now. Part of it was supposed to be mine, but I didn't get that because I guess it took it to take care of the place as far as I know."

She then produced a witness who testified that plaintiff had been in possession and had occupied the courts since 1935. A real estate appraiser testified that in 1925 the property was worth about $1400; in 1942, by reason of the improvements placed thereon, $10,000; and that in 1944 it was worth $15,000.

The record throughout shows an attitude of plaintiff to be evasive and uncertain in her answers and in many instances they were contradictory and improbable. The savings account containing plaintiff's "separate earnings" appears to have been quite "elastic" considering the withdrawals claimed to have been made from it. The claimed annual income from parcel number

1 would not coincide with the claimed expenditures made for improvements and for payment of delinquent and current taxes on the property.

The trial judge indicated the difficulty he encountered with the witness during her testimony when he said: "It seems to the court that a person involved in litigation of this kind should have a better recollection than this witness * * *. The witness has had plenty of time to think about this, it does seem to me. I don't think the witness is evasive, I don't want to say that, but it is remarkable that her memory is not better th*at* it is on some of these matters."

[1-3] The execution of the deed to plaintiff of parcel 1 from her mother-in-law, Mrs. Crowder, executed by plaintiff's husband, as the mother-in-law's attorney-in-fact, during the trial of the action in which the judgment against Mrs. Crowder and her son was anticipated and making her insolvent, is strong evidence supporting the trial court's finding. The inference of fraud was reasonable. Chichester v. Mason, 43 Cal.App.2d 577, 111 P.2d 362; Sec. 3439.04, Civ.Code; First National Bank of Petersburg, Ill. v. Shipley, 109 Cal.App. 194, 292 P. 996. A deed, even though supported by a consideration, may be set aside as fraudulent where there was knowledge on the part of the grantee of the fraudulent intent on the part of the grantor, and an intent on the grantee's part to assist the grantor in a fraudulent purpose and to hold the land as a secret trust for her. Chichester v. Mason, supra. The question of fraudulent intent was a question of fact to be determined by the trial court. Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350; Abbey v. Zimmerman, 12 Cal.App.2d 311, 55 P.2d 903.

[4] In First National Bank of Petersburg, Ill. v. Shipley, supra, it was held that questions of fraudulent intent and of adequacy of consideration are questions of fact, calling for the exercise of judicial discretion, and upon appeal every reasonable presumption must be indulged in favor of the action of the trial court, and that even though the only oral testimony at the trial, aside from testimony as to the value of said estate and the portion distributed was given by defendant and his wife, the trial court was not bound to believe their testimony on the questions of fraudulent intent and lack of consideration. In this respect, and under such interpretation, the evidence produced and the inferences deducible therefrom support the findings and conclusions reached by the trial judge.

[5] It is next argued that, notwithstanding that finding, the evidence conclusively shows that plaintiff gained title to parcel 1 by adverse possession for over five years, and has complied with all the requirements constituting the necessary elements of adverse possession, under sections 318, 319, 321, 322 and 323 of the Code of Civil Procedure.

Puccetti v. Girola, 63 Cal.App.2d 240, 146 P.2d 714, is factually similar to the instant case and seems to dispose of this contention. It is there stated, 63 Cal.App. 2d at page 248, 146 P.2d at page 717, which adopts the concurring opinion in Stewart v. Thompson, 32 Cal. 260, 265: "'As to the creditor, the fraudulent conveyance was void. Notwithstanding this conveyance, therefore, so far as the rights of the creditor are concerned, the title never passed to the grantee of the debtor until the sale under execution and the making of the sheriff's deed under which the plaintiff claims. Until that time, as to the creditor, the title must be regarded as remaining in the debtor; and his grantee, who participated in the fraud, must be regarded as being in possession with the debtor's assent, and not adversely to the creditor, his right being subject to be divested by a sale under execution against his grantor in favor of the creditor defrauded.'" This reasoning was approved in Scholle v. Finnell, 166 Cal. 546, 137 P. 241; and Bird v. Murphy, 72 Cal.App. 39, 236 P. 154.

[6] There is an additional contention that defendant Rose is barred from now levying upon parcel 1 in the enforcement of a judgment obtained in 1929, by reason of laches. There is a conflict in the evidence as to when defendant Rose first acquired actual knowledge that Mrs. Crowder did own and had conveyed the premises to plaintiff. The conveyance was made

and recorded in 1929. Defendant Rose claims in his answer that he did not discover until August, 1942, that such a conveyance had been made, and that immediately thereafter he caused an alias writ of execution to issue. There is no proof of this alleged fact. However, title, for 10 years hence, was in the State of California by reason of a delinquent tax sale, and the property was being redeemed under the 10-year plan of redemption. That property was not assessed to plaintiff on the assessment rolls until the year 1940. Defendant Rose claims also in his answer that from 1932 to 1940, he caused an examination of the records of the Orange County Assessor's office to be made and found no real property assessed to plaintiff. There is no proof of this claimed fact. There is evidence that defendant Rose brought Mrs. Crowder into court on a supplemental proceeding and did make some substantial showing indicating that he was endeavoring to discover property standing in her name. While the evidence might well have supported a contrary finding, the question of laches was a question of fact to be determined by the trial court. No abuse of discretion appears in this respect. Richardson v. Michel, 45 Cal.App.2d 188, 113 P.2d 916.

It is next argued that defendant's claim that the deed was fraudulently executed is barred by section 338, subdivision 4 of the Code of Civil Procedure. Defendant, in his amended answer, by way of defense, recites the transfer of the property to plaintiff in May, 1929, but alleges that said transfer was without consideration and was with intent to defraud him as a creditor and was accordingly "void." The prayer of the answer was that by reason thereof it should be decreed that plaintiff "has no interest in the property" except "as trustee".

It was held in Puccetti v. Girola, supra, that section 338, subdivision 4, supra, does not bar an action to quiet title against a fraudulent grantee by the grantor's creditor who purchased the property at an execution sale more than three years after the fraudulent transfer, as a creditor's cause of action does not accrue prior to the sale, and as the mere fact that the clouds of title had their inception in fraud did not render the statute applicable.

Richardson v. Michel, supra, 45 Cal.App.2d at page 196, 113 P.2d at page 920, clearly sets forth the general rule stated in 12 Cal.Jur. p. 1029, and approved in Pedro v. Soares, 18 Cal.App.2d 600, 64 P.2d 776, in reference to the election of one of three remedies by which a creditor may reach property fraudulently transferred, namely: "'* * * (1) having obtained a judgment upon his claim he may levy upon the property fraudulently conveyed, since the conveyance, so far as he is concerned, leaves the legal title and ownership in the fraudulent grantor; or, (2) he may bring an action in equity to set aside the fraudulent conveyance and subject the property to the satisfaction of his judgment lien in which case the action is not one on the judgment but is an equitable one for relief against the obstruction caused by the fraudulent transfer which hinders him in satisfying his claim by the ordinary process of law; or (3) he may bring an action in the nature of a creditor's bill for the purpose of subjecting to the payment of his judgment, the money or property transferred or concealed in fraud of his rights.'"

As to the second remedy, it has been held that the three-year statute of limitations, section 338, subdivision 4, does apply to an ordinary action (prior to the sale under execution) to set aside a deed on grounds of fraud, and that ordinarily such a cause of action would accrue on the date of judgment but that if the creditor did not know about the fraudulent conveyance, the cause (in the absence of laches) would not arise until he discovered the fraud by which his rights had been invaded. Although defendant in this action pleaded the necessary facts pertaining to the time of discovery to bring this claimed defense within such a statute, his proof fell far short of establishing those facts.

[7] This action, originally, was but an action against the sheriff to restrain the sale. The sheriff had the right to act upon the defense here alleged in defense of his action. Thornburgh v. Hand, 7 Cal. 554. Defendant obtained an alias execution even

though the title to the property stood in the name of plaintiff. Had his efforts not been intercepted by plaintiff, only such interest as Mrs. Crowder may have had in the property would have been sold under the execution sale.

Under the decision of Alhambra Building & Loan Ass'n v. DeCelle, 47 Cal.App. 2d 409, 118 P.2d 19, (Hearing denied by the Supreme Court), a different rule seems to prevail in an action to set aside a conveyance of land allegedly transferred to defraud a creditor, even though instituted more than three years after the date of the conveyance, where it was claimed by the creditor that the grantee acquired a mere naked title and held the property in trust for the judgment debtor. It was there stated that under such circumstances the judgment debtor was the beneficial owner of the property and that title simply rested in the other party for her benefit.

[8] Applying this rule to the pleadings, the facts found, and the judgment entered in the instant case, the trial court's conclusion that the three-year statute of limitations was not applicable finds legal support.

By plaintiff's complaint, as amended, she sought to quiet title to the property and to enjoin the sale. The amended answer denied her title, alleged that plaintiff "holds the property mentioned * * * as trustee * * * of * * * Ellen B. Crowder, the judgment debtor * * *." The prayer is that plaintiff be declared such a trustee. The court so found and rendered judgment accordingly. We are unable to discern therefrom any legal or factual distinction that would permit us to hold that section 338, subdivision 4 of the Code of Civil Procedure had application to this nature of a proceeding. See, also, Nevada Irrigation District v. Jones, 69 Cal.App.2d 262, 158 P.2d 973; and Bird v. Murphy, supra.

No question is here presented as to any claimed abuse of discretion of the trial court, under section 685 of the Code of Civil Procedure, in allowing the issuance of the execution after five years from the date of entry of the judgment. In Welk v. Conner, 102 Cal.App. 286, 287, 282 P. 963, it was held that a "mere lapse" of 13 years from the entry of the judgment does not deprive the trial court of the power to order issuance of execution.

Judgment affirmed.

BARNARD, P.J., and MARKS, J., concur.

WILCOX v. BERRY et al.*

Civ. 7378.

District Court of Appeal, Third District, California.

Oct. 1, 1947.

Rehearing Denied Oct. 29, 1947.

Hearing Denied Nov. 24, 1947.

1. Evidence ⚷123(10)

In action against wife for damages arising out of a collision between plaintiff's automobile and an automobile which was owned by the husband and wife, and which was driven by the husband, husband's statement, made to officers who had responded to a radio call in a relatively short time after the accident, that the brakes on his automobile did not work properly, was properly admitted as res gestae.

2. Evidence ⚷123(1)

Declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as contemporaneous and admissible as res gestae.

3. Evidence ⚷118

To render statements admissible as "res gestae" it is necessary that there be some occurrence startling enough to produce nervous excitement and render utterance spontaneous and unreflecting, that utterance was made before time to contrive and misrepresent, and that utterance relates to the circumstance of the occurrence preceding it.

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* Subsequent opinion 195 P.2d 414.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

4. Appeal and error ⚷1011(1)

Where the evidence is in conflict on question whether property is community property, an appellate court is bound by the trial court's finding based on such evidence.

5. Husband and wife ⚷262(1)

Where wife obtained title to automobile by an instrument in writing, presumption arose under statute that she took an interest therein as her separate property, rather than as community property, and such presumption would obtain in absence of a showing that instrument in fact named the parties as husband and wife. Civ.Code, § 164.

6. Husband and wife ⚷264

Evidence sustained finding that automobile, which was involved in accident while being driven by husband, was not community property of husband and wife but was owned by them as tenants in common, so that, where husband with wife's consent was operating automobile, wife was liable for damages caused by husband's negligent operation. Civ.Code, § 164; Vehicle Code, § 402.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by E. H. Wilcox against Jess G. Berry and Violet A. Berry for damages resulting from a collision between automobile operated by the plaintiff and an automobile owned by the defendants. The trial proceeded against Violet A. Berry alone. From a judgment in favor of the plaintiff, Violet A. Berry appeals.

Judgment affirmed.

Van Dyke & Harris, of Sacramento, for appellant.

Sumner Mering, of Sacramento, for respondent.

PEEK, Justice.

The present controversy arises out of a collision between an automobile operated by plaintiff and a car owned by defendants Jess G. Berry and Violet A. Berry, which was being driven by the former. Jess G. Berry, although named as a defendant, was not served with process, and the trial proceeded against Violet A. Berry alone, resulting in a judgment in favor of plaintiff. This appeal is from that judgment.

The first ground for reversal urged by appellant is that the trial court erred in admitting as evidence a statement made by Jess G. Berry, to officers at the scene of the accident to the effect that the reason he could not stop was because his brakes did not work properly.

[1, 2] The transcript shows that in response to a radio call two police officers were directed to the scene of the accident. Although the exact time of their arrival is not clearly indicated, it would appear from all of the facts and circumstances therein disclosed that their arrival was within a relatively short time after the collision occurred, and that Berry's statement was made to them at that time. The contention of the appellant that his statement was made too long after the occurrence of the accident is without merit. A comprehensive enunciation of the rule regarding lapse of time is found in Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 160 P.2d 21, 24, wherein the Supreme Court stated:

"* * * declarations which are voluntary and spontaneous and made so near the time of the principle act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as contemporaneous and admissible."

[3] With respect to admission of statements made within the res gestae the rule has been stated thus:

"To render them admissible it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. Wigmore on Evidence, 2d Ed., sec. 1750." Showalter v. Western Pacific R. R. Co., 16 Cal.2d 460, 106 P.2d 895, 900.

Under the authority of these cases it no longer is the law in this state that the statements must be made contemporaneously with the transactions to be admitted in evidence. In the Lane case the statements of the bus driver were made some twenty minutes after the accident occurred, and, as in the present case, were not spontaneous in the strict sense of the word but uttered in response to questions asked by a third disinterested party.

[4] The second ground for reversal urged by the appellant is that the evidence is insufficient to support the finding of the trial court that the automobile being driven by Jess G. Berry was not the community property of himself and the defendant Violet A. Berry, who at that time were husband and wife. It is well established that if there is a conflict in the evidence upon this point, as there was in this case, which evidence the trial judge fully set forth and discussed in his memorandum opinion, an appellate court is bound by the finding of the trial court based upon such evidence. Estate of Ades, 81 Cal.App.2d 334, 184 P.2d 1.

[5] An examination of the record reveals evidence tending to show that Mr. and Mrs. Berry considered this automobile, as well as other property, to have been owned by them as tenants in common. This is indicated solely by her testimony, when called as an adverse witness under section 2055 of the Code of Civil Procedure. Such testimony discloses their separate employment for several years prior to and during their marriage; that the automobile was purchased with the earnings of each; that it was agreed between them that each was to have an equal voice and control in its use, and that in the event of a sale the consent of the other would have to be obtained. Such an agreement as to equal voice and control is inconsistent with a community property status. It was also shown by her testimony that title to the automobile was obtained by an instrument in writing—a contract of sale. This writing was not produced in court or introduced in evidence but it was stipulated between counsel that it was in the form of "Jess G. Berry and/or Violet A. Berry." Likewise her testimony shows that all other instruments relating to the ownership of the car such as insurance policies and the certificate of registration were drafted with the use of "and/or." Although no other evidence was introduced or further stipulation made as to whether or not the instrument named the parties as husband and wife, nevertheless it having been shown by competent testimony that the wife obtained title by an instrument in writing, the presumption arose under Civil Code section 164 that she took an interest therein as her separate property, which presumption would obtain in the absence of a showing that the instrument did in fact name the parties as husband and wife.

[6] Aided by this presumption and the testimony of the wife with respect to the management and control of the automobile, the trial court was justified in concluding that is was not the community property of Jess G. Berry and Violet A. Berry.

By virtue of such determination and the further finding of the trial court, likewise upon sufficient evidence, that Jess G. Berry was operating the automobile "with the permission of Violet A. Berry and within the meaning of section 402 of the Vehicle Code of the State of California," it follows that appellant's final contention falls squarely within the rule stated in Krum v. Malloy, 22 Cal.2d 132, 137 P.2d 18, rather than the case of Cox v. Kaufman, 77 Cal.App.2d 449, 175 P.2d 260.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J. concur.

81 Cal.App.2d 712

GIFFORD v. ROBERTS.

Civ. 15778.

District Court of Appeal, Second District, Division 3, California.

Oct. 8, 1947.

Hearing Denied Dec. 4, 1947.

1. Fraud ⟹22(1)

An intending purchaser who makes his own examination of realty, and who goes on it for that purpose with a free opportunity to make a thorough examination without interference by the vendor or anyone acting in his behalf, will be conclusively presumed to have acquired all the information which would be disclosed to him if his inquiry should be pursued with ordinary diligence.

2. Fraud ⟹58(1)

In action to quiet title to realty, wherein defendant filed a counterclaim for specific performance of contract for sale of realty and for damages for alleged fraudulent misrepresentation as to number of acres and that entire tract was suitable for subdivision, evidence sustained findings that alleged misrepresentations were not made.

3. Specific performance ⟹92(1)

Where purchaser who filed counterclaim for specific performance of contract for sale of realty in vendor's action to quiet title to the realty did not offer to comply with the contract for sale according to its terms until more than 3½ years after the contract was executed and until appeal from judgment for vendor in the action to quiet title, the offer came too late.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge Assigned.

Action to quiet title by Bertha B. Gifford, as executrix of the estate of Carl M. Bergman, deceased, against John Stewart Roberts, wherein the defendant filed a counterclaim for specific performance of contract for sale of realty and for damages. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Mahaney, McDonald & Isenberg, of San Francisco, for appellant.

John W. Preston, John W. Preston Jr., and Gerald Bridges, all of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by defendant from a judgment quieting title to some 63 acres of land. The claims of defendant arise out of an agreement to purchase the land from plaintiff's testator, which defendant failed and refused to consummate.

The findings are comprehensive and embrace the following facts: Carl M. Bergman was the owner of the land and offered it for sale to defendant who was acting for himself and certain associates. On May 24, 1944, an agreement was entered into for a sale of the property to defendant for the sum of $29,000, payable by a deposit of $500, $9,500 cash through escrow, and $19,000 at the rate of $3,000 or more per year secured by note and trust deed on the property. The description of the land was by metes and bounds and time was made of the essence of the agreement. The initial payment of $500 was made but defendant failed and refused to pay any further sum according to the terms of the agreement. Bergman having died, his executrix on December 11, 1944, made certain offers to defendant as an inducement to performance upon his part. She offered, in writing, to include in the description of the property a small house known as 6301 Foothill Boulevard upon condition that defendant complete his purchase, and she offered to return to defendant $500 which he had deposited if defendant wished to rescind the contract, and she stated in the letter that she would declare forfeited the rights of defendant if he did not consent to either of her proposals. Defendant did not consent and plaintiff notified him that his rights under the contract had been forfeited.

Plaintiff instituted this action and defendant filed an answer and a counterclaim in which he charged that Bergman had represented to him that the tract contained 70 acres of land, whereas it contained only 63 acres, and that he represented the entire tract to be suitable for subdivision, whereas 14 acres in the northwest corner thereof could not be subdivided until certain public works had been constructed for protection against flood waters. He alleged that these representations had been made fraudulently, that he had relied upon them in making the purchase, that the land at the date of the agreement was worth only $17,000 and that he had been damaged by the alleged fraud to the extent of $12,000. It was also alleged that the land had increased in value since the date of the contract to $29,000. It was further alleged that Bergman had agreed to allow defendant five per cent of the selling price upon completion of the purchase and that he had also agreed to convey to defendant for a consideration of $10 a small house known as 6301 Foothill Boulevard, and had also agreed to give defendant an option to purchase certain other adjacent lands for a sum not exceeding $4,000. The prayer in the answer and counterclaim was for specific performance of the agreement of sale, for actual damages in the sum of $12,000, for punitive damages of $15,000, for $1,450 as a commission, and that defendant be granted an option to purchase the additional land for $4,000.

In rejecting plaintiff's proposals to modify the agreement, or rescind it and return the $500 deposit, defendant assumed and has since consistently maintained the position that he would not go through with his purchase on the original terms. He insisted throughout the trial that the purchase price be reduced to the extent of ten percent because of the alleged shortage in the acreage of the tract, that it be further reduced because some 14 acres were unsuitable for subdivision, that he be credited with the sum of $1,450 as a commission on the purchase price and that he be given title to the small house above described. His claimed offsets and damages exceeded the agreed purchase price. If he was willing at any time to modify his demands the record does not disclose that fact. Plaintiff has been unwilling to accede to any of defendant's demands except the one pertaining to the small house. If, therefore, the claims of defendant as asserted in his counterclaim are without validity, he has breached his contract without justification and it entitled to none of the relief which he has demanded.

The court found that Bergman did not represent to defendant that the tract contained 70 acres of land, and also found that defendant, before entering into the agreement of purchase, knew that it contained only 63 acres. It was further found that Bergman did not represent that the entire tract was ready for subdivision. These findings are challenged by defendant as being without support in the evidence. We find them to be amply supported. Defendant's evidence as to the alleged misrepresentations was unsubstantial. There are passages in the transcript plainly indicating that the trial judge believed defendant to be somewhat discredited as a witness because of contradictions in his testimony. But if the court had believed everything testified to by defendant as to statements made by Bergman, it would have been difficult to find anything therein which could be construed as a misstatement of fact, or which would have justified an inference that he did not act in entire good faith, or that defendant was misled by any statement that Bergman made. It seems that when defendant heard the land was for sale he wrote a letter to Bergman in which he referred to the tract as containing *approximately* 70 acres. Bergman's reply made no reference to the acreage. Defendant placed in evidence advertisements inserted by Bergman in the daily papers at about the date of his agreement with defendant in which he offered the property for sale and referred to it as a 70 acre tract, but it appears from defendant's testimony that he saw none of these advertisements until after he had entered into the agreement. Defendant testified that he had been on the land two or three times before he entered into the agreement; that he had met Bergman there and discussed the deal. He testified also that he had received a map of the tract from Bergman, and had shown it to an engineer whom he was consulting about improvement of the tract for subdivision; this map had been drawn to a scale indicated thereon and showed the dimensions of the property so as to furnish a basis for computation of the acreage. Defendant also made a comprehensive study of the tract, laying it out on paper into proposed town lots and acre lots. From the map received from Bergman defendant later caused the acreage to be computed by another engineer and then learned of the alleged discrepancy of some seven acres. This, however, was after the signing of the agreement. There was no evidence that Bergman at any time stated that he knew the exact acreage in the tract or made any declaration to defendant to the effect that it contained at least 70 acres.

Defendant's evidence concerning the alleged misrepresentations as to the immediate suitability of the northwest corner for subdivision was no more substantial. He testified that he had been warned by his engineer that the northwest corner of the tract might be subject to flooding by storm waters. He had been on the land with this engineer and he made no claim that he had not observed the physical condition of the entire tract. He testified that he discussed with Bergman the matter of possible flooding and that Bergman said, as to flooding, "I feel there is no difficulty there, that has all been cleared up—the flood control have given their okey, that is all you need. It is all ready to be subdivided." There was no evidence that Bergman had or pretended to have any superior knowledge as to flood conditions and if the trial judge had believed that Bergman had made the statement attributed to him it would have been entirely reasonable to infer therefrom that his statement was made in good faith, that he intended it as a mere expression of opinion and that it was so understood by defendant.

There was ample evidence to justify a finding that defendant acted solely upon his own judgment and that of his engineer as to the possibility of flood damage to part of the tract.

Defendant and his engineer conferred with Bergman and discussed with him the subdivision possibilities. Bergman showed them his contour maps of the property in addition to the map which he had given defendant. This latter map showed the flood control channel and certain existing flood control protection work. The engineer testified that Bergman stated to them that there had been a "break up" but that the county flood control engineer had done some work there which corrected that condition and was prepared to do more work to correct the condition to which the engineer called his attention; also that Bergman said that he was having trouble with the planning commission over his proposal to subdivide a portion of the property into acreage lots rather than small lots. Defendant's engineer also testified that from the map and from his inspection of the land prior to defendant's purchase he readily became acquainted with the location of the storm drain channel, and of the existence of an embankment extending across part of the property to control the flow of water out of a canyon, also the slope of the land and the elevation of the most northwesterly portion with relation to the surrounding areas. In answer to questions by the court he testified that these conditions would be readily apparent to anyone who went upon the property. It was a reasonable conclusion that Mr. Bergman's conduct and disclosures with reference to flood water conditions were honest and fair in all respects. The record contains nothing which suggests any misstatement, concealment, or intent to mislead defendant with respect to the existence of a flood control hazard and the measures that had been taken under the direction of the county flood control engineer for the protection of the land. The finding upon this issue instead of being arbitrary and unreasonable, as it is characterized by defendant, appears to us to be the only one justified by the evidence.

In addition to the foregoing there were findings to the effect that defendant was not deceived or misled by any representation or concealment on the part of Bergman. These findings had support in certain established facts. Defendant was a man of mature years and presumably ordinary business judgment. He undertook to make his own independent examination of the land and visited it not once but several times before he agreed to purchase. Bergman did or said nothing to interfere with or discourage a thorough examination of the land by defendant. This is true not only as to the condition of the land but as to the area contained therein, which latter could easily have been computed by defendant from the map furnished by Bergman. If defendant had been gauging the value of the land upon an acreage basis, and was not satisfied to rely upon his own observations as to its size, it was incumbent upon him to compute the acreage or have it computed for him from the map or by actual measurement. Bergman would have been justified in believing that defendant would do so.

[1] An intending purchaser who undertakes to make his own examination of the property and who goes upon it for that purpose, and with a free opportunity to make a thorough examination without interference by the seller or anyone acting in his behalf, will be conclusively presumed to have acquired all of the information which would be disclosed to him if his inquiry should be pursued with ordinary diligence. Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397.

[2] The determinations of the trial court with respect to the claimed fraudulent representations and the absence of deceit have support in the evidence and are therefore conclusive on appeal.

[3] Defendant having failed to establish his right to the claimed offsets, or either of them, has shown no justification for his failure to consummate his purchase. He now seeks to have the judgment reversed by this court with directions that a new judgment be entered which would extend to him an opportunity to proceed with the terms of the purchase "under, upon, and subject to the terms, conditions and provisions established by said court." If we are to understand from this that he now seeks an opportunity to purchase the land at the original price, and upon the terms stated in the agreement, his offer comes too late. If that would have been a just and equitable provision to be incorporated in the judgment, considering the lapse of more than three and one-half years since the date of the original agreement, defendant had an opportunity to establish that fact in the trial court. He made no effort to do this. The judgment is not justly subject to criticism upon the ground that it failed to accord him a right to acquire the property upon the original terms. He alleged in his counterclaim that the land was of the value of $29,000 as of the date of his verification of his counterclaim, and yet he was unwilling and made no offer to conclude a purchase at that price. He elected to stand upon his charge of fraud. He has had a day in court, his rights have been fairly determined and his appeal is without merit.

Other grounds for affirmance of the judgment are relied upon by plaintiff. Among them is the contention that specific performance of the agreement could not be granted defendant except in accordance with the contract, as written, or as it might be reformed by the court upon a showing justifying reformation. It is unnecessary to discuss these additional points.

The judgment is affirmed.

WOOD, J., and VALLÉE, Justice pro tem., concur.

81 Cal.App.2d 688

CARLIN v. PRICKETT et al.

Civ. 15756.

District Court of Appeal, Second District, Division 3, California.

Oct. 6, 1947.

Hearing Denied Dec. 4, 1947.

1. Appeal and error 🔑110

An appeal would not lie from order denying motion for new trial.

2. Trial 🔑296(13)

Even if trial court erred in telling jury that only the nine jurors who voted in favor of plaintiff could participate in fixing amount of verdict, error was cured by later telling jury that all members could participate in all stages in arriving at amount of verdict and that they all had a right to enter into discussion to help fix the amount. Code Civ.Proc. §§ 613, 618; Const. art. 1, § 7.

3. Appeal and error ⟹978(1)

Trial judge's conclusions that no prejudice was suffered by defendants as result of his first telling jury that only the nine jurors who were in favor of plaintiff could participate in fixing amount of verdict because of his later telling them that they could do so would not be disturbed on appeal, where it did not appear to be plainly wrong.

4. Trial ⟹296(13)

Even if instruction given when jury returned to courtroom that only the nine jurors who voted in favor of plaintiff could participate in fixing amount of verdict was contradictory to instruction imposing duty upon jurors to consult with one another and deliberate with a view towards reaching an agreement, conflict was cured when trial court subsequently told jury that all members could take part in fixing amount of the verdict.

5. Automobiles ⟹246(47)

Refusal of defendants' requested instruction treating of rights of a driver of vehicle on boulevards and arterial highways in his approach to and entrance of, an intersection was proper, where accident out of which action arose occurred at intersection controlled by "stop" and "go" signals then in operation. Vehicle Code, § 476.

6. Trial ⟹260(1)

Defendants could not complain of refusal of their proffered instructions, where subject matter of the refused instructions was fully, fairly and completely covered by instructions given.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Elizabeth Carlin against Ralph Prickett and Hollywood Wholesale Produce Company to recover for personal injuries sustained in an automobile collision. From a judgment for plaintiff and from order denying motion for new trial, the defendants appeal.

Judgment affirmed, and appeal from order dismissed.

Forrest A. Betts, of Los Angeles, for appellants.

Francis J. Gabel and Henry F. Walker, both of Los Angeles, for respondent.

VALLÉE, Justice protem.

[1] Appeal by defendants from a judgment for plaintiff entered upon a verdict of a jury in an action for damages for personal injuries. Defendants also appeal from an order denying their motion for a new trial. As an appeal does not lie from an order denying a motion for a new trial, the appeal from that order is dismissed. Reilly v. California Street Cable R. R. Co., 76 Cal.App.2d 620, 631, 173 P.2d 872.

Respondent, driving her Chevrolet coupe, proceeded easterly on Third Street in Los Angeles toward its intersection with La Brea Avenue. Her daughter-in-law and a friend were in the car. It was her intention to turn left at this intersection and proceed northerly on La Brea. As she approached the intersection, she was in the center lane in order to make a left turn. There was no traffic immediately in front of her. The intersection of Third and La Brea was controlled by "Stop" and "Go" signals, which were in operation at the time. As respondent approached and entered the intersection, the signal was "Go", i. e., for east-west traffic on Third, and "Stop" for north-south traffic on La Brea. Two south bound vehicles were stopped in the western traffic lane on La Brea at the north side of the intersection. There was no vehicle stopped in the center lane just west of and adjacent to the center line of La Brea and on the north side of the intersection. There was evidence from which the jury could properly have concluded that as respondent's vehicle entered the intersection appellant Prickett drove defendant's truck southerly in this west center traffic lane, passing the two stopped vehicles on their left, and went into the intersection against the "Stop" signal, striking respondent's car as she was negotiating her left turn. As a result of the collision respondent was seriously injured.

Appellants urge three grounds for reversal: (1) That the court erred in instructing the jury that only the nine jurors who were in favor of a verdict for the plaintiff were entitled to participate in fixing the amount of the verdict. (2) That the court erred in giving the jury diametrically opposed instructions. (3) That the court erred in refusing to instruct the jury that a driver of a vehicle is entitled to rely on the protection afforded drivers on boulevards and arterial highways in his approach to, and entrance of, the intersection. No question is raised as to the sufficiency of the evidence to support the verdict.

After the jury had been deliberating for some time, they were brought into the courtroom. The attorney for appellants was absent. He had stipulated in writing that in his absence the court could bring the jury into the courtroom and reread to the jury any instruction previously given or give any new instruction. Upon the return of the jury to the courtroom, the following occurred:

"The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

"Foreman Prather: We have arrived at a partial verdict, your Honor. We have found in favor of the plaintiffs, but we have not arrived at the sum to be assessed.

"The Court: Are you having some difficulty?

"Foreman Prather: In this way: there is a division of opinion on the general verdict, and those jurors that found for the defendant are contending that they should not vote on the matter of the damages.

"The Court: How do you stand as to the liability? What percentage?

"Foreman Prather: Nine to three.

"The Court: Nine to three. Where is Mr. Betts?

"The Clerk: Mr. Betts is at his office. (Discussion at the bench between the Court and Mr. Gabel [attorney for respondent].)

"The Court: Well, the court will instruct the jury that only the nine people who voted in favor of the plaintiffs can participate in fixing the amount of the verdicts; and the three people who were for the defendants will not take part in the fixing of the amount. You may return to the jury room then." About 30 minutes later, the jury again returned to the courtroom and the following took place:

"The Court: Ladies and gentlemen, as I understood your query a while ago, there were three of you who voted for the defendants and who thought you should not participate in arriving at the amount of the award. Is that correct?

"Foreman Prather: I believe that is correct.

"The Court: Well, of course, the members of the jury, all of you, can participate at all stages in arriving at the verdict. Do those three members want to participate in fixing the award?

"Foreman Prather: I believe not, your Honor.

"The Court: Who are the three members? Do you want to participate?

"Juror Pinkert: It's immaterial. I am satisfied with the position of the others.

"The Court: Do you want to participate?

"Juror Smith: No, sir.

"The Court: Do you want to participate?

"Juror Linthicum: No, sir.

"The Court: You are satisfied not to enter into this discussion and arrive at the amount of the verdict? That is your desire?

"Juror Linthicum: Now?

"The Court: Yes.

"Juror Linthicum: Is there going to be a discussion?

"The Court: You may take part if you want to.

"Juror Linthicum: In helping arrive at the figure?

"The Court: If it is your desire.

"Juror Smith: The verdict, the amount, your Honor—

"The Court: You may take part in the discussion. The Court has not received any verdict, and you may still take part as you desire. Suppose we leave you here for a few minutes, clear the courtroom and just leave you right here and let you discuss it further.

"Mr. Gabel: May I approach the bench, your Honor?

"The Court: Yes. (Discussion at the bench between the Court and Mr. Gable.)

"The Court: Of course, ladies and gentlemen, you understand that only nine are required for a verdict, and we can receive the verdict from nine of you; but you all have a right to enter into the discussions to help fix the amounts of the different awards. You may just rap on the outside door there when you are through and the bailiff will let us know that you are ready.

"Juror Markus: The nine of us have arrived—

"The Court: Enter into some further discussion. They may want to take part in it.

"Juror Markus: All right." A short time later proceedings were resumed in open court and the jury returned a verdict for plaintiff. The jury was polled. Nine jurors answered "Yes", and the three jurors who had stated, in effect, that they did not want to participate in fixing the award, answered "No".

[2] Appellants contend that they were deprived of their right to trial by a jury of 12 on the issue of the amount of plaintiff's damages. We think that they were not. Assuming, without deciding, that the court was in error in telling the jury that only the nine people who voted in favor of the plaintiff could participate in fixing the amount of the verdict and that the three people who were for the defendants could not take part in fixing the amount. Cf. Earl v. Times-Mirror Co., 185 Cal. 165, 183, 196 P. 57; Balero v. Littell, 124 Cal. App. 190, 12 P.2d 41; Nelson v. Superior Court, 26 Cal.App.2d 119, 78 P.2d 1037, the error was cured by the court later telling the jury that all members could participate at all stages in arriving at the amount of the verdict and that they all had a right to enter into the discussion to help fix the amount. There is nothing in the record to indicate that all of the jurors did not participate in the discussion as to the amount of the verdict after the court told them that they could do so. It is presumed that they did. After a jury retires they are to be kept under the charge of an officer until three-fourths of them agree upon a verdict. Code Civ.Proc., sec. 613. When three-fourths have agreed upon a verdict, the verdict must be rendered. Upon polling the jury the verdict is complete if three-fourths of the jurors, or more, agree upon that verdict. Code Civ.Proc., sec. 618. The jury returned the verdict by the determination and concurrence of nine of its members. Nothing more is required. Const., art. I, sec. 7.

[3] In denying the motion for a new trial, the trial judge must be deemed to have concluded that no prejudice was suffered by defendants as a result of his first telling the jury that only the nine who were in favor of the plaintiff could participate in fixing the amount of the verdict, because of his later telling them that they could do so. His conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. Lafargue v. United Railroads of San Francisco, 183 Cal. 720, 724, 192 P. 538; MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 271 P. 509. That we cannot fairly say.

[4] Appellants' second point is that the court gave two instructions diametrically opposed to each other. Before retiring to deliberate in the first instance, the jury were instructed that it was the duty of jurors to consult with one another and to deliberate with a view toward reaching an agreement; that each juror must decide the case for himself but should do so only after a consideration of the case with his fellow jurors. This is California Jury Instructions Civil, 3d Ed., No. 7. (Others will be referred to by number.) It is urged that the instruction given when the jury returned to the courtroom, quoted above, to the effect that only the nine people who voted in favor of plaintiff could participate in fixing the amount of the verdict, is contradictory to No. 7. The point is not well taken. If the latter instruction is in conflict with No. 7, a point we do not decide, the conflict was cured when the court told the jury that all members could take part in fixing the amount of the verdict.

[5, 6] Appellants' third point is that the court erred in refusing to give six instruc-

tions offered by them, which they characterize as regarding their theory that a driver of a vehicle is entitled to rely upon the protection afforded drivers on boulevards and arterial highways in his approach to, and entry of, an intersection. Appellants' description of the refused instructions is incorrect. One of them only treats of the rights of a driver of a vehicle on boulevards and arterial highways in his approach to, and entrance of, an intersection. This instruction was properly refused. The accident occurred at an intersection controlled by "Stop" and "Go" signals then in operation. The rules governing a driver's approach to, and entrance of, such an intersection control here. The other five refused instructions endeavor to treat of the rights of a driver in his approach to, and entrance of, an intersection controlled by "Stop" and "Go" signals in operation. We have read carefully these five instructions proffered and refused and those given. The subject matter of the refused instructions was fully, fairly and completely covered by the instructions given. The court gave No. 138, requested by appellants, telling the jury that a person who, himself, is exercising ordinary care, has a right to assume that others, too, will perform their duty under the law; that he has a right to rely and act on that assumption; that it is not negligence for a person to fail to anticipate injury which can come to him only from a violation of law or duty by another; that there is an exception in that the rights defined do not exist when it is reasonably apparent to him, or, in the exercise of ordinary care, would be apparent to him, that another is not going to perform his duty; that one is not justified in ignoring obvious dangers, although created by another's misconduct; and that he is never excused from exercising ordinary care. The court, at the request of appellants, read to the jury the pertinent parts of Vehicle Code section 476, prescribing the rights and duties of persons driving motor vehicles at an intersection controlled by "Stop" and "Go" signals, and it gave No. 141, further elucidating such rights and duties. These and other instructions given, sufficiently covered all of the matters dealt with in the refused instructions. The trial judge was diligent in refraining from burdening the jury, and the record, with inapplicable instructions, and he used extreme care in avoiding unnecessary, complex and repetitious statements, and in informing the jury adequately on all the issues actually involved in the case. Appellants do not complain of any instruction given. There was no error in refusing the offered instructions.

Our conclusion with respect to the points made by appellants for reversal makes it unnecessary to discuss respondent's suggestion that the notice of appeal is ineffective.

Judgment affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

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81 Cal.App.2d 700

ANDERSON et al. v. SOUTHERN TITLE & TRUST CO. et al.

Civ. 3667.

District Court of Appeal, Fourth District, California.

Oct. 6, 1947.

Rehearing Denied Oct. 29, 1947.

Hearing Denied Dec. 4, 1947.

Escrows 🔑15

Prospective purchasers were entitled to return of deposit made on purchase price of dwelling, where prospective vendors failed to furnish possession or termite clearance at close of escrow as required by escrow instructions, and prospective purchasers did not approve any modification of escrow instructions in respect to possession and termite clearance.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Edythe B. Anderson and L. H. Anderson, husband and wife, against Southern Title & Trust Company, a corporation, and Walter M. McKellar and Laura-Lee

McKellar, husband and wife, for return of deposit made on purchase price of realty. Defendants filed a cross-complaint. From an adverse judgment, Walter M. McKellar and Laura-Lee McKellar appeal.

Affirmed.

Henry J. Bischoff, of San Diego, for appellants.

James C. Henderson, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment against defendants for a $1100 deposit made on the purchase price of real property on which was a dwelling. The purchase was not completed.

Appellants were the owners of the property in the city of San Diego which they proposed to sell to respondents for $20,000.

On October 14, 1945, respondents paid appellants $100 as a deposit on the purchase price. The next day written escrow instructions were given to the Southern Title and Trust Company with which respondents deposited an additional $1000. The time for completion of the escrow was fixed at November 15, 1945. The following appears in respondents' portion of the instructions:

"I understand I am to have possession of the above described premises at close of escrow." And, "Termite clearance to be furnished at expense of seller before close of escrow." The instructions also contain the following:

"I agree that no notice, demand, or change of instructions shall be of any effect unless given in writing and approved in writing by all parties affected thereby.

"In the event the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you shall complete the same at the earliest possible date thereafter, unless I shall have made written demand upon you for the return of all instruments or money deposited by me."

Under date of October 22, 1945, appellants delivered additional or amended escrow instructions to the title company in which the following appears:

"Amending the instructions given you as of October 15, 1945, which were given you by the buyers herein, I hand you termite report made by Smale's Termite Control Service as of February 12, 1945, and said termite report is the only termite clearance that I will furnish on property covered by above numbered escrow. If the buyers herein wish further termite report and clearance, they are to furnish same at their own expense.

"Regarding matter of possession of property covered by above numbered escrow, possession is to be given on or before November 25, 1945, if possible, and in any event not later than December 10, 1945."

One copy of the amended instructions was delivered to respondents about October 23rd but they did not sign or approve it. The escrow agent wrote them two or three letters requesting them to sign and thus approve the amendments. This they did not do. Appellants knew before the 15th of November that respondents had not approved the amendments.

On November 16, 1945, respondents notified appellants that they had cancelled the escrow and demanded of them and the escrow holder, in writing, the return of the money deposited which demand was refused. Thereafter appellants offered in writing to perform under the terms of the original instructions.

Respondents testified that possession at the time specified in the escrow was material to them for reasons given and that they wanted a current "termite clearance" instead of the "termite report" dated February 12, 1945, which appellants proposed to furnish them. There is evidence in the record to the effect that there is a material difference betweeen a "termite clearance" and a "termite report" and that the "termite clearance" is much more advantageous to the purchaser.

Appellants testified that respondents told them that respondents were comfortable in their apartment and that the time of getting possession of the house was not important; that they would regard as sufficient the Smale's Termite Control Service Report. From this appellants argue that they were lulled into a sense of security and the belief that the amended escrow instructions were satisfactory and that the transaction would be completed. Respondents denied making such statements. This situation presents a conflict in the evidence which was resolved against appellants by the trial judge which is final and conclusive here.

The provisions of the escrow instructions are clear and explicit. The proposed amendments were not approved in writing by respondents so they can be given no effect. Appellants knew they had not been approved in time to have completed the transaction under the signed instructions. This they did not do so respondents were entitled to demand and receive the return of the money deposited by them.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

81 Cal.App.2d 664

WILSON v. HOFFMAN.

Civ. 3466.

District Court of Appeal, Fourth District, California.

Oct. 1, 1947.

Rehearing Denied Oct. 29, 1947.

Hearing Denied Nov. 24, 1947.

1. Venue 🔑21

Generally, a defendant is entitled to have an action tried in the county of his residence, and the right of the plaintiff to have the action tried elsewhere is the exceptional right and must find its justification in the terms of some statute, and the burden is on plaintiff to bring himself within some exception to the general rule.

2. Venue 🔑7

Actions in contract, except as provided in statute dealing with venue of actions involving contracts to be performed in a particular county, are personal actions and are triable in county of defendant's residence. Code Civ.Proc. § 395.

3. Venue 🔑70

Action to recover for drilling water well on defendant's land in Los Angeles county, under terms of contract, should have been transferred from Orange to Los Angeles county on defendant's motion for change of venue supported by affidavit of defendant and his wife that defendant was a resident of Los Angeles county, and that contract was entered into and signed there, notwithstanding that contract recited, and that plaintiff alleged, that contract was entered into in Orange county, where plaintiff filed no counter affidavit. Code Civ.Proc. § 395.

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by W. M. Wilson, doing business as Trudeau Pumps and Wells, against Fred Hoffman to recover for drilling a water well on defendant's land under the terms of a written contract. From an order denying defendant's motion to change the place of trial, the defendant appeals.

Order reversed.

Melvin Hoffman and Denio, Hart, Taubman & Simpson, and James Munholland, by Matthew C. Simpson, all of Long Beach, for appellant.

Stephen F. Gallagher, of Anaheim, for respondent.

MARKS, Justice.

This is an appeal from an order denying defendant's motion to change the place of trial from Orange County to Los Angeles County.

By the action plaintiff seeks judgment for $1674.50, for drilling a water well on defendant's land in Los Angeles County under the terms of a written contract a copy of which is attached to the complaint. The contract recites that it was "made and entered into at Santa Ana, California" and describes the property on which the well is to be drilled as in Los Angeles County.

The complaint recites "that the contract, which is the basis for this action, was entered into in the County of Orange wherein the obligation sued upon herein was incurred and is payable, and wherein the plaintiff resides."

Defendant filed his notice of motion to change the place of trial which was supported by an affidavit of merits and an affidavit by defendant and his wife to the effect that defendant at all material times was a resident of the City of Long Beach in Los Angeles County and that the written contract was entered into and signed in the home of defendant at 160 Bennett Avenue in the City of Long Beach in Los Angeles County. No counter affidavit was filed.

The venue of this action is to be determined by the provisions of section 395 of the Code of Civil Procedure which contains the following: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

The contract was *in fact* entered into in Los Angeles County and the written contract contained no special provision that payment was to be made elsewhere.

[1, 2] The action is based on contract and as said in Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104, 107: "The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can—otherwise, the defendant's right is to have the case tried in the county of his residence. See cases collected 25 Cal.Jur., p. 866, § 13. Actions in contract, except as provided in § 395 above quoted, are personal actions triable in the county of defendant's residence. See 25 Cal.Jur., p. 869, § 15." See also, Peterson v. Sherman, 68 Cal.App.2d 706, 157 P.2d 863; Bybee v. Fairchild, 75 Cal.App.2d 35, 170 P.2d 54; De Campos v. State Compensation Ins. Fund, 75 Cal.App.2d 13, 170 P.2d 60.

[3] Plaintiff argues that the recitation in the contract that it was made and entered into in Santa Ana, Orange County, California, is sufficient to hold the case in that county. The identical argument was made in Taylor v. Lundblade, 43 Cal.App.2d 638, 111 P.2d 344, 345, where it was said: "It is to be noted that the legislature, in determining the place of trial, did not provide the proper county was where the contract may have been made, or where the contract declared it to have been made, or where the parties may have stipulated it was made, but declared that the county where the contract was *in fact* made is the proper county for the commencement of the action." It was also held that the recital in the attestation clause to the effect that the contract was executed in one county when in fact it was executed in another county was not sufficient to prevent the change in the place of trial.

In Armstrong v. Smith, 49 Cal.App.2d 528, 122 P.2d 115, 117, in discussing the proper place of trial of an action based on contract it was said: "The effect of the limitation is to cut down the number of counties in which an action may properly be tried to two, namely, the county in which the defendant resides, and the county in which the contract was made. Having set up the limitation, the legislature created an exception to it, providing that if it be specially contracted in writing as to the county of performance, such county is also a proper county for the trial of an action. Under conditions where the exception is effective, the number of proper counties goes back to three."

Upon the foregoing we must conclude that the motion to change the place of trial should have been granted.

The order is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

81 Cal.App.2d 709

PEOPLE v. OGANESOFF.

Cr. 4128.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1947.

1. Criminal law 🔑1144(13)

The evidence on defendant's appeal from judgment of conviction would be viewed in light most favorable to the people.

2. Kidnaping 🔑5
Rape 🔑51(4)

Evidence supported conviction on three counts of forcible rape and kidnaping, as against defendant's contention that evidence was inherently improbable.

3. Criminal law 🔑258(2)

Finding that on three separate occasions defendant had forcibly and without their consent had sexual intercourse with women to whom he was not married and that such intercourse was accomplished by placing them in fear of bodily harm sustained conviction on three counts of forcible rape.

4. Criminal law 🔑258(2)

Finding that defendant had aided and abetted another in forcibly carrying woman from automobile in which she was riding into defendant's home contrary to her wishes supported conviction of kidnaping.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Ernest Oganesoff was convicted on three counts of forcible rape and kidnaping, and he appeals.

Affirmed.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

Gladys Towles Root, of Los Angeles, for appellant.

McCOMB, Justice.

After trial before the court without a jury defendant was found guilty of (1) three counts of forcible rape and (2) kidnaping. From each of the judgments he appeals.

[1] The evidence being viewed in the light most favorable to the people (respondent) and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

At about 11:15 p.m. on August 30, 1946, Mrs. Allgood left the Vets Club in Gardena with defendant who had offered to take her home. They entered defendant's small truck and started driving toward Torrance. As they approached 182nd street defendant told her that he was going to take her over to his house to have a drink. She replied that she did not want a drink and a tussle ensued between them during which she grabbed the steering wheel of the truck. Defendant hit her and told her to leave the car alone and then drove to his house. There Mrs. Allgood stated to defendant that she was not going to get out of the automobile. After some fighting she got out of the truck and started to scream and yell, whereupon defendant hit her in the face and broke her glasses. Mrs. Allgood started to cry and defendant kicked her. Finally they went into the house and defendant removed his clothing and told Mrs. Allgood that he was going to have intercourse with her. He had a knife with a blade about five inches long and informed her that if she did not take off her clothing he would kill her. They argued for some little time and the complaining witness told defendant that she was ill. He let her put on her shoes and stockings and they went outside together. When she was outside of the house she started to run across a field and endeavored to hide in a row of corn but defendant found her and took her back into the house and made her go to bed and had an act of sexual intercourse with her.

Subsequently defendant had another act of intercourse with Mrs. Allgood. During both acts defendant threatened the prosecuting witness with a knife which he had in his hand. Both acts of sexual intercourse were against her will and while she was in fear of defendant. Following the acts defendant drank a large quantity of whisky and fell asleep whereupon Mrs. Allgood left the house and encountered Mr. Wartanian and asked him to take her to the police. He replied that it would cause him trouble so he took her to her home. The following day Mrs. Allgood reported the entire matter to the Gardena police who told her that the case was out of their jurisdiction and should be reported to the Torrance police department.

On September 29, 1946, Mrs. Georgia L. Eaton was in the Skylight Cafe in Compton with three friends, a man and two women. As the cafe was about to close defendant, who was in the company of a young man named Johnnie Elsen, asked her to dance. She danced and then had a drink with defendant. Johnnie Elsen then stated to her that since there was not enough room in the truck in which Mrs. Eaton's friends were riding to accommodate her, he would drive her to the Famous Cafe where her friends were going. Defendant joined Mrs. Eaton and Johnnie Elsen, Mrs. Eaton sitting between the two on the seat of the car. Elsen who was driving the car started in the opposite direction from Compton and when she asked them where they were going they said they were taking her to another dance. She stated that she did not want to go to another dance and said she wanted to go home. Instead the car was driven to defendant's house. When they reached the house, Johnnie Elsen, contrary to the prosecuting witness' desires, carried her into it while defendant unlocked the door.

Inside the house Mrs. Eaton pleaded with Elsen and defendant not to harm her. After having a couple of drinks Elsen picked up the prosecutrix and threw her on the bed. Defendant held her arms while Elsen removed his clothing and had an act of intercourse with her, telling her not to make a rumpus or scream because no one would hear her and that they had killed people before and they could just as easily kill her.

Each man in turn had two acts of intercourse with the prosecutrix. Thereupon Elsen left the house and defendant went to sleep. As soon as defendant had gone to sleep Mrs. Eaton arose, left the house and went to an adjacent home where she rang the door bell and upon being admitted called the Torrance police. Upon the arrival of the police they went to defendant's house where they found him asleep. They recovered Mrs. Eaton's earrings and some of her clothing.

[2] Defendant urges reversal of the judgments of guilty on the sole ground that there is not any substantial evidence to sustain them for the reason that the evidence is inherently improbable.

This proposition is totally devoid of merit. An examination of the record discloses evidence to sustain a finding of each and every fact set forth above. From such facts the trial court was thoroughly justified in finding:

[3] First: That on three separate occasions defendant had forcibly and without their consent had sexual intercourse with women to whom he was not married, and that such intercourse was accomplished by placing them in fear of bodily harm. (This finding sustains the judgment of guilty on three counts of forcible rape.)

[4] Second: That defendant had aided and abetted Johnnie Elsen in forcibly carrying Mrs. Eaton from the car in which she was riding into defendant's home contrary to her wishes. (This finding sustains the judgment of guilty of kidnaping.) (People v. Arechiga, 72 Cal.App.2d 238, 239, 164 P.2d 503.)

People v. Headlee, 18 Cal.2d 266, 115 P.2d 427, People v. Ardaga, 51 Cal. 371, People v. Benson, 6 Cal. 221, 65 Am.Dec. 506, People v. Hamilton, 46 Cal. 540, People v. Hardin, 37 Cal. 258, each relied on by defendant are factually distinguishable from the instant case. None of these cases lend any support to defendant's contention that the evidence before the trial court in the present case was inherently improbable.

The judgments are affirmed.

MOORE, P. J., and WILSON, J., concur.

81 Cal.App.2d 732

PEOPLE v. DEFER et al.

Cr. 2461.

District Court of Appeal, First District,
Division 2, California.

Sept. 9, 1947.

Hearing Denied Nov. 6, 1947.

1. Criminal law 🔑892

The placing of filing stamp on verdicts in murder prosecution was not a "recordation" of the verdicts of the minutes of the court, either actual or constructive, within meaning of statute providing that when a verdict is received, clerk must immediately record it in full on the minutes. Pen.Code, § 1164.

See Words and Phrases, Permanent Edition, for all other definitions of "Recordation".

2. Habeas corpus 🔑30(3)

Trial court's failure to comply with statute requiring that clerk must immediately record verdict in full on the minutes, read it to the jury, and inquire of jury whether it is the jury's verdict, cannot be raised on habeas corpus. Pen.Code, § 1164.

3. Criminal law 🔑1175

Where clerk read verdicts in murder prosecution to jury and inquired of foreman of jury and then of jury as a whole if verdicts were their verdicts and received affirmative answers, and judge inquired of defendants whether they wanted jury polled and received a negative answer, and clerk, after being directed by judge to record verdicts, put his stamp on each and again read verdicts to the jury and inquired whether it was jury's verdict and again received affirmative answers, irregularity in failing to comply with statute requiring that a verdict be immediately recorded was not prejudicial. Pen.Code, §§ 1149, 1163, 1164, 1258, 1404; Const. art. 6, § 4½.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

John C. Defer and Edgar M. Ellis were convicted of first degree murder, and from orders denying defendants' motions to correct the record, they appeal.

Orders affirmed.

Alfred J. Hennessy, of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Dept. Atty. Gen., for respondent.

GOODELL, Justice.

The appellants were convicted of murder of the first degree and sentenced on the jury's recommendation to life imprisonment. No appeal was taken from the judgments of conviction. A motion was made in each case to correct the record "to make the clerk's minutes * * * speak the truth", and from orders denying such motions these appeals were taken. Appellants sought such correction so that the record would affirmatively show that the verdicts had not been recorded before the jury was discharged. The case will be treated as if the record in the trial court had been so corrected, for the record on appeal shows that the verdicts were not so recorded.

Section 1164, Penal Code provides that "When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case."

On submission to the jury, forms of verdict were given them in the usual way. When they returned into court the foreman handed the signed verdicts to the clerk, who handed them to the judge. The judge returned them to the clerk with the direction to read them to the jury and have the jury "declare them to be their verdicts" (sec. 1149, Pen.Code) which was done. The clerk put the question first to the foreman and then to the jury as a whole and received affirmative answers. To the judge's question whether the defense wished the jury polled (sec. 1163, Pen.Code), counsel answered in the negative

The judge then directed the clerk to record the verdicts. What the clerk did in response to this order was to put the county clerk's stamp on each verdict, showing its filing on December 13, 1946. Immediately after doing so he again read each verdict to the jury and inquired whether it was their "true and lawful verdict as announced and recorded", and affirmative answers were again given, first by the foreman and then by all the jurors.

The verdicts were not written into either the rough, courtroom minutes or the official minute book until after the jury was discharged. The appellants contend that because of this failure, and the failure to read them to the jury after recordation, they were not valid verdicts and the court was without jurisdiction to pronounce judgment.

The case of People v. Gilbert, 57 Cal. 96, is relied on by the respondents. There the foreman wrote the verdict in the jury room on "a scrap of paper". The clerk read this informal writing to the jury and they declared it to be their verdict. The jury was then discharged and the verdict was not recorded in any minute book until after they disbanded. This is substantially what happened in the case at bar except that here the verdicts were twice read to the foreman and twice to the jury as a whole, and were stamped as filed.

"It is very obvious", said the court in that case "that the proceedings in the case were not in strict conformity to Sec. 1164 of the Penal Code", but the court nevertheless decided that the irregularity was not prejudicial, remarking that the provisions of sections 1258 and 1404 removed all doubt on the point. Those sections, enacted in 1872 and still in effect, antedated by many years section 4½ of article VI of the constitution, to which they are akin in purpose.

In the Gilbert case the court said, "If the clerk had first pasted the verdict in his rough minutes, and had then read it to the jury, the letter of the law would have been complied with; and it is difficult to see what additional weight or authority would have been given to the verdict by that proceeding".

Appellants claim that the Gilbert case was impliedly overruled by Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, 92, but we are satisfied that it was not. In that case the court, in speaking of the rough minutes kept by the clerk of a probate department, said: "There is no law providing for 'rough minutes' * * * they do not constitute an official record of the court. * * * We cannot regard this personal memorandum as in any sense a record of the court, or as an official record of any character." The question in that case was whether the petitioner's time to apply for relief under section 473, Code Civ.Proc., ran from the clerk's entry in his rough minutes or from the signing and entry of the "paper" order or decree of partial distribution. If it ran from the entry in the rough minutes the application for relief was too late. The court held that the rough minutes meant nothing and that the time ran from the signing and entry of the judge's order.

Obviously the Brownell case could not have overruled the Gilbert case, for in the latter case rough minutes were not at all involved. The clerk there had not pasted the verdict in his rough minutes, and whatever the court had to say on that subject was purely hypothetical and by way of argument.

[1] The present case cannot be distinguished on its facts from People v. Gilbert, and we are of course bound to follow that case, the authority of which seems never to have been questioned. Accordingly we must hold that the placing of the filing stamp on the verdicts was not a recordation of them on the minutes of the court, either actual or constructive. It merely made the verdicts part of the court files as of December 13, 1946.

Appellants have cited cases on this subject from other jurisdictions, but with direct authority in this state, it is unnecessary to discuss them.

The practice of failing to comply with the requirements of section 1164 has been sharply criticized by our Supreme Court. In People v. Smalling, 94 Cal. 112, 29 P. 421, 423, there was (as in this case) a conviction of murder of the first degree with punishment fixed at imprisonment for life. Forms of verdict were given to the jury on the three issues of former acquittal, former conviction and once in jeopardy, with directions to find thereon in favor of the people. After the verdict of guilty had been regularly returned defense counsel was asked by the court whether they insisted on the entry of these three directed verdicts before the jury was discharged, and answered that they did not. Accordingly (as in this case) the verdicts were not recorded until after the jury had been discharged and this was urged on appeal as a ground for reversal. The court, following People v. Gilbert, held that the irregularities did "not affect the validity of the judgment, and are such as come squarely within the provisions of the Penal Code cited" (meaning sections 1258 and 1404, supra). The opinion pointed out that in People v. Gilbert "there was no waiver, and the verdict was not recorded until after the jury had been discharged; and, while the proceeding was irregular, the court decided, especially in the light of sections 1404 and 1258 of the Penal Code, that no error existed which would justify a reversal of the judgment."

Notwithstanding this holding the court saw fit to register the following criticism of what had been done: "* * * in a case of the importance of the present one, it is a matter of regret that it ever should have arisen. * * * The record clearly shows that irregularities existed in the manner in which these various verdicts were returned into court; *irregularities occasioned without necessity, and which could have been easily avoided. In cases of felony,* and especially where a defendant is charged with the crime of murder, *the only correct procedure is to adhere strictly to the statute. Any other course is a dangerous innovation,* which generally results in a miscarriage of justice." (Emphasis added).

This criticism is all the more pointed because (1) the verdicts were written in advance under the direction of the court; (2) they were given to the jury with directions simply to sign and return them; (3) by reason of the court's direction there could have been no alternative verdicts by which the jury could have been confused, and (4) there was a clear-cut waiver of the requirements of section 1164. In no subsequent case, to our knowledge, has the Supreme Court receded from its position.

[2] A reversal of the orders appealed from would be of no avail to the appellants for even if the record as corrected showed the non-compliance, the validity of the judgments of conviction would remain unaffected under the authority of the cases already discussed. Moreover the judgments have become final and the point could not be raised on habeas corpus. In re Northcott, 71 Cal.App. 281, 235 P. 458.

It is not contended that the verdicts did not express the true findings of the jury or that they were not unanimous. In this case, as was said in People v. Kelso, 25 Cal.2d 848, 854, 155 P.2d 819, 823, "* * * counsel for the appellants expressly waived his right to poll the jury, as he might have done if he questioned the votes by which the verdicts had been found". The record shows that the foreman was twice asked if it was the jury's verdict and twice answered in the affirmative, and the jurors as a whole were likewise twice asked and twice answered in the affirmative.

[3] On the authority of People v. Gilbert, supra, we must hold that the irregularity in failing to comply with section 1164 was not prejudicial.

The orders appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

In re ABILA'S ESTATE.

ABILA v. SPENDRUP.*

Civ. 15840.

District Court of Appeal, Second District,
Division 3, California.

Oct. 8, 1947.

Rehearing Granted Nov. 5, 1947.

1. **Divorce** 🔑172

Final decree of divorce conclusively establishes previous validity of marriage only as between parties and their privies.

2. **Divorce** 🔑172

Final decree of divorce from second husband did not conclusively establish validity of marriage as between divorced wife claiming as widow of a former husband, who died after entry of decree, and beneficiaries under his will.

3. **Marriage** 🔑40(10)

Presumption as to validity of marriage arising from proof thereof was not conclusive and was dispelled by proof of previous marriage of wife to another and that no final decree of divorce had been entered in divorce action instituted by former husband.

4. **Marriage** 🔑40(6)

Record showing no entry of a final decree of divorce constituted affirmative evidence that none was entered and no presumption could be indulged to the contrary, since the presumption is that official duty has been regularly performed and the law obeyed. Code Civ.Proc., § 1963, subds. 13, 15.

5. **Marriage** 🔑40(10)

Presumption of validity of second marriage could not prevail over testimony of wife and recorded certificate of previous marriage to another so as to preclude wife from claiming as widow of first husband.

6. **Divorce** 🔑172

Interlocutory decree of divorce was res judicata as to previous validity of marriage and its continuance to date of decree in subsequent proceeding to determine right to deceased husband's estate as between wife claiming as widow and beneficiaries under decedent's will.

7. **Marriage** 🔑50(2)

Wife's testimony supported by presumption of validity of second marriage and adjudication of validity of such marriage in interlocutory decree of divorce established annulment of previous marriage, though no record evidence of annulment was produced.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Jose Maria Abila, deceased, upon the petition of Emelina V. Abila, also known as Emelina V. Moser, to be decreed to be decedent's widow and to have his estate assigned to her, which petition was opposed by M. V. Spendrup. From an adverse judgment, and order denying her motion for a new trial petitioner appeals.

Appeal from order denying a new trial dismissed and judgment reversed with directions.

Jesse Bach Porter, of Los Angeles, for appellant.

MacDonald, Wallace, Cashin & Arrington and W. W. Wallace, all of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Jose Maria Abila died in Los Angeles County in December, 1943, leaving a will which was duly admitted to probate. He left a parcel of real estate to Juana G. Lopez and the remainder of his estate to his sister, Josefa Abila, and his niece, Rebecca Camacho. Some months after the admission of the will to probate, appellant herein, Emelina V. Abila, filed her petition to determine heirship under section 1080, Probate Code, alleging that she married decedent in 1910 and remained married to him until his death; that the estate was of the value of less than $2,500; that she was entitled to have it assigned to her under section 640 et seq., Probate Code, and prayed that she be decreed to be the widow of decedent and that she be granted any other proper relief. The hearing was opposed by the administrator-with-will-annexed, the issue as to appellant's claimed widowhood was tried, the court made a finding that appellant was not the widow of decedent and entered a decree adjudging that she was not entitled to take anything under the will. She appeals.

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* Subsequent opinion 190 P.2d 237.

There was evidence of the following facts: Appellant married decedent on March 31, 1910. They had one child, who had grown to maturity at the time of the trial and who testified on behalf of appellant. Appellant and Jose Abila separated. Abila obtained an interlocutory decree of divorce from appellant in March, 1913, but no final decree. The administrator-with-will-annexed of his estate petitioned the court for the entry of a final decree nunc pro tunc, but this petition was denied. In September, 1915, appellant went through a ceremony of marriage with one Gus Moser and this purported marriage was ended by final decree of divorce in appellant's favor, entered in May, 1930. Appellant testified that she resumed marital relations with Abila in the year 1930 and continued them until his death in 1943.

The foregoing facts as to plaintiff's marriage to Moser were found by the court in the instant proceeding, but there was no finding that appellant had or had not married Jose Maria Abila. The court, however, made the following finding: "The Court finds that at the time of the death of Jose Maria Abila the said Emelina V. Moser was the divorced wife of Gustave Moser, and was not the wife of Jose Maria Abila after her marriage to Gustave Moser, and was not his widow at the time of his death." As a conclusion of law, the court found that "Emelina V. Moser was not the widow of Jose Maria Abila, deceased, at the time of his death, but was a divorced wife of Gustave Moser."

[1, 2] Respondent advances two theories, either of which, it is contended, furnishes support for the judgment: (1) that the decree of divorce in the Moser action conclusively determined, as between the parties to that action and also as between the parties to the instant proceeding, that appellant and Moser were legally married; and (2) that by virture of that adjudication and of the presumption of validity of appellant's marriage to Moser, it will be presumed that appellant never married Abila or that a final decree of divorce was signed in the Abila action and later lost. We cannot give such sweeping effect to the decree in the Moser case. Respondent relies upon the rule stated in Petry v. Petry, 47 Cal.App.2d 594, 118 P.2d 498, 499, that "It is well established in this state that a final decree of divorce conclusively determines, as between the parties thereto, that they were legally married; and this regardless of the true fact * * * and seemingly despite the most flagrant fraud practiced by one of the parties." In Estate of Hughes, 80 Cal.App.2d 550, 182 P.2d 253, the rule was applied and a judgment of divorce was given effect as a final adjudication of the validity of the marriage of the parties, binding upon them and upon others who were parties to the action and in privity with one of the parties to the divorce. The principle of these cases would be applicable here if the controversy were between the parties to the Moser action or their privies. Such, however, is not the case. Jose Maria Abila was a stranger to that action and those who claim under his will are likewise strangers. The rule, as quoted from the Petry case is not extended to third persons unless they stand in privity with one of the parties. This was held directly in Blumenthal v. Blumenthal, 97 Cal.App. 558, 561, 275 P. 987. It is unnecessary to quote from the text or to list the supporting authorities cited in that opinion. Since any claimed estoppel would be lacking in mutuality, the adjudication implicit in the Moser decree that appellant was legally married to Moser is not binding upon either of the parties hereto as claimants to the Estate of Abila.

[3, 4] The judgment is not sustainable upon the second ground urged by respondent. A presumption arose from proof of the Moser marriage that it was a valid marriage, but this was not a conclusive presumption and it was dispelled by proof of the prior marriage to Abila and the fact that no final decree of divorce had been entered in the action instituted by the husband. Respondent would have us presume that a final decree was signed but that it was not entered because it was lost. A sufficient answer is that there are presumptions that

official duty has been regularly performed and that the law has been obeyed (Code Civ. Proc., Sec. 1963 (15), (13)). Where the record shows no entry of a final decree of divorce it constitutes affirmative evidence that none was entered and no presumption can be indulged to the contrary.

[5, 6] It is suggested that the presumption of validity of the Moser marriage, also, is proof that appellant was never married to Abila, but the presumption cannot prevail since the latter marriage was established by the testimony of appellant and a duly recorded certificate of marriage. The interlocutory decree in the Abila divorce case was an adjudication of the validity of the marriage and its subsistence to the date of the decree, under the principle stated in Petry v. Petry, supra. By that adjudication the parties to the action were bound and the parties to the instant proceeding are likewise bound, since they both lay claims to the Estate of Jose Maria Abila. It was established by the evidence, beyond peradventure, that appellant was married to Abila and that the marriage was not dissolved except by his death.

[7] It is suggested further by respondent that appellant admitted having married one Ortega before she married Abila and that there was insufficient proof to show that that marriage had been dissolved. Appellant, while admitting the marriage, testified that it had been annulled, although no record evidence of the annulment was produced. Her testimony was fortified by the presumption of the validity of her marriage to Abila and by the adjudication of the validity of that marriage in the interlocutory decree.

The findings and judgment to the effect that appellant is not the widow of Abila rest solely upon the effect erroneously given to the decree in the Moser action. The finding that appellant is not the widow of Jose Maria Abila is without any support in the evidence.

The judgment is reversed for further proceedings in accordance with the views herein stated. The attempted appeal from the order denying motion for new trial is dismissed.

VALLÉE, J. pro tem., concurs.